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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
November 9, 2022 Session

PAUL ZACHARY MOSS v. SHELBY COUNTY CIVIL SERVICE MERIT BOARD

Appeal by Permission from the Court of Appeals
Chancery Court for Shelby County
No. CH-15-1669 JoeDae L. Jenkins, Chancellor

No. W2017-01813-SC-R11-CV

The issue presented is whether a civil service merit board acts arbitrarily or capriciously by not allowing an employee to ask questions in a termination hearing about more lenient discipline imposed on other civil service employees. A Shelby County Fire Department employee was fired based on his participation in an altercation involving a firearm at a political rally and his dishonesty during the subsequent investigation. He appealed his termination to the Shelby County Civil Service Merit Board. During the hearing, the Board did not allow the employee's counsel to ask questions about discipline imposed on other Fire Department employees. The Board affirmed the employee's termination for just cause. The employee appealed, and the trial court affirmed. The Court of Appeals reversed, holding that the Board's decision to exclude the questions about other discipline was arbitrary and unreasonable, and remanded the case for consideration of such evidence. Under the narrow standard of review provided in the Uniform Administrative Procedures Act, we hold that the Board did not act arbitrarily or capriciously by declining to consider evidence of discipline imposed on other employees. We reverse the Court of Appeals' judgment and affirm the judgment of the trial court.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Reversed; Judgment of the Trial Court Affirmed

SHARON G. LEE, J., delivered the opinion of the Court, in which ROGER A. PAGE, C.J., and JEFFREY S. BIVINS, HOLLY KIRBY, and SARAH K. CAMPBELL, JJ., joined.

E. Lee Whitwell and Megan J. Smith, Memphis, Tennessee, for the appellant, Shelby County Civil Service Merit Board.

Andrew C. Clarke and Mari-Elizabeth Sanford, Memphis, Tennessee, and Eric H. Espey, Germantown, Tennessee, for the appellee, Paul Zachary Moss.

OPINION

I.

November 2013 Incident

On November 1, 2013, several individuals held a political rally on an interstate overpass in Memphis. Rally participants held signs that advocated for the impeachment of then-President Barack Obama, and at least one individual wore a plastic mask depicting President Obama. Passing motorists reacted negatively to the demonstration. Fearful of the possibility of violence, participants called the Memphis Police Department ("MPD") for assistance.

Paul Zachary Moss arrived at the overpass after his wife, a rally attendee, said she feared for her safety. Mr. Moss approached the scene armed with a .38 caliber handgun. Upon learning that an attendee, Thomas Mason Ezzell, Jr., wore the "Obama mask," Mr. Moss became angry. The situation escalated into a physical altercation between Mr. Moss, Mr. Ezzell, and another rally attendee, Earl Mayfield. Mr. Moss pointed his handgun at both men, threatening to kill them. Mr. Ezzell and Mr. Mayfield relented, and Mr. Moss returned to his truck where he was disarmed and arrested by MPD officers. Mr. Moss informed the Fire Department about the incident.

Later, a grand jury indicted Mr. Moss on two counts of aggravated assault. He entered an *Alford* plea to one count of aggravated assault.[1] After successfully completing three years of judicial diversion, the diverted charge was dismissed. *See* Tenn. Code Ann. § 40-35-313(a)(2) (2010 & Supp. 2013).

[1] An *Alford* or best interest plea allows a defendant to concede that the prosecution's evidence would likely result in a conviction without admitting to the charged offense. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

Employment Termination

After Mr. Moss entered the plea, Fire Department Deputy Chief Dale Burress sent Mr. Moss a *Loudermill* notice,[2] advising him of the possibility of major discipline, including termination, on two grounds: conviction of a felony and conduct "in violation of Shelby County Policies, procedures or regulations." Fire Department Chief Alvin Benson and Deputy Chief Burress held a *Loudermill* hearing with Mr. Moss to discuss the charges and possible discipline. Mr. Moss told them that during the November 2013 altercation, Mr. Ezzell confronted him first, but Mr. Moss had continued the conversation after Mr. Ezzell walked away. Mr. Moss denied he had been drinking but admitted to pointing his gun at Mr. Ezzell and Mr. Mayfield. Mr. Moss admitted he had previously been arrested for possession of a firearm but denied alcohol had been involved. Mr. Moss denied he had assaulted a woman. However, police records showed that in March 2011, Mr. Moss was arrested on charges of public intoxication and possession of a firearm while under the influence of alcohol. Police records also showed that in October 2012, a police officer responded to a domestic violence call during which Mrs. Moss stated Mr. Moss had assaulted her.

After the *Loudermill* hearing, Chief Benson notified Mr. Moss by letter that his employment was terminated. The letter cited Mr. Moss's actions at the November 2013 rally and subsequent legal proceedings, as well as his "vague and in some cases deceptive and/or untrue" statements made at the *Loudermill* hearing,[3] including:

- Mr. Moss claimed that he only intended to escort his wife from the rally, but Mr. Moss "confronted protesters, engaged in a fight, and attempted to leave" without his wife;

- Mr. Moss denied that he "intended to personally settle the disturbance," but he was confrontational and his actions indicated extremely aggressive behavior and "hot-temperedness";

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[2] In *Cleveland Board of Education v. Loudermill*, the United States Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution entitle a "tenured public employee . . . to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 470 U.S. 532, 546 (1985). Mr. Moss was a classified Shelby County employee and was thus entitled to notice before termination "[f]or unsatisfactory performance of duties or other just cause." Act of May 6, 1971, ch. 110, § 22, 1971 Tenn. Priv. Acts 493, 504–05.

[3] Under the Fire Department's general rules of conduct, "[r]efusal of an employee to give complete and accurate information shall be grounds for disciplinary actions."

- Mr. Moss denied he had been drinking alcohol on the day of the altercation but told Deputy Chief Burress otherwise. Also, witnesses testified that Mr. Moss appeared to be "under the influence of alcohol and out of control";

- Mr. Moss denied confronting an upset woman at the rally but admitted in a written statement that he approached the woman to try to calm her;

- Mr. Moss denied showing aggression toward "the man with the [former President Barack] Obama mask" but followed him, lunged at him, and ripped his shirt;

- Mr. Moss admitted to a previous arrest for possession of a gun without a permit but denied the police report account that alcohol was involved; and

- Mr. Moss denied being involved in a previous incident in which police responded to a call about Mr. Moss allegedly assaulting his wife.

Moss v. Shelby Cnty. Civ. Serv. Merit Bd., 597 S.W.3d 823, 825–26 (Tenn. 2020). Chief Benson ended his letter by summarizing the bases for his decision and notifying Mr. Moss that his employment was terminated because he had violated the applicable standards of personal conduct and behavior of Fire Department employees.

Administrative Review

Mr. Moss appealed his termination to the Shelby County Civil Service Merit Board ("Board"). The Board conducted a hearing, and witnesses included Mr. Mayfield, Chief Benson, Deputy Chief Burress, and Mr. Moss.[4]

Mr. Mayfield testified that on November 1, 2013, he and six or eight acquaintances gathered at the interstate overpass, displaying "an anti-Obama banner" and waving American flags to the motorists below. He noted that various passersby voiced their opinions at rally participants, including one woman who stopped her car "in the middle of the road and began haranguing [them] and insulting [them]." After the woman began taking

[4] Kenneth Brashier, Mr. Moss's attorney, also testified that before the *Loudermill* hearing, he advised the Fire Department by letter that Mr. Moss's *Alford* plea and subsequent judicial diversion did not constitute a conviction. *Moss*, 597 S.W.3d at 828.

pictures of rally participants and making phone calls, Mr. Ezzell, concerned about the possibility of violence, called the MPD and asked them to "send somebody over to provide some safety while [they] ended the rally." Mr. Mayfield and Mr. Ezzell then returned to the parking lot near the overpass where their vehicles were parked. Mr. Mayfield testified that Mr. Moss began walking toward them "yelling that [they] were stupid and [they] were racists" and demanding to know who wore the Obama mask. When Mr. Ezzell told Mr. Moss he had been wearing the mask, Mr. Moss continued to yell at the two men. Mr. Mayfield observed that Mr. Moss appeared to be under the influence of alcohol or drugs. Eventually, Mr. Moss lunged at Mr. Ezzell, leading Mr. Mayfield to grab Mr. Moss from behind. Mr. Moss broke loose from Mr. Mayfield's grasp before "pointing a gun in [Mr. Mayfield's] face and threatening to kill [him]." Mr. Moss then walked away from the two men. Another rally attendee quickly notified the arriving MPD officers of Mr. Moss's actions, and Mr. Moss was arrested without incident. All three men were taken to the police station where Mr. Mayfield gave a written statement about the incident.

Chief Benson testified that after the *Loudermill* hearing and based on a preponderance of the evidence, he concluded Mr. Moss was the primary aggressor in the November 2013 altercation, that he had threatened to use a firearm, and that he appeared to have been under the influence of alcohol. Chief Benson detailed Mr. Moss's prior behaviors, including a 2011 charge for public intoxication and possession of a firearm while under the influence of alcohol and his involvement in a 2012 domestic assault incident. The Fire Department had no record of Mr. Moss reporting either incident to his superiors.

Chief Benson explained he had a uniform policy for handling discipline. He stated he would terminate a firefighter who was under the influence and had a weapon to be used against a citizen. Chief Benson also noted he handled the incident involving Mr. Moss in the same way he would have responded to a similar instance involving another employee.

During cross-examination, counsel for Mr. Moss attempted to question Chief Benson about whether he had uniformly applied this policy to prior disciplinary incidents, specifically asking about a firefighter who had committed sexual assault. Chief Benson testified that "a firefighter who committed sexual battery would likely be terminated." *Moss v. Shelby Cnty. Civ. Serv. Merit Bd.*, No. W2017-01813-COA-R3-CV, 2021 WL 4786370, at *4 (Tenn. Ct. App. Oct. 14, 2021), *perm. app. granted* (Tenn. Mar. 25, 2022). When Mr. Moss's attorney asked Chief Benson why he had not terminated that particular firefighter, counsel for the Fire Department objected to the line of questioning as irrelevant. The Board sustained the objection and declined to hear evidence relating to the prior discipline.

Deputy Chief Burress testified that Mr. Moss had pleaded guilty to a felony charge and been granted diversion. Thus, under Shelby County government rules, he could not continue his employment after pleading guilty to a felony. Deputy Chief Burress also described Mr. Moss's untruthful answers to questions during the *Loudermill* hearing about the 2011 and 2012 incidents and his failure to report these incidents to his superiors.

Finally, Mr. Moss testified about his employment with the Fire Department, his prior encounters with law enforcement, and the November 2013 incident:

> Mr. Moss testified that he began working as a firefighter with the Fire Department in October 2007, after about five years with the Memphis Fire Department. Mr. Moss explained that after his 2011 arrest for public intoxication and possession of a firearm, he reported the arrest to his superiors, explaining that he had been arrested after a sleepwalking incident caused by taking prescribed medication. Mr. Moss maintained that no alcohol was involved, that all charges were dismissed, and that the Fire Department brought no disciplinary charges against him. He admitted he had no documentation showing that the meeting with his superiors took place and that he had no permit for the firearm he was carrying. As to the 2012 domestic violence incident, Mr. Moss said he was not present when the police responded to his wife's call and did not know there was a police report about the call.
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> Mr. Moss then explained that on November 1, 2013, he was at home when his wife called and asked him to meet her at a political rally because she was feeling threatened. Mr. Moss denied consuming alcohol that day. He stated that when he arrived at the event, he approached a woman on the street who told him she was angry because white men were wearing "black-men" masks. The police arrived moments later, and the woman went to talk to the police. Mr. Moss then spoke with a former coworker, who told him someone had mentioned doing a "drive-by" shooting. Mr. Moss went to a parking lot to speak to the event participants and to ask his wife why she was at the rally with the men wearing "black-men" masks. According to Mr. Moss, Mr. Ezzell then walked over and said he was the person wearing the "Obama" mask. Mr. Moss said he became upset and yelled at Mr. Ezzell because Mr. Moss's wife had been put in a dangerous situation. He admitted saying to Mr. Ezzell, "Are you stupid?" He also acknowledged that he was "trying to be heard," but denied swinging at, grabbing, or punching Mr. Ezzell. Mr. Moss explained that Mr. Mayfield hit him from behind and put him on the ground in a headlock, and Mr. Ezzell tried to grab his arms. When Mr. Moss

> freed himself, he pulled his gun because he felt he was in imminent danger. The police arrested Mr. Moss and took him to the police station. After his release, Mr. Moss reported his arrest to his battalion chief.
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> Mr. Moss said that he kept Deputy Chief Burress informed about the case and that Deputy Chief Burress recommended that he take the diversion as "the best way to hold on to [his] job." Mr. Moss agreed that a higher standard applies to firefighters than to the general public. He asserted that he did not make a "conscious choice" to take his gun to the rally. Mr. Moss explained that because he always carries his gun, the gun was in his pocket when his wife called asking him to meet her.

Moss, 597 S.W.3d at 828 (alteration in original).

Based on this evidence, the Board found that Mr. Moss had been untruthful during the *Loudermill* hearing and had "exhibited conduct unbecoming of a Shelby County Firefighter or Shelby County employee while off duty." Further, the Board considered Mr. Moss's completion of judicial diversion immaterial because "the fact is that the incident occurred and is an egregious violation of the General Rules of Conduct" that "reflected adversely on all firefighters." Thus, the Board determined the Fire Department had met its burden of proof in showing Mr. Moss was fired for just cause.

Trial Court Review

Mr. Moss sought review of the Board's termination decision in the Shelby County Chancery Court. He asserted, among other things, that his termination violated his procedural due process rights because he did not receive adequate notice of the charges against him. Mr. Moss also argued that the Board's decision was unsupported by substantial and material evidence and was arbitrary and capricious.

The trial court ruled that Mr. Moss had adequate notice of the reasons for his termination and that the requirements of due process had been satisfied. It found substantial and material evidence supported the Board's decision, including the testimony of multiple witnesses who confirmed Mr. Moss had violated applicable policies. The trial court also concluded that evidence about other discipline was irrelevant to the inquiry about Mr. Moss's conduct. Thus, the trial court affirmed the Board's decision.

Appellate Review

Mr. Moss appealed to the Court of Appeals, asserting that his procedural due process rights had been violated, that the Board had made incorrect evidentiary rulings, and that the Board's decision was "arbitrary and/or was unsupported by substantial and material evidence." *Moss v. Shelby Cnty. Civ. Serv. Merit Bd.*, No. W2017-01813-COA-R3-CV, 2018 WL 4913829, at *2 (Tenn. Ct. App. Oct. 10, 2018), *rev'd*, 597 S.W.3d 823 (Tenn. 2020). The Court of Appeals reversed the Board's decision on due process grounds, concluding that the *Loudermill* notice was inadequate. *Id*. at *3–5. Pretermitting the other issues, the Court of Appeals reversed and remanded to the trial court with instructions to order the Board to reinstate Mr. Moss to his position with the Fire Department with benefits and back pay. *Id.* at *5.

We granted the Board's petition for review and held that Mr. Moss received adequate notice of the factual allegations against him and had an opportunity to prepare for his hearing before the Board. *Moss*, 597 S.W.3d at 832–33. We reversed and remanded the case to the Court of Appeals to consider the remaining issues. *Id.* at 834.

On remand, the Court of Appeals concluded that there had been no violation of Mr. Moss's procedural due process rights during the Board hearing and that the Board's decision was supported by substantial and material evidence. *Moss*, 2021 WL 4786370, at *8–12, *18–19. However, the Court of Appeals found the Board's decision to exclude evidence of past discipline during Chief Benson's cross-examination to be arbitrary and unreasonable because this evidence was not "clearly irrelevant" when counsel's stated purpose was impeaching the testimony of Chief Benson about his uniform application of his termination policy. *Id.* at *17. The case was remanded to the Board for consideration of Mr. Moss's disparate discipline evidence with respect to the one specific employee Chief Benson was asked about, as well as other past disciplinary instances Mr. Moss intended to introduce. *Id.*

We granted the Board's application for permission to appeal to consider the only remaining issue: Whether a civil service merit board acts arbitrarily or capriciously by declining to consider evidence of more lenient discipline previously imposed on other employees.

II.

When reviewing the decision of a civil service merit board "affect[ing] the employment status of a county or city civil service employee," courts apply the standard of review outlined in the Uniform Administrative Procedures Act ("UAPA"). Tenn. Code

Ann. § 27-9-114(b)(1) (2000 & Supp. 2013); *Davis v. Shelby Cnty. Sheriff's Dep't*, 278 S.W.3d 256, 263–64 (Tenn. 2009). Unlike the "broad standard of review used in other civil appeals," the UAPA provides a more narrowly circumscribed standard. *Tenn. Dep't of Corr. v. Pressley*, 528 S.W.3d 506, 512 (Tenn. 2017) (citing *Davis*, 278 S.W.3d at 263–64). Under that standard of review:

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional or statutory provisions;
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> (2) In excess of the statutory authority of the agency;
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> (3) Made upon unlawful procedure;
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> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
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> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h) (2011).

Reviewing courts may only reverse, remand, or modify civil service merit board decisions "for errors that affect the merits of such decision." *Id.* § -322(i). "[A]s opposed to the broader standard of review applied in other appeals," the UAPA's standard of review "reflects the general principle that courts should defer to decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise." *StarLink Logistics Inc. v. ACC, LLC*, 494 S.W.3d 659, 669 (Tenn. 2016) (citing *Tenn. Env't Council, Inc. v. Tenn. Water Quality Control Bd.*, 254 S.W.3d 396, 401–02 (Tenn. Ct. App. 2007); *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988); *CF Indus. v. Tenn. Pub. Serv. Comm'n*, 599

S.W.2d 536, 540 (Tenn. 1980); *Metro. Gov't of Nashville & Davidson Cnty. v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977)).

Mr. Moss asserts that the Board's decision to uphold his termination was arbitrary or capricious because the Board excluded evidence of past discipline of Fire Department employees. *See id.* § -322(h)(4).

"A decision of an administrative agency is arbitrary or capricious when there is no substantial and material evidence supporting the decision." *StarLink Logistics*, 494 S.W.3d at 669 (citing *Pittman v. City of Memphis*, 360 S.W.3d 382, 389 (Tenn. Ct. App. 2011); *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993)); *see also Watts v. Civ. Serv. Bd. for Columbia*, 606 S.W.2d 274, 277 (Tenn. 1980) ("Whether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court upon an examination of the evidence introduced before the agency."). "[S]ubstantial and material evidence" is "less than a preponderance of the evidence and more than a 'scintilla or glimmer' of evidence." *StarLink Logistics*, 494 S.W.3d at 669 (citation omitted) (quoting *Wayne Cnty.*, 756 S.W.2d at 280). "A decision with evidentiary support can be arbitrary or capricious if it amounts to a clear error in judgment," *id*. at 669 (citing *City of Memphis v. Civ. Serv. Comm'n of Memphis*, 216 S.W.3d 311, 316 (Tenn. 2007)), and "is not based on any course of reasoning or exercise of judgment, or . . . disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion," *id.* at 669–70 (alteration in original) (quoting *Civ. Serv. Comm'n of Memphis*, 216 S.W.3d at 316). But as this Court noted in *StarLink Logistics*:

> If there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though [a reviewing court] think[s] a different conclusion might have been reached. The "arbitrary or capricious" standard is a limited scope of review, and a court will not overturn a decision of an agency acting within its area of expertise and within the exercise of its judgment solely because the court disagrees with an agency's ultimate conclusion.

Id. at 670 (alterations in original) (internal citations and quotation marks omitted) (quoting *Bowers v. Pollution Control Hearings Bd.*, 13 P.3d 1076, 1083 (Wash. Ct. App. 2000)).

Civil service employees may be subject to dismissal "[f]or unsatisfactory performance of duties or other just cause."[5] § 22, 1971 Tenn. Priv. Acts at 504–05; *Davis*, 278 S.W.3d at 265 n.19. In the context of civil service employee terminations, civil service merit boards seek to determine whether those terminations are supported by evidence establishing "just cause." § 23, 1971 Tenn. Priv. Acts at 505–06 ("The board shall . . . commence a hearing thereon, and shall thereupon fully hear and determine the matter and shall either affirm, modify or revoke such order of discipline."); *cf. Lamarr v. City of Memphis*, No. W2002-02087-COA-R3-CV, 2004 WL 370298, at *4 (Tenn. Ct. App. Feb. 27, 2004) (Kirby, J., concurring) ("LaMarr's defense regarding the new zero tolerance policy appears to be that no one had told him that [the policy] would really be enforced. This is smokescreen. The real issue is whether there was sufficient evidence to support the Commission's conclusion that LaMarr violated [the policy] . . . .").

We accord significant deference to a merit board's just cause determination. Thus, as a reviewing court, we "will not overturn a decision of an agency acting within its area of expertise and within the exercise of its judgment solely because the court disagrees with an agency's ultimate conclusion." *StarLink Logistics*, 494 S.W.3d at 670 (citing *Bowers*, 13 P.3d at 1083).

The operative question is whether the Board's decision to disallow questions about more lenient discipline imposed on other Fire Department employees was a "clear error in judgment" that rendered the decision arbitrary or capricious. *See id.* at 669–70. Our analysis begins with the issue the Board had to decide—whether there was evidence of Mr. Moss's unsatisfactory performance of duties or other just cause for termination. To determine whether the Board acted arbitrarily or capriciously by excluding Mr. Moss's proposed questioning, we must examine the relevance of that questioning to the Board's

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[5] The Court of Appeals has previously addressed what exactly qualifies as "just cause":

> The term "cause" implies good cause which must be substantial; but, any reasonable, sufficient cause may be ground for dismissal, and the power to discharge is not limited to specific grounds. The term "cause" is construed to mean some substantial shortcoming which renders continuance in office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and sound public opinion recognize as good cause for removal.

Mitchell v. Elec. Emps.' Civ. Serv. & Pension Bd. of Metro. Gov't of Nashville & Davidson Cnty., No. M2018-00186-COA-R3-CV, 2019 WL 211921, at *9 (Tenn. Ct. App. Jan. 16, 2019) (quoting *Knoxville Utils. Bd. v. Knoxville Civ. Serv. Merit Bd.*, No. 03A01-9301-CH-00008, 1993 WL 229505, at *10 (Tenn. Ct. App. June 28, 1993)). The "overriding consideration" in determining whether just cause exists "is whether the conduct of the employee harms the public service." *Knoxville Utils. Bd.*, 1993 WL 229505, at *10 (quoting 67 C.J.S. *Officers and Public Employees* § 132 (1992)).

ultimate determination of whether just cause existed to terminate Mr. Moss. Evidence that is not relevant is inadmissible. Tenn. R. Evid. 402; *see Hayes v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 01-A-019108CH00291, 1992 WL 40194, at *5 (Tenn. Ct. App. Mar. 4, 1992) ("While the rules of evidence are relaxed in administrative hearings in comparison to judicial proceedings, even in administrative hearings, there must be some relevancy to the issue before the administrative body.").[6] To be relevant, evidence must tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. The essential facts "of consequence" to the Board's decision involved Mr. Moss's conduct. Evidence about discipline that may have been imposed on employees in other situations did not tend to make the facts about Mr. Moss's conduct more or less probable.

Relevancy of discipline imposed on other employees in a termination proceeding was considered in *Knoxville Utilities Board v. Knoxville Civil Service Merit Board*, No. 03A01-9301-CH-00008, 1993 WL 229505 (Tenn. Ct. App. June 28, 1993). In this case, a utilities services employee was terminated after testing positive for marijuana. *Id*. at *1. The merit board overturned the termination, concluding that evidence of discipline in other cases should be considered in the just cause analysis. *Id.* at *6. The chancery court reversed, finding that employee was fired for just cause. *Id.* at *9. The Court of Appeals framed the merit board's task as deciding "whether there was just cause to terminate [the employee], not whether [the utility board] could have terminated others and chose not to. . . . [T]he relevant inquiry is whether the actions of the employee before the administrative tribunal constituted just cause for discharge." *Id.* at *13 (citing *Fairweather v. Long*, 10 TAM 11-3 (Tenn. Ct. App. Feb. 18, 1985)).[7]

[6] While Board hearings are not subject to the Tennessee Rules of Evidence, the Rules provide helpful guidance in determining whether the Board's decision to exclude Mr. Moss's evidence comports with "a sense of fair play and the avoidance of undue prejudice." *Davis*, 278 S.W.3d at 266 (quoting *Goodwin v. Metro. Bd. of Health*, 656 S.W.2d 383, 388 (Tenn. Ct. App. 1983)).

[7] *See also Freeman v. City of Chattanooga*, No. E2010-01286-COA-R3-CV, 2011 WL 1197676, at *4 (Tenn. Ct. App. Mar. 31, 2011) ("[T]he real issue is whether there is substantial and material evidence in the record to uphold the Council's decision."); *cf. City of Morristown v. Long*, No. E2004-01545-COA-R3-CV, 2005 WL 735028, at *8 (Tenn. Ct. App. Mar. 31, 2005) ("*While we do not necessarily disagree that the disciplinary actions taken by the City with respect to other employees is not relevant to the determination of whether Ms. Long violated the City's drug policy*, we do not agree that this factor carried an inordinate amount of weight in the Agency's decision." (emphasis added) (footnote omitted)).

Mr. Moss argues that Tennessee courts have consistently allowed civil service employees to introduce disparate discipline evidence[8] during merit board hearings. We disagree. Mr. Moss does not claim an equal protection violation based on membership in a protected class; his only claim is that other, similarly situated individuals before him have received more lenient discipline. Tennessee courts have rejected this "class-of-one" equal protection argument in the public employment context by noting that the relevance of disparate discipline evidence is especially limited in cases like this, where a terminated employee is not claiming a constitutional equal protection violation. In *Echols v. City of Memphis*, a police officer was terminated after he lied about violating department policy by working a second job. No. W2013-00410-COA-R3-CV, 2013 WL 5230251, at *1 (Tenn. Ct. App. Sept. 16, 2013). The employee argued that his termination should be reversed because others violating the same policy only received verbal reprimands, and he unsuccessfully attempted to introduce evidence of this before the City of Memphis Civil Service Commission. *Id.* The Court of Appeals held that the so-called "class-of-one" equal protection claim was not cognizable in the context of public employment and that evidence of disparate discipline was not material. *Id.* at *3–4. The *Echols* court relied on the United States Supreme Court's decision in *Engquist v. Oregon Department of Agriculture*, which rejected a similar claim by noting that "[t]o treat employees differently is not to classify them in a way that raises equal protection concerns." *Id.* at *3 (quoting 553 U.S. 591, 605 (2008)); *see also* Robert C. Farrell, *The Equal Protection Class of One Claim:* Olech*,* Engquist*, and the Supreme Court's Misadventure*, 61 S.C. L. Rev. 107, 127 (2009) ("The [*Engquist*] Court noted that while 'government employees do not lose their constitutional rights when they accept their positions,' the government maintains 'significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.' Because government employees interact with the government in this proprietary context, their class of one equal protection claims are correspondingly limited." (footnotes omitted) (quoting *Engquist*, 553 U.S. at 599–600)). Thus, *Echols* held that the Commission did not err by refusing to allow the disparate discipline evidence. *Echols*, 2013 WL 5230251, at *4; *see also Holmes v. City of Memphis Civ. Serv. Comm'n*, No. W2016-00590-COA-R3-CV, 2017 WL 129113, at *8 (Tenn. Ct. App. Jan. 13, 2017) ("[I]t makes sense to consider evidence intended to show disparate

[8] Both parties use the term "disparate treatment evidence" to describe the questioning Mr. Moss offered before the Board. In the context of this case, however, "disparate treatment" is a misnomer. "Disparate treatment" is a term of art signifying a theory of discrimination "where an employer has treated a particular person less favorably than others *because of a protected trait*." *Goree v. United Parcel Serv., Inc.*, 490 S.W.3d 413, 426 (Tenn. Ct. App. 2015) (emphasis added) (quoting *Maddox v. Tenn. Student Assistance Corp.*, No. M2009-02171-COA-R3-CV, 2010 WL 2943279, at *6 (Tenn. Ct. App. July 27, 2010)). Therefore, for clarity, we refer to Mr. Moss's proposed questions as "disparate discipline evidence."

treatment violating equal protection only insofar as it is based on discrimination against a suspect class.").[9]

In contending he should have been able to introduce his disparate discipline evidence, Mr. Moss relies on several Court of Appeals cases. None are persuasive. For instance, in *Mack v. Civil Service Commission of City of Memphis*, a public employee was terminated for failing to follow orders, and termination was affirmed by both the administrative agency and the trial court. No. 02A01-9807-CH-00215, 1999 WL 250180, at *1–2 (Tenn. Ct. App. Apr. 28, 1999). The Court of Appeals remanded the case to the trial court to consider the plaintiff's disparate treatment evidence. *Id.* at *6. But the plaintiff in *Mack*, unlike Mr. Moss, was seeking to prove discrimination based on protected class status. *Id*. at *5–6; *see Engquist*, 553 U.S. at 605 ("[T]he Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently. . . . But we have never found the Equal Protection Clause implicated . . . where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner."). Because the UAPA provides grounds for reversal where an agency decision is "[i]n violation of constitutional or statutory provisions," the *Mack* court properly remanded the case to the trial court for consideration of the employee's evidence. Tenn. Code Ann. § 4-5-322(h)(1).

Barrom v. City of Memphis Civil Service Commission is distinguishable for similar reasons. No. W2011-01248-COA-R3-CV, 2011 WL 5420365 (Tenn. Ct. App. Nov. 9, 2011).[10] In that case, a Memphis police officer was terminated after a physical altercation with a parking lot attendant. *Id.* at *1. The City of Memphis Civil Service Commission

[9] Mr. Moss attempts to distinguish *Holmes* by pointing out that the Court of Appeals came to its conclusion after considering the plaintiff's petition for judicial review made no reference to any policy requiring equal treatment. 2017 WL 129113, at *8. He argues that *Holmes* differs from this case because Chief Benson asserted in his testimony before the Board that he uniformly applied his disciplinary policy. But *Holmes* stands for the proposition that disparate discipline evidence is only pertinent to the extent discrimination is claimed based on protected class status. Despite Chief Benson's claims of a uniformly applied disciplinary policy, Mr. Moss did not claim he was treated differently under that policy based on his status in a protected class.

[10] Notably, *Barrom* was designated as a "memorandum opinion" pursuant to Rule 10 of the Rules of the Court of Appeals of Tennessee. Tenn. Ct. App. R. 10 (allowing for the issuance of a memorandum opinion "when a formal opinion would have no precedential value" and providing that such opinions "shall not be published[] and shall not be cited or relied on for any reason in any unrelated case"). While we are not bound by the rules of the intermediate appellate court, we have previously declined to cite or rely upon cases designated as "memorandum opinions" under Rule 10. *See Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade*, 404 S.W.3d 464, 467 n.5 (Tenn. 2013).

refused to consider the officer's equal protection claim and affirmed his termination. *Id.* at *1, *3–4. On appeal, the chancery court affirmed the termination, declining to consider the officer's contention that his equal protection rights had been violated by disparate application of disciplinary rules. *Id.* at *1–2. The Court of Appeals reversed and remanded for consideration of the disparate treatment evidence. *Id.* at *5. The *Barrom* court's reversal was predicated on the fact that the officer "sufficiently asserted an *equal protection claim* when he asserted disparate application of the disciplinary rules." *Id.* (emphasis added). Thus, unlike Mr. Moss, the officer advanced a constitutional equal protection argument which was not considered, and the chancery court erred by failing to consider it. *See id.* *Barrom* should not be read to support requiring merit boards to consider evidence of disparate discipline when the terminated employee does not sufficiently assert a constitutional equal protection violation based on protected class status.[11]

In requiring the Board to hear Mr. Moss's evidence regarding disparate discipline of other employees, the Court of Appeals failed to adhere to the narrow standard of review required by the UAPA and primarily relied on *City of Memphis v. Cattron*, No. W2010-01659-COA-R3-CV, 2011 WL 1902167 (Tenn. Ct. App. May 13, 2011). There, a 911 dispatcher was terminated after he improperly cancelled an emergency call from a man without sending police, resulting in the man's death. *Id.* at *1. The merit board heard evidence regarding two other dispatchers who had similarly cancelled calls and only received suspensions. *Id.* at *2. The merit board reversed the termination based on the lesser discipline imposed on other dispatchers for similar violations. *Id.* at *3. Both the chancery court and the intermediate appellate court affirmed. *Id.* at *3, *7. The Court of Appeals' reliance on *Cattron* is misplaced. The *Cattron* court explicitly noted that the City had not raised the issue of whether past discipline should have been considered at all; rather, the City sought review on whether the merit board improperly accorded significant

[11] Mr. Moss also cites to *Stroud v. Shelby County Civil Service Commission*, No. W2005-01909-COA-R3-CV, 2006 WL 305796 (Tenn. Ct. App. Feb. 9, 2006). In *Stroud*, the merit board initially refused to consider evidence that the terminated employees "had been treated unfairly or disparately when compared to another allegedly similarly situated employee who had received less drastic punishment for allegedly similar conduct." *Id.* at *1. Despite claiming "that the policies ordinances [sic] of Shelby County, while constitutional on their face, were applied in a disparate fashion in violation of their equal protection rights under both the United States Constitutional [sic] and Tennessee Constitution," the terminated employees did not claim equal protection violations based on protected class status. Brief for Appellees Thomas & Stroud at 20, Stroud v. Shelby Cnty. Civ. Serv. Comm'n, No. W2005-01909-COA-R3-CV (Tenn. Ct. App. Nov. 3, 2005), 2005 WL 6521522. The chancery court remanded the case back to the merit board for consideration of that argument. *Stroud*, 2006 WL 305796, at *1. Thus, the Court of Appeals was bound to address the evidence introduced in the proceedings below. *Id.* at *3. But the merit board in *Stroud* acted within its discretion in refusing to entertain such a "class-of-one" equal protection argument, and the chancery court erred by requiring the merit board to consider that argument on remand. *See Holmes*, 2017 WL 129113, at *8; *Echols*, 2013 WL 5230251, at *3–4.

weight to the other cases. *Id.* at *6 ("While the City raised evidentiary issues related to these other cases at the Commission hearing, it has not raised these issues on appeal. Rather, the City's argument goes to the weight that should be placed on such incidents. . . ."). While *Cattron* might tacitly approve of one merit board's consideration of disparate discipline evidence, nothing in the decision *requires* merit boards to hear such evidence.[12]

Thus, in requiring the Board to consider disparate discipline evidence on remand, the Court of Appeals elides the actual holdings of the cases cited. None of those cases required the merit board on remand to consider such evidence. The cases either do not directly require the merit board to hear the evidence or otherwise fail to address the question of whether the merit board *must* hear the evidence. As such, the intermediate appellate court's opinion in this case is unique in its outright instruction for the Board to consider disparate discipline evidence.

If allowed to stand, the Court of Appeals decision would confine civil service agencies to a level of imposed discipline in line with previous instances. For example, if a civil service agency wants to "crack down" on particularly troubling behavior within the agency, it would be limited to whatever discipline was previously meted out in the past, essentially nullifying any deterrent effect. There is also the issue of pragmatism. If Mr. Moss's argument carries the day, merit boards (and the courts to which their decisions are appealed) will sift through instances of past discipline to determine whether the prior instances are analogous to the cases before them. And, at the very least, Mr. Moss's position does not fit within the "limited scope of review" utilized by this Court in reviewing administrative agency decisions and would undermine the deference we have traditionally given to agencies with regard to personnel matters. *StarLink Logistics*, 494 S.W.3d at 670.

In sum, the Board's decision to exclude Mr. Moss's disparate discipline evidence was not a clear error in judgment. *See id.* at 669. The Board did not abuse its discretion in determining that the evidence was irrelevant to the issue of whether there was just cause to terminate Mr. Moss's employment.

[12] The Court of Appeals cited several other cases supporting its decision to require the Board to hear Mr. Moss's evidence on remand. *Moss*, 2021 WL 4786370, at *16 (citing *Cooper v. City of Memphis Civ. Serv. Comm'n*, No. W2018-01112-COA-R3-CV, 2019 WL 3774086, at *5 (Tenn. Ct. App. Aug. 12, 2019); *City of Memphis v. Civ. Serv. Comm'n of Memphis*, No. W2006-01258-COA-R3-CV, 2007 WL 1227465, at *7 (Tenn. Ct. App. Apr. 25, 2007); *Lamarr*, 2004 WL 370298, at *1–3). But, like *Cattron*, these cases implicitly approve of the introduction of disparate discipline evidence but do not require merit boards to consider such evidence.

CONCLUSION

We hold that a civil service merit board does not act arbitrarily or capriciously by declining to allow an employee challenging his termination for just cause to inquire about more lenient discipline imposed on other employees. Thus, the Court of Appeals erred by finding the Board's decision arbitrary and unreasonable and remanding to the Board to hear evidence of discipline imposed on other employees. We reverse the judgment of the Court of Appeals and affirm the judgment of the trial court. The costs of this appeal are taxed to Paul Zachary Moss, for which execution may issue if necessary.

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SHARON G. LEE, JUSTICE