ing or shadowy" and accompanied by the avowed purpose of returning it to the person who had lost it. The jury decided not.

We agree with the majority below that because the absence of a permit is "an essential element of the offense of unlawful possession of a handgun[,] * * * [t]he jury should have been apprised of the permissible inference, authorized by *N.J.S.A.* 2C:39–2, that no permit had been obtained, but that the ultimate burden of establishing its absence was to be borne by the prosecution." As well, we agree that the failure of the trial court to have delivered that instruction would ordinarily call for reversal of defendant's conviction, but that the peculiar facts of this case warrant an exception to the ordinarily-hard-and-fast rule. We therefore adopt the view of the majority below that the error was harmless beyond a reasonable doubt and that "it is plain beyond peradventure that defendant was in no sense prejudiced," nor could any of his substantial rights possibly have been compromised by the trial court's mistake. Noteworthy is the fact that the dissenter below agreed entirely with the views of his colleagues in the majority, but felt constrained to reverse because of what he perceived to be precedent from this Court that would prohibit characterizing the acknowledged error as "harmless."

We find ourselves at a loss to understand the Court's concern for this defendant, who complains of the trial court's failure to have charged the jury on the State's obligation to *prove* that he did not have the permit that defendant himself *insists* he did not have—nor could he have had, inasmuch as the handgun concededly belonged to the police officer, to whom defendant wished (he says) to return it, and thus only the officer was authorized to carry it. See *N.J.S.A.* 2C:58–4. We should all recognize that our cases may occasionally turn up freakish factual contexts in which the rigid, mechanistic application of a sound, well-established, respected principle of law will produce a result that is plainly at odds with substantial justice. This is such a case. When, as here, there is a collision between law and common sense, this Court should exert its best effort to vindicate good sense. Our institutional legitimacy depends on our succeeding in that endeavor.

We would affirm defendant's conviction rather than expend time, energy, and valuable resources on a retrial, when the first trial was so eminently fair.

For reversal and remandment—Chief Justice WILENTZ, and Justices HANDLER, POLLOCK, O'HERN and GARIBALDI—5.

For affirmance—Justices CLIFFORD and STEIN—2.

117 N.J. 295

In the Matter of John E. WARREN and Gerald Sowa.

Supreme Court of New Jersey.

Argued Oct. 24, 1989.
Decided Dec. 4, 1989.

Appeal was taken from order of the Superior Court, Appellate Division, which affirmed recommendation of suspension rather than removal of prison guard. The Supreme Court held that the evidence supported the determination to suspend rather than to remove the guard.

Affirmed.

1. Administrative Law and Procedure ⇐763, 791

Determination of whether action of agency was arbitrary and capricious encompasses inquiries into whether the agency's actions violated the enabling act's express or implied legislative policies, whether there was substantial evidence in the record to support the findings on which the agency based its action, and whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have

been made on a showing of the relevant factors.

2. Prisons ⇐7

Determination to impose penalty of suspension, rather than discharge, for prison guard from whose unit escape occurred and who falsely indicated that he had made a required prisoner count was supported by the record.

Carol A. Blasi, Deputy Atty. Gen., for appellant New Jersey Dept. of Corrections (Peter N. Perretti, Jr., Atty. Gen., attorney; Michael R. Clancy, Asst. Atty. Gen., of counsel).

Robert A. Fagella, for respondent John E. Warren (Zazzali, Zazzali, Fagella & Nowak, Newark, attorneys).

PER CURIAM.

This case is before us on appeal as of right under *Rule* 2:2–1(a)(2) because of a disagreement among the Appellate Division members over whether the Merit System Board had properly determined that a period of suspension, and not removal, was the appropriate discipline for a prison guard. The dissent concerns only the discipline of John E. Warren, one of the parties charged.

[1] All agree that a court may not contravene the Board's measure of discipline unless the court finds that the Board's action was arbitrary and capricious. This shorthand expression for the scope of judicial review really encompasses three inquiries: (1) whether the agency's action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which the agency based its action; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. *Campbell v. Department of Civil Serv.*, 39 *N.J.* 556, 562, 189 *A.*2d 712 (1963).

A useful calculus for the first prong of this agency review test, violation of express or implied legislative policies, is the inquiry whether the decision "was not premised upon a consideration of all relevant factors * * * [or conversely] a consideration of irrelevant or inappropriate factors." *State v. Bender*, 80 *N.J.* 84, 93, 402 *A.*2d 217 (1979) (guiding judicial supervision of an executive branch decision to admit a defendant to PTI).

In *Henry v. Rahway State Prison*, 81 *N.J.* 571, 410 *A.*2d 686 (1980), the Civil Service Commission (predecessor to the Merit System Board) was found to have acted arbitrarily in reducing a penalty from removal to a ninety-day suspension because it failed to consider a relevant factor, namely, the seriousness of a single instance of a State corrections officer's falsification of a report. Specifically, the Court found that the Commission failed to consider the seriousness of the officer's offense in the context of the prison setting, where order and discipline are necessary for safety and security. In other words, the Commission had failed to consider the effect on the environment of a State prison, and therefore on public safety itself, of a correction officer's falsifying a report. *Id.* at 580, 410 *A.*2d 686. "The falsification of a report can disrupt and destroy order and discipline in a prison." *Ibid.*

The Warren case was primarily tried as a "neglect of duty" infraction that resulted in the escape of four prisoners under the officer's supervision. The prisoners were detained in a special, independently-functioning unit of the Trenton State Prison. The unit is designed to house prisoners suffering from medical problems that require their separation from the general prison population. Some of the inmates are terminally ill. Consequently, in a humane gesture, the Department of Corrections has relaxed some of the ordinarily prevalent restraints against prisoner movement within the unit; namely, inmates in the unit have complete access to recreational areas from 8:00 a.m. till 10:00 p.m. However, the unit originally was designed to be a maximum-security unit.

When a "Code 99" report signaling an escape is broadcast, prison officers are dis-

persed throughout the prison and armed guards surround the entire institution. All access doors are automatically locked and the corrections officers take a "standing count" of the inmates in their cells. Once all inmates are accounted for, the count is "cleared" and the prison returns to normal operation.

However, because Warren's unit operated separately from the prison, the 9:18 p.m. "Code 99" was cleared without accounting for the inmates under his supervision. Warren was not aware of the "Code 99" report because the intercom in the unit was broken. Thus, due to the fact that the "Code 99" was cleared after all prisoners in the main prison were accounted for, the actual discovery of the escape did not occur until Officer Warren took a head count sometime after 10:00 p.m. After the escape, the Board reviewed the overall-security measures in the unit supervised.

Of course, the allegations embraced the fact that Warren had at first misrepresented what he observed in the hours before the break and that he had called in to report falsely that he had made a required 10:00 p.m. prisoner count. As to the first count, Warren said that he must have been mistaken about what he had seen, and, as concerning the second count, that he intended immediately to complete the 10:00 p.m. check. But, as noted, Warren's unit had never been informed that at 9:18 p.m. a "Code 99" report of an escape had been sounded in other units of the prison complex.

The Board expressed concern over the procedural posture of the case, namely, whether it was a neglect of duty case or a falsification of report case. It did, however, believe that it had adequately considered "Mr. Warren's conduct in failing to conduct the 10:00 p.m. count before calling in his report." It thus asserts that it did consider "all relevant factors." *Bender, supra*, 80 *N.J.* at 93, 402 *A.*2d 217. A majority of the Appellate Division panel affirmed the Board's recommendation of suspension, as opposed to removal. The dissent argued that Warren's lies concerning the 9:30 and 10:00 p.m. body counts and his failure to discover the escaped prisoners for almost an hour should result in his removal.

[2] In the context of this case, we are satisfied to affirm the majority disposition of the Appellate Division that a period of suspension is not a penalty that could not reasonably have been imposed on a showing of the relevant factors. *Campbell v. Department of Civil Serv., supra*, 39 *N.J.* at 562, 189 *A.*2d 712. In the clearer context of a corrections officer's trial for intentional falsification of a report, there can be no doubt that the Board must consider this as an offense striking at the heart of discipline within the corrections system. Failure to accord due consideration to that factor in the prison setting would violate implied legislative policies regarding prison security.

The judgment of the Appellate Division is affirmed.

For affirmance—Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN—7.

Opposed—None.

236 N.J.Super. 510

STATE of New Jersey, Plaintiff-Respondent,

v.

Thomas F. SHERWIN, Defendant-Appellant.

Superior Court of New Jersey, Appellate Division.

Argued Aug. 30, 1989.
Decided Oct. 24, 1989.

Defendant was convicted in the Superior Court, Law Division, Cape May County, of operating a motor vehicle under the in-