SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0069-21

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

Petitioner-Respondent,

v.

CONSTRUCTION,
INVESTIGATIONS &
ADJUSTMENTS, LLC, and
GENE MEHMEL,

Respondents-Appellants.

———————————————————

Submitted October 25, 2022 – Decided January 3, 2023

Before Judges Sumners and Susswein.

On appeal from the New Jersey Department of Banking and Insurance, Docket No. OTSC #E17-31.

John B. Kearney, attorney for appellants.

Matthew J. Platkin, Attorney General, attorney for respondent (Donna Arons, Assistant Attorney General,

of counsel; Nicholas Kant, Deputy Attorney General, on the brief).

PER CURIAM

The Commissioner of the New Jersey Department of Banking and Insurance issued a four-count order to show cause against respondents Gene Mehmel and his public adjustment business, Construction, Investigations & Adjustments, LLC (CIA), seeking to impose monetary penalties, investigation costs, and restitution, in addition to revocation of their public adjuster licenses, for alleged violations of the New Jersey Public Adjusters' Licensing Act (the Act), N.J.S.A. 17:22B-1 to -20, and related regulations. The Department contended that forty-seven of respondents' contracts with New Jersey insureds were signed by Mehmel on behalf of CIA without CIA being properly licensed; "fail[ed] to prominently include cancellation procedures;" and included an unclear fee structure that was "not reasonably related to the services rendered." In addition, the Department alleged respondents accepted insurance proceeds on behalf of insureds and failed to deposit those funds into an interest-bearing escrow or trust account.

After the matter was transmitted as a contested case to the Office of Administrative Law, an Administrative Law Judge (ALJ) issued an order granting partial summary decision to the Department on all but one count of

the order to show cause. The ALJ later issued a nineteen-page initial decision incorporating his earlier partial summary decision and granting summary decision in the Department's favor on the remaining count. The ALJ recommended the imposition of monetary penalties, investigation costs, and restitution, in addition to revocation of respondents' public adjuster licenses.

Both parties filed exceptions to the initial decision. In an eighty-one-page final agency decision, the Commissioner mostly adopted the initial decision.

The Commissioner recognized N.J.S.A. 17:22B-17 grants the Superior Court jurisdiction over claims alleging unlicensed public adjusting, but she maintained the entire controversy doctrine required the Department to prosecute all its allegations against respondents in one proceeding to effectuate a comprehensive resolution. The Commissioner determined Mehmel signed forty-six of the forty-seven contracts, knowing the contracts' language indicated CIA, an unlicensed entity, was a party to the contracts, thereby violating N.J.S.A. 17:22B-3(a) and (b), N.J.S.A. 17:22B-14(a), and N.J.A.C. 11:1-37.14(a). The Commissioner concluded the Department proved all its allegations and revoked the respondents' license because they

> took advantage of the insureds with whom they contracted by not providing the information that was

> necessary for the insureds to make an informed decision regarding the services to be provided by the [r]espondents, the fees related to those services, and their rights under the contracts if they were unsatisfied with the [r]espondents' representation during the course of the contract.

Relying on N.J.S.A. 17:22B-17 and Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 137-139 (1987), the Commissioner ruled respondents are jointly and severally liable for monetary penalties totaling $143,500, restitution costs of $26,961.49, and investigation costs of $2900. The Commisioner noted

> [t]hese penalties demonstrate the appropriate level of opprobrium for their misconduct, and will serve to deter future misconduct by the [r]espondents and the industry as a whole. I also note it is far less than the Department could have requested under N.J.S.A. 17:22B-17, which allows the imposition of up to a $2,500 fine for the first violation and up to a $5,000 fine for any subsequent violations of the [the Act].

In their appeal, respondents contend:

> POINT I
>
> THERE IS NO BASIS FOR THE PROSECUTION OF MEHMEL OR CIA FOR BEING AN UNLICENSED PUBLIC ADJUSTER.
>
> A. THE DEPARTMENT DOES NOT HAVE JURISDICTION.

B. THERE IS NO BASIS FOR THE CHARGES OF UNLICENSED PUBLIC ADJUSTING AGAINST CIA WHEN MEHMEL WAS ALWAYS LICENSED.

POINT II

THE CONTRACTS IN QUESTION DO INCLUDE A SECTION THAT SPECIFIES THE PROCEDURES BY WHICH AN INSURED MAY CANCEL THE CONTRACT.

A. THE CONTRACTS AS WRITTEN COMPLY WITH THE STATUTE AND RULE.

B. DEPARTMENT'S POSITION CONCERNING COUNT II VIOLATES DUE PROCESS.

C. THE DEPARTMENT'S POSITION CONCERNING COUNT II IS ULTRA VIRES.

D. THE DEPARTMENT'S POSITION CONCERNING COUNT II IS IMPERMISSIBLE RULEMAKING.

POINT III

THE CONTRACTS IN QUESTION PROVIDED FOR FEES WHICH WERE REASONABLY RELATED TO THE SERVICES PROVIDED WHICH CLEARLY DEFINED THE COMPENSATION FOR THE PUBLIC ADJUSTER SERVICES.

POINT IV

APPELLANTS NEVER HELD ANY FUNDS ON BEHALF OF THEIR CLIENTS.

POINT V

THE COMMISSIONER SHOULD HAVE RECONSIDERED HER DECISION TO TAKE INTO ACCOUNT THE ACTIONS OF HER PREDECESSOR[']S REPRESENTATIVE.

POINT VI

THERE IS NO SUPPORT IN THE RECORD FOR THE IMPOSITION OF PENALTIES.

Our review of an administrative agency's decision is limited. Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009). This court "does not substitute its judgment of the facts for that of an administrative agency." Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001) (citation omitted). Rather, "we defer to matters that lie within the special competence" of the administrative agency. Balagun v. N.J. Dep't of Corr., 361 N.J. Super. 199, 202 (App. Div. 2003). As for,

> authority to alter a sanction imposed by an administrative agency, [an appellate] [c]ourt can do so only when necessary to bring the agency's action into conformity with its delegated authority. [An appellate] [c]ourt has no power to act independently as an administrative tribunal or to substitute its judgment for that of the agency. It can interpose its views only where it is satisfied that the agency has mistakenly

> exercised its discretion or misperceived its own statutory authority.
>
> [In re Polk, 90 N.J. 550, 578 (1982).]

"[T]he test in reviewing administrative sanctions is whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Ibid. (internal quotations and citation omitted).

"Ordinarily, an appellate court will reverse the decision of the administrative agency only if it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Mejia v. N.J. Dep't of Corr., 446 N.J. Super. 369, 376 (App. Div. 2016) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). "However, a reviewing court is 'in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.'" Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 158 (2018) (alteration in original) (quoting Dep't of Children & Families, DYFS v. T.B., 207 N.J. 294, 302 (2011)). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." In re Adoption of Amends. to Ne., Upper Raritan, Sussex Cty. & Upper Del. Water Quality Mgmt. Plans, 435 N.J.

Super. 571, 582 (App. Div. 2014) (alteration in original) (quoting In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006)).

In accordance with N.J.A.C. 1:1-12.5(b), a state agency's decision to grant a motion for summary decision is "substantially the same" as that governing a motion for summary judgment adjudicated by a trial court under Rule 4:46-2. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995). When reviewing an order granting summary judgment, we apply "the same standard governing the trial court." Oyola v. Liu, 431 N.J. Super. 493, 497 (App. Div. 2013). Summary judgment should be granted only when the record reveals "no genuine issue as to any material fact" and "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Although we "must give deference to [an] agency's . . . 'interpretation of statutes and regulations within its implementing and enforcing responsibility,' we are 'in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue[.]'" Utley v. Bd. of Rev., Dep't of Labor, 194 N.J. 534, 551 (2008) (citations omitted).

Summary judgment should be denied when the determination of material disputed facts depends primarily on credibility evaluations. See Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011). Although both

parties moved for summary decision, we consider the facts in a light most favorable to respondents because judgment was granted in favor of the Department. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

Considering these legal standards and the parties' arguments, we affirm substantially for the reasons expressed by the Commissioner in her cogent decision. The Commissioner's factual findings, adopting the ALJ's findings with some modification, are supported by substantial credible evidence, and thus, were not arbitrary, capricious, or unreasonable. See In re Stallworth, 208 N.J. 182, 194 (2011). Moreover, given respondents' violations, the penalties are not so unduly harsh as to shock our sense of fairness. See In re Carter, 191 N.J. 474, 484 (2007). Respondents' contentions are without sufficient merit to warrant discussion in this opinion, R. 2:11-3(e)(1)(E). We find no basis to disturb the Commissioner's decision.

Affirmed.