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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4955-15T2

IN THE MATTER OF  
RUSSELL S. CLINE.

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Argued April 27, 2017 – Decided August 17, 2017

Before Judges Lihotz and Hoffman.

On appeal from the New Jersey Motor Vehicle  
Commission.

Michael Confusione argued the cause for  
appellant Russell S. Cline (Hegge &  
Confusione, LLC, attorneys; Mr. Confusione, of  
counsel and on the brief).

Jennifer R. Jaremback, Deputy Attorney  
General, argued the cause for respondent New  
Jersey Motor Vehicle Commission (Christopher  
S. Porrino, Attorney General, attorney;  
Melissa H. Raksa, Assistant Attorney General,  
of counsel; Ms. Jaremback, on the brief).

PER CURIAM

Appellant Russell S. Cline appeals from a final agency  
decision issued by the Motor Vehicle Commission (MVC), which  
approved the suspension of his driver's registration privileges,  
pursuant to N.J.S.A. 27:23-38 and N.J.S.A. 39:5-30. The MVC  
conditioned reinstatement of appellant's registration upon

satisfaction of \$912.30 in unpaid tolls and \$12,225 in administrative fees owed to the New Jersey Turnpike Authority (NJTA), along with a \$100 registration restoration fee. On appeal, appellant urges the court to vacate the agency decision, arguing the MVC did not provide timely notice of the fines and assessments, and violated statutory law by suspending his registration privileges prior to filing an action. Further, appellant argues administrative fees, issued for each toll violation, are unreasonable and the doctrine of laches bars payment because the three-year delay in commencing administrative proceedings prejudiced appellant's ability to contest the charges.

We reject appellant's procedural and substantive challenges attacking the registration suspension pending satisfaction of the outstanding tolls. However, following our review, we conclude the record contains insufficient evidence to sustain the amount of the administrative assessments imposed, requiring us to remand for further proceedings.

Between August 25, 2011 and December 28, 2012, appellant, used an E-ZPass lane even though the credit card linked to his E-ZPass account had repeatedly declined payment. In total, he accrued 572 toll violations. In September 2012, appellant's E-ZPass account was closed, as provided in the E-ZPass contract, when it remained underfunded for ninety consecutive days.

In April 2013, the MVC notified appellant it would suspend his vehicle registration privileges the following month, unless he satisfied all outstanding tolls and administrative fees. Arguing the claims by the MVC were erroneous, appellant requested a formal hearing. Almost three years later, a hearing was held before an Administrative Law Judge (ALJ), on February 25, 2016.

Three witnesses testified at the hearing. The MVC called Carlos Caraballo, assistant violations manager for Xerox, the company contracted "to run and maintain the electronic toll collection system on behalf of the . . . agencies under the New Jersey E-ZPass consortium" and Rebecca Donington, of the MVC Department of Regulatory and Legislative Affairs. Appellant testified on his own behalf.

Caraballo explained the procedure followed when a vehicle exits a toll plaza through an E-ZPass lane without paying the toll. If the vehicle is not associated with an active E-ZPass account, or the account is unfunded, Xerox informs the MVC, which then issued an advisory notice of enforcement to the recorded address on the vehicle's registration. The notice included a picture of the vehicle captured at the toll plaza, the toll due, any applicable fees, and options to dispute the notice. Xerox issued three notices over a 105-day period. If payment, or challenge, is not received, the matter is transferred to pursue

formal collection. Xerox also retained records of customer contacts and phone calls regarding alleged toll violations.

Caraballo stated the administrative fee, initially set at \$25 for each violation, was raised to \$50 per violation during the period relevant to the instant case. The fee offsets administrative expenses to enforce the unpaid toll, such as the cost of: maintaining the violation enforcement cameras, storing the image on a server, transmitting the image, undertaking a motor vehicle look-up, reviewing the matter, processing disputes, printing, and postage. He stated the fee is a fixed amount and does not vary whether the fee is paid to the MVC, or if the account has been sent to collection. However, there are variations in application of the administrative fee by certain toll roads. Applicable to this matter, the NJT charges \$50 for a single violation but the GSP imposes one \$50 fee for up to four tolls missed in a single day.

Caraballo identified the toll violations on the New Jersey Turnpike (NJT) and the Garden State Parkway (GSP) attributed to appellant's registered vehicle. Reviewing the records of violations, he was able to provide the date, time, place and exact toll lane where each violation occurred. Further, he recited the date Xerox mailed the notice of violation to appellant. Caraballo also provided a summary sheet of the violations, tolls due, and

administrative assessments, concluding unpaid tolls were \$912.30 and the associated administrative fees totaled \$12,200.

On cross-examination, in an effort to show the MVC's records were not "complete," appellant questioned why certain notices of violation, incurred during the specified period, were not listed among records Caraballo identified. Appellant also challenged inconsistent dates between MVC's record of violations, and notices he received in the mail. Caraballo generally attributed the apparent discrepancy to a change in the mail processor used by Xerox. He confirmed "[t]he actual toll violation transactions date and time, the name and address all match," the records admitted into evidence, and the only discrepancy was the date the notice was mailed. Also discussed were records showing appellant's settlement of 478 different E-ZPass toll violations, noting the MVC waived its claim for administration fees on these matters because appellant resolved those claims within 105 days of the violations, and no referral for collection was initiated.<sup>1</sup>

Donington testified that as a result of appellant's repeated toll violations, the MVC suspended his registration. Her office

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<sup>1</sup> Caraballo explained one could use the MVC website and transfer the violations to a valid E-ZPass account for payment. He noted some of appellant's past violations were resolved this way. As a result, administrative fees were waived. We also note the hearing giving rise to this appeal did not adjudicate the other 478 violations.

prepared and mailed the notice to appellant at his last reported address on April 22, 2013. She also explained the steps necessary for appellant to restore his registration, which included satisfaction of the tolls, administrative fees, and a restoration fee.

In his testimony, appellant asserted in the past he resolved E-ZPass violations before the administrative fee attached. Regarding the unpaid amounts now asserted as due by the MVC, he acknowledged he received notices for the 2011 violations, but maintained they arrived later than the date stated by Caraballo. Appellant stated the late mailing dates limited his ability to contact the MVC to "fix it." Further, as to violations in 2012, appellant insisted he did not receive any written notices; however, he confirmed his address matched the MVC's records, and also acknowledged he received emails.

Additionally, defendant argued he could not afford the administrative fees and believed he should not be obligated to pay them because of the late notices. Appellant agreed he received "a letter that said [the NJTA was] gonna [sic] stop mailing statements," in lieu of email notices. He contacted "E-ZPass a number of times, trying to resolve" the obligations, but agreed he never raised the problem of late received notices. Finally,

he claimed the delay in the administrative proceedings prevented acquisition of phone records showing these calls.

On April 28, 2016, the ALJ issued his decision. He rejected appellant's arguments, approved the suspension, and ordered satisfaction of all amounts due. Appellant appealed to the Commissioner of the MVC. In a decision dated June 6, 2016, the Commissioner adopted the ALJ's findings and conclusions, with a slight modification to the amount due. This appeal followed.

Our review of an administrative agency's final decision is limited and we give due regard to the agency's credibility findings. Logan v. Bd. of Review, 299 N.J. Super. 346, 347-48 (App. Div. 1997). In our review we examine

(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)).]

In this regard, we uphold the agency's determination unless a challenger presents "a clear showing [the decision] is arbitrary,

capricious, or unreasonable, or that it lacks fair support in the record." Id. at 27-28.

The obligations of motorists using toll roads is set forth by statute. "No vehicle shall be permitted to make use of any highway . . . operated by the New Jersey Turnpike Authority . . . except upon the payment of such tolls, if any, as may from time to time be prescribed by the Authority." N.J.S.A. 27:23-25. Further, the Legislature has authorized the MVC "in addition to any punishment or penalty provided by other sections," to suspend or revoke the license or registration certificate for, among other things, nonpayment of tolls. N.J.S.A. 27:23-38; see also N.J.S.A. 39:5-30 ("Every registration certificate, every license certificate, every privilege to drive motor vehicles, . . . may be suspended or revoked, . . . for a violation of any of the provisions of this Title or on any other reasonable grounds.").

On appeal, appellant first argues the MVC failed to provide timely notice of the violations. Relying on N.J.S.A. 27:23-34.3, he urges written notice must be provided within sixty days of the violation. Asserting the MVC did not meet this mandate, he argues the request for payment and the administrative assessment is out of time, making suspension of his registration unfounded. We are not persuaded.



Importantly, appellant does not assert he was denied notice of the proposed suspension or revocation of registration imposed for violating toll obligations. N.J.S.A. 27:23-38 (requiring written notice of the proposed registration revocation). Rather, appellant's argument invokes language from N.J.S.A. 27:23-34.3(a) which states: "If a violation of the toll collection monitoring system regulations is committed . . . the agent of the authority may send an advisory and payment request within 60 days of the date of the violation to the owner of the vehicle . . . providing . . . the opportunity to resolve the matter prior to the issuance of a summons and complaint . . . ." The statute permits a process to resolve disputes regarding toll obligations, prior to initiation of legal action. Its language is permissive, and does not compel a prerequisite to collection of unpaid tolls or the MVC exercise of authority pursuant to N.J.S.A. 27:23-38. See Fogerty v. Fantasy, Inc., 510 U.S. 517, 533, 114 S. Ct. 1023, 127 L. Ed. 2d 455, 469 (1994) ("The word 'may' clearly connotes discretion.").

The evidence presented in the administrative hearing reflects Xerox issued notices to appellant of each toll violation, at his address. The notice was issued within the period stated in N.J.S.A. 27:23-34.3(a) and included a photograph of his license plate at the toll plaza, the date of the offense and even the toll lane used. See SSI Med. Servs. v. Dept. of Human Servs., 146 N.J.

614, 621 (1996) (recognizing "a presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed"). Later, notices were sent electronically. Again, appellant received and ignored them.

Appellant's testimony the notices were untimely or not received was apparently found not credible by the ALJ. We note appellant never presented or articulated a need for more time to resolve his challenges because of the allegedly untimely notices, despite what he described as constant contact with E-ZPass regarding the violations. He presented no evidence other than his own testimony supporting his position the notices were untimely mailed. We also observe appellant knew of the violations when committed. For years, he purposely used the toll roads without payment, essentially using funds due the taxpayers of this State at his convenience. His contention of insufficient notice is at best specious.

Appellant next claims registration suspension is permitted only following initiation of a formal proceeding in municipal court. In pertinent part, N.J.S.A. 27:23-34.4 provides "[t]he municipal court of the municipality wherein a toll collection monitoring system record was made shall have jurisdiction to hear violations of the toll collection monitoring system regulations." However, N.J.S.A. 27:23-38, and N.J.S.A. 39:5-30, permit the MVC

to pursue administrative remedies against offenders. We do not view these avenues as mutually exclusive.

We also are unpersuaded appellant suffered prejudice by the delay in initiation of the administrative hearing. The record does not show the MVC was dilatory. Further, appellant's bald assertion is insufficient to trigger laches. See Nw. Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 141 (2001) ("The primary factor to consider when deciding whether to apply laches is whether there has been a general change in condition during the passage of time that has made it inequitable to allow the claim to proceed."). Here, suspension of appellant's registration did not occur until the final determination was issued in June 2016. We reject his claim of prejudice.

The final argument attacks the reasonableness of the administrative fee attached to each toll violation.

An administrative regulation is accorded a presumption of validity against a party's challenge that the regulation is arbitrary, capricious, or unreasonable. N.J. League of Muns. v. Dept. of Cmty. Affairs, 158 N.J. 211, 222 (1999). "If procedurally regular, it may be set aside only if it is proved to be arbitrary or capricious or if it plainly transgresses the statute it purports to effectuate . . . or if it alters the terms of the statute or frustrates the policy embodied in it." In re Repeal of N.J.A.C. 6:28, 204 N.J. Super. 158, 160-61, (App. Div. 1985) (citations omitted). See also In re Adoption of N.J.A.C. 13:38-1.3(f) by the State Board

of Optometrists, 341 N.J. Super. 536, 542-43 (App. Div. 2001).

[In re Req. of Oper. Serv. Providers, 343 N.J. Super. 282, 327 (App. Div. 2001).]

Imposition of an administrative fee assessed against violators is authorized by N.J.S.A. 27:23-34.3(a), which provides:

The authority or its agent may require as part of the advisory and payment request that the owner pay to the agent the proper toll and a reasonable administrative fee established by the authority and the based upon the actual cost of processing and collecting the violation.

Regulations promulgated by the Commissioner establish the fee stating only: "the violating vehicle shall pay to the Authority or its agent, the proper toll and an administrative fee in the amount of \$50.00 per violation." N.J.A.C. 19:9-9.2(b). We note during the course of appellant's violations relevant to this appeal, on October 17, 2011, the administrative fee was raised from \$25 to \$50. See 43 N.J.R. 2672(b). This rule change was first proposed on June 6, 2011. See 34 N.J.R. 1325(a) ("Administrative Fee for E-ZPass Violations; Video Enforcement of Toll Violations in Garden State Parkway Exact Change Lanes; Prohibition of Non-Passenger Vehicles in Garden State Parkway Exact Change Lanes; Public Access to Authority Records"). The proposed amendment to N.J.A.C. 19:9-9.2(b) noted:

The administrative fee has remained unchanged at \$ 25.00 since the implementation of E-ZPass in the late 1990s. A financial analysis conducted by Authority staff shows that the actual costs of enforcement have risen to \$ 50.00 per violation. The Authority proposes an amendment to N.J.A.C. 19:9-9.2(b) to increase the administrative fee to \$ 50.00 per violation, in order to allocate the enforcement costs to the narrow class of habitual or intentional toll violators. This increase will only affect E-ZPass violators, and the Authority's practices for the adjudication of inadvertent toll violations will remain unchanged.

The aforementioned financial analysis was not introduced into the administrative record, nor was it a component of the State's case below or included in its brief on appeal. When questioned as to the total amount of fees assessed, Caraballo stated: "The reason why is because, at one point, the administrative fee was \$25. . . . And then . . . the Turnpike increased it to 50." Unfortunately, Caraballo's testimony establishing the costs to justify the underlying \$50 administrative fee for each toll violation was brief and general. He said:

I mean, some of the -- some of the costs -- and it's not all-inclusive, but some of the costs can be, again, mailing, print and mail, postage, envelopes, image capture, the violation enforcement cameras, storing the images on the server, transmission. So, it's all-encompassing. And there's some things I'm missing, but that was established as -- as -- \$50 was established as the cost for the whole violation enforcement. . . . Handling

disputes, handling payments is also a cost that is inclusive of that . . . \$50 fee.

We are constrained to conclude this record is insufficient to support the calculation of the fee as matching "the actual cost of processing and collecting the violation" mandated by N.J.S.A. 27:23-34.3(a). Accordingly, a remand is required. See Oper. Serv. Providers, supra, 343 N.J. Super. at 327.

We reject appellant's suggestion that because the administrative fee significantly exceeds the toll, it is unreasonable. The need for a sophisticated system to capture toll violators easily shows the cost to track such individuals down would exceed the comparatively modest cost of any given toll. Prudently, the Legislature decided taxpayers should not bear this burden and shifted the expense to those who commit toll violations and fail to address their lapse. If the cost of collection is \$50, the sum does not shock the court's sense of fairness.

However, the Legislature provided the agency may charge a fee that reflects "the actual cost of processing and collecting the violation." N.J.S.A. 27:23-34.3(a) (emphasis added). The fee cannot be a disguised method of generating revenue or a penalty. While the Agency abided by the proper procedures necessary to increase the administrative fee, we conclude the State's proofs as to the reasonableness of the fee itself are insufficient. We

owe no deference to a regulation we believe runs contrary to its authorizing statute. See Oper. Serv. Providers, supra, 343 N.J. Super. at 327.

An agency exercising the power of the State must act fairly and candidly towards those whose interests may be affected by agency action. Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dept. of Envir. Prot., 191 N.J. 38, 57 (2007). It remains imperative that "government must 'turn square corners.'" F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985) (quoting Gruber v. Mayor and Twp. Com. of Raritan, 73 N.J. Super. 120 (App. Div.), aff'd, 39 N.J. 1 (1962)). Accordingly, the fee imposed must properly be based on the average cost of processing and collection of unpaid tolls and may not be an arbitrary estimation.


Our ruling does not require a determination of the individual cost to pursue each toll appellant evaded on a toll-by-toll basis. Rather, on remand, the MVC must demonstrate the computation of the "actual cost of processing and collecting" toll violations, on a general basis. N.J.S.A. 27:23-34.3(a). Furthermore, such fee must be uniformly, and rationally, applied to violators throughout the State. Testimony showing toll violations throughout the state are processed once per day. Thus, in presenting support for setting the administrative fee the MVC must substantiate the basis

for application on a per violation basis, N.J.S.A. 27:23-34.3(a), to ameliorate the cost of collection, and not to assess a disguised fine. Compare Fee, Black's Law Dictionary (9th ed. 2009) (defining fee as "a charge for labor or services"), with Fine, Black's Law Dictionary (9th ed. 2009) (defining fine as "a pecuniary criminal punishment or civil penalty").

We reject as unavailing appellant's claims of insufficient ability to pay these obligations. Appellant's ample past interactions with the MVC made him well versed an administrative fee attached as a consequence to his decision not to pay the tolls when due. Nevertheless, we are constrained to remand for further proceedings to determine the proper administrative fee, and the scope of appellant's violations warranting assessment of the administrative fee on a rational basis.

Affirmed in part and remanded for additional review consistent with this opinion. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION