SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2289-19

MARLENE CARIDE, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,

Petitioner-Respondent,

v.

DEAN I. ORLOFF,

Respondent-Appellant.

Submitted February 10, 2021 - Decided May 24, 2022

Before Judges Accurso and Vernoia.

On appeal from the New Jersey Department of Banking and Insurance.

Dean I. Orloff, appellant pro se.

Gurbir S. Grewal, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Nicholas Kant and Jessica Lugo, Deputy Attorneys General, on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

Dean I. Orloff is a former New Jersey attorney disbarred pursuant to In re Wilson, 81 N.J. 451 (1979). The Commissioner of the Department of Banking and Insurance subsequently denied his application for an insurance producer license pursuant to N.J.S.A. 17:22A-32(a)(2) and N.J.S.A. 17:22A-40(a)(16), based on the fraudulent act which precipitated his disbarment. Orloff appeals, claiming the Commissioner should have applied the standards of the Rehabilitated Convicted Offender Act, N.J.S.A. 2A:168A-1 to -16, in considering his current fitness for licensure.

We affirm. The New Jersey Insurance Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48, prohibits the Commissioner from issuing an insurance producer license to anyone who has committed "a fraudulent act." Orloff's misappropriation of client funds is, without doubt, a disqualifying fraudulent act under the Producer Act. Although, that conduct would also constitute a crime under N.J.S.A. 2C:20-9, In re Wilson, 81 N.J. at 454, Orloff was not convicted of any crime, or ever even charged with one. The Rehabilitated Convicted Offender Act directs the State's licensing authorities not to disqualify or discriminate against any person based on his conviction of a crime or disorderly persons offense; it does not permit the Commissioner to

waive the statutory provision mandating Orloff's disqualification for commission of a fraudulent act not resulting in the conviction of a crime.[1] The relief Orloff seeks must come from the Legislature, not the Commissioner or this court.

The material facts are undisputed. Orloff was employed by a Pennsylvania law firm in 2005 when he obtained a $28,920 personal injury settlement for his client, $6,500 of which he was to hold in escrow for unpaid medical bills. Orloff did not provide the client a settlement statement or advise him of the total amount of the settlement. Orloff also failed to respond to his client's inquiries about the status of the efforts to resolve the outstanding bills.

In 2010, having left his former firm, Orloff asked the firm to disburse the $6,500 to him for distribution. The firm issued a check made payable to

[1] Orloff similarly argues the Commissioner should have considered his application under N.J.A.C. 11:17E-1.4(i), part of the regulations implementing 18 U.S.C. § 1033, "a Federal statute which provides that no person having been convicted of a felony involving dishonesty or breach of trust or an offense under 18 U.S.C. § 1033 shall engage in the business of insurance without having first obtained the written consent of the Commissioner or his or her designee," N.J.A.C. 11:17E-1.1, or under N.J.A.C. 11:17D-2.7, the regulation governing the procedure for reinstatement of an insurance producer license following revocation. The Commissioner had no ability to consider Orloff's application under either provision as Orloff has not been convicted of a crime, nor held a producer's license he was seeking to have reinstated.

Orloff and his client. Orloff endorsed the check, signing his and his client's names, without the client's permission, and deposited the check into his trust account. Several months later, Orloff made two withdrawals totaling $3,000 from the trust account to pay personal expenses, including child support. Shortly thereafter, a new attorney representing the client inquired about the remaining settlement funds. Following the inquiry, Orloff replaced the $3,000 with funds borrowed from a friend and transferred the client's $6,500 to new counsel, falsely representing it had always been on deposit. After being served with a malpractice complaint by his former client, Orloff reported his misappropriation of client funds to the Pennsylvania attorney ethics authorities.

In 2014, the Pennsylvania Supreme Court suspended Orloff from the practice of law for one year and one day for his misconduct. In January 2017, the New Jersey Supreme Court imposed reciprocal discipline disbarring Orloff pursuant to Rule 1:20-14(a)(4)(E), based on discipline imposed in Pennsylvania "for unethical conduct that in New Jersey constitutes violations of RPC 1.4(b) (failure to communicate with client), RPC 1.15(a) (knowing misappropriation and comingling of funds), RPC 1.15(b) (failure to promptly disburse funds to client or third party), RPC 8.4(c) (conduct involving

dishonesty, fraud, deceit or misrepresentation), and the principles of In re Wilson." In re Orloff, 227 N.J. 321, 321 (2017). Several months after his disbarment in New Jersey, Orloff was reinstated to practice in Pennsylvania.

In 2018, Orloff took the New Jersey insurance producer license examination and applied for a producer license, disclosing both his disciplinary history and his efforts at rehabilitation. The Department denied the application, explaining in a letter to Orloff that the conduct described in the Court's order, "failure to communicate with client, knowing misappropriation and comingling of funds, failure to promptly disburse funds to client or third party, and conduct involving dishonesty, fraud, deceit, or misrepresentation[,]" coupled with "the removal of [his] name from the New Jersey roll of attorneys combine to result in our decision to issue this denial."

Orloff appealed and the matter was transmitted to the Office of Administrative Law as a contested case. Administrative Law Judge Tricia M. Caliguire issued an initial decision on the parties' cross-motions for summary disposition recommending the Department's decision to deny Orloff a producer license be upheld. In a comprehensive opinion, the ALJ addressed, and rejected, each of Orloff's arguments: (1) that the Department failed to explain

its denial in sufficient detail or support it by substantial evidence; (2) that it should have evaluated Orloff's current fitness under the Rehabilitated Convicted Offender Act using the criteria for considering the applications of prohibited persons[2] under N.J.A.C. 11:17E-1.4(i); and (3) that it denied him due process and equal protection under the United States and New Jersey constitutions because he was not provided the same opportunity to establish his rehabilitation as former felons.

The ALJ found the Department could not review Orloff's application under the same criteria used to review the applications of those persons convicted of crimes involving a breach of trust or dishonesty or who lost their licenses due to conduct involving a breach of trust or dishonesty because "[t]he law as it stands," namely, N.J.S.A. 17:22A-32(a)(2) and N.J.S.A. 17:22A-40(a)(16), prohibits it. She also rejected Orloff's belated argument that summary disposition was not appropriate as the matter required an evidentiary hearing.

[2] N.J.A.C. 11:17E-1.2 defines "prohibited person" as "any person convicted of a felony [defined to include an offense of the first, second, third or fourth degree pursuant to N.J.S.A. 2C:1-4 and 43-1] involving dishonesty or breach of trust who is prohibited from being employed by an insurer in the business of insurance pursuant to 18 U.S.C. § 1033."

Orloff filed exceptions claiming the ALJ incorrectly interpreted his constitutional argument, which is that he is similarly situated to ex-offenders seeking waivers to obtain a producer's license, and there is no rational basis for treating him differently from them. He also claimed the ALJ omitted specific factual findings about his rehabilitation, failed to itemize certain items submitted as part of the record and erred in her conclusions of law.

The Commissioner adopted the ALJ's findings, expounding on them in a thorough and thoughtful thirty-two-page decision. The Commissioner agreed with the ALJ that summary decision was appropriate here as there is no dispute as to any material fact and the decision turns on the plain language of the Producer Act.

The Commissioner explained that N.J.S.A. 17:22A-32(a)(2) plainly states that "Before approving the application [for a resident insurance producer license], the commissioner shall find that the individual: . . . (2) Has not committed any act that is a ground for denial, suspension or revocation set forth in section 15 of [N.J.S.A. 17:22A-40]." N.J.S.A. 17:22A-40 provides: "a. The commissioner may place on probation, suspend, revoke or refuse to issue or renew an insurance producer's license . . . for any one or more of the following causes: . . . (16) Committing any fraudulent act." Because it is

undisputed that Orloff misappropriated client funds — a "fraudulent act" — the Commissioner was not permitted to approve his producer license.

The Commissioner rejected Orloff's argument that although he was not criminally convicted of the fraudulent conduct resulting in his disbarment in New Jersey, and is thus not required[3] to seek a waiver pursuant to 18 U.S.C. § 1033, the Department should have considered his rehabilitation and specifically the factors in N.J.A.C. 11:17E-1.4(i) and those in the Rehabilitated Convicted Offender Act in considering his application. The Commissioner explained that both 18 U.S.C. § 1033 and the Rehabilitated Convicted Offender Act are addressed to persons having been convicted of crimes, with the New Jersey statute "intended to address the rehabilitation of convicted offenders." Because Orloff was not convicted of a crime or felony involving a breach of trust or dishonesty, the Rehabilitated Convicted Offender Act and N.J.A.C. 11:17E-1.4(i) are not the standards governing his application for a producer's license. The Commissioner agreed with the ALJ the Department could not consider Orloff's application under the standards he proposed without "statutory revisions by the Legislature."

[3] Orloff is not only not required to seek a waiver, he is not permitted to do so. See N.J.A.C. 11:17E-1.4(e)(1) (prohibiting acceptance of waiver applications from other than prohibited persons as defined in N.J.A.C. 11:17E-1.2).

The Commissioner also rejected Orloff's argument that N.J.A.C. 11:17D-2.17, which applies to individuals seeking reinstatement of licenses the Department has revoked, should have been applied to him. The Commissioner agreed with the ALJ that because Orloff never held a license, N.J.A.C. 11:17D-2.17 is inapplicable to him and N.J.S.A. 17:22A-32(a)(2) and N.J.S.A. 17:22A-40(a)(16) are the controlling standards.

The Commissioner also rejected Orloff's constitutional arguments. The Commissioner rejected Orloff's due process argument because although an occupational license has long been acknowledged to be in the nature of a property right deserving of due process protection, In re Polk, 90 N.J. 550, 562 (1982), "[a] protected property right comes into existence only after a license has been obtained," Valdes v. N.J. State Bd. of Med. Exam'rs, 205 N.J. Super. 398, 405 (App. Div. 1985). "An applicant for a license has merely an expectation of obtaining a property interest," which is not afforded the same protection. Graham v. N.J. Real Estate Comm'n, 217 N.J. Super. 130, 136 (App. Div. 1987). Thus, Orloff's expectation of an insurance producer license is not a property interest deserving of due process protection.

The Commissioner also addressed the ALJ's reasons for rejecting Orloff's equal protection argument, namely that he is part of a class of

disbarred attorneys, which the government has deprived of the benefit of a "current fitness" analysis permitted convicted felons who engaged in the same disqualifying behavior or those attempting to reinstate a revoked producer license. The Commissioner agreed with the ALJ that the argument fails because disbarred attorneys are not a suspect class and there is no fundamental right to an insurance producer license. See Doe v. Poritz, 142 N.J. 1, 92 (1995) ("A classification that does not impact a suspect class or impinge upon a fundamental constitutional right will be upheld if it is rationally related to a legitimate government interest.").

Orloff asserted the ALJ mischaracterized his argument, which was not that disbarred attorneys are a suspect class but only that he is similarly situated to ex-offenders who may seek waivers to obtain an insurance producer's license, thereby obligating the Department to consider their current fitness, a right he has been deprived. The Commissioner disagreed, finding the statutes clearly survive rational basis scrutiny. Orloff appeals, reprising the arguments he made to the Commissioner.

Our review of agency action is limited. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018). Three channels of inquiry inform the appellate review function:

> (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 action; 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 Herrmann, 192 N.J. 19, 28 (2007) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

Applying those standards here, we have no hesitation in affirming the Commissioner's denial of Orloff's producer's license — largely for the reasons she set forth. We add only the following.

Orloff does not dispute his misappropriation of client funds constitutes a disqualifying fraudulent act under N.J.S.A. 17:22A-40(a)(16). That being so, N.J.S.A. 17:22A-32(a)(2) prohibited the Commissioner from issuing him a producer's license. Although 18 U.S.C. § 1033 and the Rehabilitated Convicted Offender Act would override that result had Orloff been convicted of the theft of his client's funds and permit the Commissioner to consider his current fitness for licensure under N.J.A.C. 11:17E-1.4(i), it is undisputed Orloff was not convicted of any crime and is thus not an ex-offender entitled to benefit from those statutes.

The Commissioner did not err in deciding she lacked the freedom to treat Orloff's misappropriation of client funds as the equivalent of a conviction and thus subject to 18 U.S.C. § 1033 and the Rehabilitated Convicted Offender Act. The Legislature is quite capable of electing to treat conduct that would constitute a crime the same as if a person had been convicted of such. It did so in the Casino Control Act, for instance. See N.J.S.A. 5:12-86(g); Dunston v. Dep't of Law & Pub. Safety, Div. of Gaming Enf't, 240 N.J. Super. 53, 56 (App. Div. 1990) (noting "[s]ubsection (g) disqualifies a person from licensure based on the commission of conduct prescribed by (c)(1) and (c)(2) even though that conduct was not prosecuted").[4] The failure of the Legislature or Congress to have done so here, prohibits the Commissioner from deeming Orloff's

[4] The different structure of the Casino Control Act, which includes as disqualifying conduct both specified offenses under the Act and the Criminal Code, as well any act that would constitute those offenses even if never prosecuted, and expressly permits the affirmative demonstration of rehabilitation for both types of conduct, explains our holding in Dunston v. Dep't of Law & Pub. Safety, Div. of Gaming Enf't, that the Commission abused its discretion in applying and balancing the relevant rehabilitation factors, and that those factors could be applied to affect the requisite good character, honesty and integrity finding notwithstanding the absence of express statutory language authorizing the same. 240 N.J. Super. 53, 61-62 (App. Div. 1990) (holding it would "contravene the statutory intendment to insist that while the [disqualifying] conduct can be overcome by rehabilitation, the circumstances surrounding that conduct cannot be. In that case, no one would ever be eligible for rehabilitation relief"). Dunston is no assistance here in interpreting the very different provisions of the Producers Act.

misappropriation of client funds the equivalent of a criminal conviction entitling him to relief under the Rehabilitated Convicted Offender Act or to seek a waiver pursuant to 18 U.S.C. § 1033 and N.J.A.C. 11:17E-1.4(i). To do so would violate "express or implied legislative policies." See In re Herrmann, 192 N.J. at 28.

Orloff's equal protection argument, his claim that there is no rational basis for the statutory classification that would treat attorneys disbarred for misappropriation of client funds differently from ex-offenders convicted of theft in the application process for a producer's license, is without merit. The question "is whether there is any conceivable state of facts which would afford a rational basis for the classification." New Jersey Bar Ass'n v. Berman, 259 N.J. Super. 137, 145-46 (App. Div. 1992).

In passing the Rehabilitated Convicted Offender Act, the Legislature declared it "in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely upon the existence of a criminal record." N.J.S.A. 2A:168A-1. It accordingly prohibited any licensing authority from disqualifying or discriminating against a person "because of any conviction for

a crime," "notwithstanding the contrary provisions of any law or rule or regulation," "unless the conviction relates adversely to the occupation . . . for which the license . . . is sought." As the classification of ex-offenders is obviously "rationally related to a legitimate governmental purpose" Barone v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 107 N.J. 355, 367 (1987), of ending unjustified discrimination against persons previously convicted of crimes, the classification easily withstands an equal protection challenge.

Orloff's remaining arguments, to the extent we have not addressed them, are without sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.