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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0190-21**

THOMAS MALONEY,

Plaintiff-Respondent,

v.

BOROUGH OF CARLSTADT,

Defendant-Appellant.

Argued April 26, 2023 – Decided July 10, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3281-21.

David F. Corrigan argued the cause for appellant (The Corrigan Law Firm, attorneys; David F. Corrigan, of counsel and on the briefs; Frank J. Dyevoich, on the briefs).

Kenneth Ralph argued the cause for respondent (Bruno & Ferraro, attorneys; Kenneth Ralph, of counsel and on the brief).

PER CURIAM

Plaintiff Thomas Maloney was a commissioner with the Carlstadt Sewerage Authority in 2021 when he was removed from his position by the Carlstadt Borough Council based on a recommendation by a hearing officer. Plaintiff then filed an action in lieu of prerogative writs against defendant, the Borough of Carlstadt, challenging his removal as a commissioner. Defendant now appeals from the September 9, 2021 Law Division order that granted plaintiff's summary judgment motion and reinstated plaintiff to his position. For the reasons that follow, we reverse and remand.

On November 3, 2020, defendant filed a Preliminary Notice of Disciplinary Action (PNDA) against plaintiff charging him with misconduct, inefficiency, and neglect of duty based on a February 8, 2020 incident in which plaintiff shared an explicit video in a Facebook messenger group that included the present Carlstadt Mayor, former mayors, Carlstadt Councilmembers, a Carlstadt Board of Education member, the former Bergen County Executive, and other area residents and community leaders. Plaintiff's message consisted of a "[thirty-eight-] second recording of a naked male defecating in the mouth and onto the face of a topless female, who appears on her knees in a bathroom." The video was accompanied by text, which read, "Shit Happens, Thug Life, Dug

Life, and Bitch." Plaintiff sent the video along with the message, "Don't say nothing. Keep it going lmao!" followed by several emojis.

Cheryl Rivera, a former resident of Carlstadt and former clerk of the Carlstadt Municipal Court, complained to the Mayor and Council about the video, which complaint prompted an investigation that led to the filing of the PNDA. During the ensuing disciplinary hearing conducted virtually on February 8, 2021, the facts were largely undisputed.¹ Rivera, the only testifying witness at the hearing besides plaintiff, testified that she saw the video when it was first sent. She subsequently sent an email to the Carlstadt Mayor and Council on June 12, 2020, to lodge a complaint because she was "'shocked and disgusted' by it." During his testimony, plaintiff admitted posting the video, but claimed that he intended to send it to only one person, not the entire group. He also acknowledged feeling "embarrassed because of it." At the time the video was posted, plaintiff's term as a commissioner of the Carlstadt Sewerage Authority was scheduled to expire on January 31, 2023.

Following the hearing, on March 26, 2021, the hearing officer issued a written decision recommending plaintiff's removal. In reaching his decision, the hearing officer reviewed caselaw addressing police misconduct under N.J.S.A.

¹ Due to technical difficulties, the hearing was not recorded.

40A:14-147, pointing out that it was "similar to N.J.S.A. 40:14A-5(c)." Based on his review, the hearing officer concluded that plaintiff's behavior constituted "misconduct and neglect of duty." Because Carlstadt Borough Ordinance § 3-5.1 required approval from the Mayor and Borough Council prior to suspension or dismissal, and N.J.S.A. 40:14A-5(c) "place[d] the authority to remove a Commissioner only upon the governing body by which the person was appointed," the hearing officer referred his decision for removal to the governing body for approval.

On April 7, 2021, the Mayor and the Borough Council passed a resolution removing plaintiff as a Carlstadt Sewerage Authority commissioner. In the resolution, the Mayor and the Borough Council noted that they had reviewed the hearing officer's decision, as well as counsels' arguments, and "accepted and adopted" the hearing officer's recommendation.

On May 19, 2021, plaintiff filed an action in lieu of prerogative writs, alleging that there was insufficient evidence to sustain the charges against him, that termination was not authorized under N.J.S.A. 40:14A-5(c), and that termination was an "excessive" remedy. Subsequently, the parties filed cross-motions for summary judgment. In their respective motions, plaintiff sought to

vacate his removal while defendant sought dismissal of plaintiff's complaint with prejudice.

In support of his position, plaintiff argued he was not subject to the disciplinary provisions under the Carlstadt Borough Ordinance, including § 3-5.1, because his position as a commissioner was a statutory appointment governed solely by N.J.S.A. 40:14A-5(c). Further, plaintiff argued that N.J.S.A. 40:14A-5(c) only applied to conduct performed in his official capacity as a commissioner, and because his "conduct did not touch upon or involve his office," there were no grounds for removal. Plaintiff also distinguished authorities governing misconduct by police officers on the ground that they involved a different standard of duty than other public officials. Defendant countered that, under the common law, misconduct in office was tantamount to conduct unbecoming a public employee, and encompassed any conduct, including plaintiff's, that adversely affected the morale or efficiency of the Borough. Defendant posited that appointed public officials, not just police officers, had a higher standard of duty.

Following oral argument, the motion judge entered orders on September 9, 2021, granting plaintiff's motion for summary judgment and denying defendant's. In an accompanying statement of reasons, the judge found that the

hearing officer erred in predicating his decision on Carlstadt Borough Ordinance § 3-5.1. According to the judge, because plaintiff was a commissioner serving a limited term, and not a borough employee, the Carlstadt Borough Ordinance was inapplicable.

The judge explained that the hearing officer should have applied N.J.S.A. 40:14A-5(c) in deciding "whether plaintiff was inefficient or neglectful of his duties as a commissioner or engaged in misconduct in office." Because the judge concluded that the hearing officer applied the wrong standard, the judge found the hearing officer's determination was "arbitrary, capricious, and unreasonable and contrary to the law." Thus, the judge reinstated plaintiff as a commissioner.

Defendant appealed the decision, and we granted defendant's motion for a stay pending appeal. On appeal, defendant contends that the judge erred in granting plaintiff's motion for summary judgment because plaintiff's conduct constituted misconduct and neglect of duty under N.J.S.A. 40:14A-5(c). Specifically, defendant asserts that: (1) the judge incorrectly concluded that the hearing officer failed to consider N.J.S.A. 40:14A-5(c); (2) the hearing officer's determination that plaintiff's behavior violated N.J.S.A. 40:14A-5(c) was not

arbitrary or capricious; and (3) because plaintiff is a public official, his private conduct can constitute misconduct under the statute.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). That standard is well-settled.

[I]f the evidence of record—the pleadings, depositions, answers to interrogatories, and affidavits—"together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted.

[Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) (citations omitted) (quoting R. 4:46-2(c)).]

Whether a genuine issue of material fact exists depends on "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). "If there is no genuine issue of material fact, we must then 'decide whether the trial court correctly interpreted the law.'"

DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). "We review issues of law de novo and accord no deference to the trial judge's [legal] conclusions" MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 312 (App. Div. 2018).

Likewise, "[w]hen reviewing a trial court's decision regarding the validity of a local board's determination, 'we are bound by the same standards as was the trial court.'" Jacoby v. Zoning Bd. of Adjustment of Englewood Cliffs, 442 N.J. Super. 450, 462 (App. Div. 2015) (quoting Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)). Under that standard, "[w]e give deference to the actions and factual findings of local boards and may not disturb such findings unless they were arbitrary, capricious, or unreasonable." Ibid.

A municipality acts "arbitrarily, capriciously, or unreasonably if its findings of fact . . . are not supported by the record," or if it "usurps power" not otherwise allotted to it. Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013). "Basically, the reviewing court must determine whether the board below followed the statutory guidelines and properly exercised its discretion." Menlo Park Plaza Assocs. v. Planning Bd. of Woodbridge, 316 N.J. Super. 451, 460

(App. Div. 1998). As always, "[i]n construing the meaning of a statute, an ordinance, or our case law, our review is de novo." 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington, 221 N.J. 318, 338 (2015).

Here, the judge determined that plaintiff's removal was governed by N.J.S.A. 40:14A-5(c), and not by Carlstadt Borough Ordinance § 3-5.1. N.J.S.A. 40:14A-5(c), governing the appointment and removal of county and municipal sewerage authorities, including commissioners, provides in pertinent part that "[a] member of a sewerage authority may be removed only by the governing body by which he was appointed and only for inefficiency or neglect of duty or misconduct in office." On the other hand, Carlstadt Borough Ordinance § 3-5.1, which applies to municipal employees, provides for disciplinary action against certain employees. Carlstadt Borough Ordinance § 3-5.2 articulates the grounds to institute disciplinary actions, including neglect of duty and conduct unbecoming a public employee.

It is undisputed that, pursuant to N.J.S.A. 40:14A-4(a), plaintiff was appointed to a five-year term as a member of the sewerage authority. Thus, it is "clear that plaintiff was the holder of a public office rather than a public employment and that his appointment was for a term fixed by statute." Golaine v. Cardinale, 142 N.J. Super. 385, 393 (App. Div. 1976). Consequently, the

judge was correct in concluding that plaintiff's removal was governed by the statute, and not the ordinance.

However, the judge erred in concluding that the hearing officer's determination recommending plaintiff's removal was predicated solely on the hearing officer's application of the municipal ordinance. On the contrary, the hearing officer's determination was based on consideration of both Borough Ordinance § 3-5.1 and N.J.S.A. 40:14A-5(c). We reach this conclusion from our review of the record, which reveals that the hearing officer considered N.J.S.A. 40:14A-5(c) throughout his decision. Specifically, in his introduction, the hearing officer stated that "Carlstadt Borough Ordinances §[]1-8, §[]1-9, §[]3-5 and N.J.S.A. 40:14A-5(c) govern the procedures and conduct of this disciplinary matter." In the decision itself, the hearing officer again reiterated that "the removal of a Sewerage Authority Commissioner from office is governed by N.J.S.A. 40:14A-5(c), which provides that a Commissioner may be removed only by the governing body by which he was appointed."

Although the hearing officer determined that plaintiff was also "subject to the disciplinary action procedures under the Borough Code," this determination was not made to the exclusion of the statute. Moreover, in analyzing plaintiff's behavior, the hearing officer specifically referenced N.J.S.A. 40:14A-5(c) and

compared it to N.J.S.A. 40A:14-147, relating to misconduct by police officers. Critically, the hearing officer ultimately determined that plaintiff's conduct "constitute[d] misconduct and neglect of duty," language that is identical to the language in N.J.S.A. 40:14A-5(c) referencing "neglect of duty or misconduct in office."

Consequently, we agree with defendant that the judge erred in finding that the hearing officer failed to consider N.J.S.A. 40:14A-5(c). The record clearly shows that the hearing officer's determination was based on his consideration of both N.J.S.A. 40:14A-5(c) and Carlstadt Borough Ordinance § 3-5.1.² Because of the judge's procedural error in determining that the hearing officer applied the wrong legal standard in reviewing the disciplinary action against plaintiff, the judge did not address the merits and resolve the substantive legal issue of

² When approving the resolution to terminate plaintiff's employment, the Mayor and Borough Council "accepted and adopted" the hearing officer's recommendation. In an apparent drafting error, the resolution mistakenly stated that the hearing officer's recommendation was made "pursuant to Borough Ordinance § 3-5.1." It is clear, however, that the judge's determination was based upon her review of the hearing officer's decision and the reasoning articulated therein, and not simply the ultimate resolution which resulted in plaintiff's dismissal. See In re Appeal of Cohen, 56 N.J. Super. 502, 507 (App. Div. 1959) (affirming disciplinary proceeding against police officer for misconduct even though the charges against him were brought under the wrong cause of action because the charges were nevertheless "substantively described and satisfactorily proven" to constitute misconduct in office).

whether an appointed public official's private conduct can constitute misconduct in office under N.J.S.A. 40:14A-5(c). We therefore reverse and remand for the judge to address the dispositive legal issue on the merits.

Reversed and remanded for further proceedings 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