SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0999-21

A.B.,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,

Respondent-Respondent.

Submitted September 11, 2023 – Decided October 5, 2023

Before Judges Mawla and Marczyk.

On appeal from the New Jersey Commissioner of Education, Docket No. 300-11/19.

Springstead & Maurice, attorneys for appellant (Alfred F. Maurice, Harold N. Springstead, and Lauren E. McGovern, of counsel and on the briefs).

Scarinci Hollenbeck, attorneys for respondent Board of Education of the City of Hackensack (John G. Geppert, Jr., of counsel and on the brief; Sarah A. Gober, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent Commissioner of Education (Joshua P. Bohn, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Petitioner A.B. appeals from the October 21, 2021 final agency decision of the Acting Commissioner of Education ("Commissioner") granting the Hackensack Board of Education's ("HBOE") motion for summary decision and denying A.B.'s motion for summary decision. In doing so, the Commissioner adopted the decision of the Administrative Law Judge ("ALJ"). Based on our review of the record and the applicable legal principles, we affirm.

I.

A.B. is a math teacher who was formerly employed by the HBOE. In 2013, the HBOE was advised A.B. had posted inappropriate and sexually suggestive content to her social media page. The posts included the following statements: "Fuck me, I'm Irish" and "Women say Men Think with Their Penis. Ladies, don't be afraid to blow their minds." The HBOE found the posts objectionable and considered disciplinary action against A.B.

Hackensack High School principal Jim Montesano certified that as result of the postings, the school started an investigation into A.B.'s potential sexual misconduct. On April 22, 2013, Montesano requested Detective Luis Furcal of

the Hackensack Police Department, in conjunction with the Bergen County Prosecutor's Office, to review the posts and confirm students were able to review and comment on them.[1]

Three days later, A.B. and the HBOE finalized a settlement agreement whereby A.B agreed to submit an irrevocable letter of resignation effective June 30, 2013. Montesano stated A.B. resigned before the conclusion of the HBOE's investigation, and a formal police investigation did not commence prior to A.B.'s resignation. Following her resignation, A.B. worked for another school district.

In May 2019, A.B. was offered a position with the Clifton Board of Education ("CBOE"). On or about May 15, 2019, the HBOE received a "Sexual Misconduct/Child Abuse Disclosure Information Request" form ("questionnaire") from the CBOE regarding petitioner's potential employment. The questionnaire was submitted as part of the requirements imposed upon boards of education by N.J.S.A. 18A:6-7.6 to -13, commonly referred to as the "Pass the Trash" law, which was enacted in 2018. Under the statute, prospective school district employers are required to contact an applicant's prior employers to obtain information relating to child abuse and sexual misconduct. The

[1] According to Montesano's certification, he was advised by Detective Furcal A.B.'s posts were accessible and "commented on" by A.B.'s students.

CBOE's questionnaire was submitted along with an authorization form, signed by A.B.

The questionnaire contained the following three questions regarding A.B.'s employment with the HBOE:

> Was [A.B.] the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families[?]
>
> Was [A.B.] disciplined, discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or find[ing] of child abuse or sexual misconduct[?]
>
> [Did A.B. have] a license, professional license, or certificate suspended, surrendered, or revoked while allegations of child abuse [or] sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct[?]

The HBOE answered the first two questions in the affirmative. Specifically, the HBOE indicated A.B. had been the subject of a sexual misconduct investigation and that she had resigned from or otherwise separated from employment while

allegations of sexual misconduct were under investigation.[2] The CBOE subsequently withdrew the offer of employment to A.B. on June 26, 2019.

In August 2019, A.B. filed a verified complaint and order to show cause in the Chancery Division. A.B. sought to enforce the confidentiality provision of the settlement agreement, compel the HBOE to rescind and correct its response to the CBOE's questionnaire, and enjoin the HBOE from reporting to any other prospective employer that A.B. was the subject of an investigation for sexual misconduct at the time of her resignation under the Pass the Trash statute. The HBOE filed an answer, and the court heard cross-motions for summary judgment. In November 2019, the court dismissed A.B.'s complaint and transferred the matter to the Commissioner for resolution. The Commissioner, in turn, transmitted the contested matter to the Office of Administrative Law for adjudication.

The ALJ directed the parties to file simultaneous cross-motions for summary decision. The ALJ issued an initial decision granting the HBOE's motion for summary decision, denying A.B.'s motion for summary decision, and dismissing the petition in its entirety. Thereafter, petitioner filed exceptions.

[2] A.B.'s attorney subsequently requested the HBOE to correct the information provided to the CBOE. The HBOE declined to do so.

The Commissioner issued a final agency decision, discussed more fully below, adopting the ALJ's decision. This appeal followed.

II.

A.B. argues summary decision was improperly granted in favor of respondent because there were disputed issues of material fact. She further asserts her due process rights were violated when the Commissioner wrongfully interpreted the statute and denied petitioner the right to a hearing, and that the Commissioner and ALJ distorted the Legislature's plain meaning of "sexual misconduct" as defined in N.J.S.A. 18A:6-7.6. A.B. also contends the Commissioner wrongfully concluded an investigation was pending for sexual misconduct at the time of her resignation. Additionally, A.B. maintains the Commissioner erred by finding the settlement agreement was subject to the requirements of the Pass the Trash law because it was executed before the effective date of the statute. Lastly, A.B. argues the Commissioner wrongfully determined she consented to the disclosure of the information produced by the HBOE by signing the mandatory authorization form.

Our role in reviewing the decision of an administrative agency is limited. In re Stallworth, 208 N.J. 182, 194 (2011) (citing Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). We accord a strong presumption of reasonableness to

an agency's exercise of its statutorily delegated responsibility and defer to its fact-finding. City of Newark v. Nat. Res. Council in Dep't of Env't Prot., 82 N.J. 530, 539 (1980); Utley v. Bd. of Rev., Dep't of Lab., 194 N.J. 534, 551 (2008). We will not upset the determination of an administrative agency absent a showing that it was arbitrary, capricious, or unreasonable; that it lacked fair support in the evidence; or that it violated legislative policies. Lavezzi v. State, 219 N.J. 163, 171 (2014); Campbell v. Dep't of Civ. Serv., 39 N.J. 556, 562 (1963). "A reviewing court 'may not substitute its own judgment for the agency's, even though the court might have reached a different result.'" In re Stallworth, 208 N.J. at 194 (quoting In re Carter, 191 N.J. 474, 483 (2007)).

On questions of law, our review is de novo. In re N.J. Dep't of Env't Prot. Conditional Highlands Applicability Determination, Program Int. No. 435434, 433 N.J. Super. 223, 235 (App. Div. 2013) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). We are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affs. of Dep't of L. & Pub. Safety, 64 N.J. 85, 93 (1973).

In determining whether agency action is arbitrary, capricious, or unreasonable, a reviewing court must 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 Stallworth, 208 N.J. at 194 (quoting In re Carter, 191 N.J. at 482-83).]

"The party challenging the agency action has the burden to show that the administrative determination is arbitrary, capricious or unreasonable." In re Renewal TEAM Acad. Charter Sch., 247 N.J. 46, 73-74 (2021) (citing Lavezzi, 219 N.J. at 171).

A.

A.B. asserts summary decision should not have been granted because there were fact issues in dispute. Particularly, A.B. contends she was never accused of sexual misconduct and was not under investigation for sexual misconduct at the time of her resignation. A.B. further asserts the ALJ accepted the certifications of Montesano, while ignoring the "counterstatement of contested facts" presented by A.B. and the certifications submitted by former HBOE

attorney Richard Salkin and A.B.'s counsel Lauren McGovern. She disputes students were able to view and comment on her social media posts in question.[3]

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).

Montesano's certification notes the HBOE "launched an investigation into [A.B.'s] potential sexual misconduct" and that the school's "investigation was ongoing, on April 25, 2013, [when] the [p]arties entered into a settlement

[3] A.B. does not provide any citation to the record for the proposition that students were unable to view the social media posts. The Commissioner observed: "The ALJ's finding of fact that students saw petitioner's social media post was supported by the record. . . . Petitioner points to the certifications of . . . Salkin . . . and . . . McGovern, . . . but neither of those certifications dispute that students saw the social media posts." Moreover, whether students were able to view the posts at issue is not dispositive to any issue before us. A.B. was never adjudicated as having engaged in sexual misconduct. The primary issue in this matter is whether she was investigated for sexual misconduct.

agreement." Although A.B. argues the Commissioner disregarded the certifications of Salkin and McGovern, the Commissioner observed their certifications do not "directly dispute" Montesano's statements that the school conducted an investigation. Specifically, the Commissioner noted:

> [T]he certification of [Salkin], the Board attorney at the time, states that "[t]o my knowledge, there was no investigation of [A.B.] for sexual misconduct or child abuse by the School Administration, DYFS, the Hackensack Police or the Bergen County Prosecutor's Office." While he may not have been personally aware of an investigation, that statement does not mean that one did not occur.

As to McGovern's certification, the Commissioner concluded:

> [W]hile law enforcement may have chosen not to act, it is important to note that the question does not require that the investigation involve the police. The Board was required to answer if petitioner "was the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families." N.J.S.A. 18A:6-7.7[(b)]. As such, even though [A.B.] was not the subject of a sexual misconduct investigation by law enforcement, the Board answered yes because she had been the subject of an investigation at the school level. Moreover, the fact that the principal reached out to law enforcement further demonstrates that an investigation was underway – even if it was in the early stages – when [A.B.] reached a settlement agreement with the Board and resigned her teaching position in the wake of the sexual misconduct allegations.

The Commissioner's analysis was correct. Moreover, McGovern's certification indicates the prosecutor determined A.B.'s social media posts did not warrant a criminal investigation, but she does not address whether the HBOE conducted an investigation or whether it was pending when A.B. agreed to resign. Accordingly, we are unpersuaded the Commissioner disregarded disputed material facts.

B.

A.B. contends she was never given notice in 2019 that the HBOE intended to advise the CBOE she had resigned her prior position while a sexual misconduct investigation was pending. A.B. further contends she was not given a hearing regarding the HBOE's "factual findings."

N.J.S.A. 18A:6-7.6 defines "sexual misconduct" as:

> [A]ny verbal, nonverbal, written, or electronic communication, or any other act directed toward or with a student that is designed to establish a sexual relationship with the student, including a sexual invitation, dating or soliciting a date, engaging in sexual dialogue, making sexually suggestive comments, self-disclosure or physical exposure of a sexual or erotic nature, and any other sexual, indecent or erotic contact with a student.

Concerning the CBOE's obligations under the Pass the Trash law, N.J.S.A. 18A:6-7.7(b)(2) provides:

A school district . . . shall not employ . . . any person serving in a position which involves regular contact with students unless the school district . . . :

> . . . .
>
> b. Conducts a review of the employment history of the applicant by contacting those employers listed by the applicant under the provisions of paragraph (1) of subsection a. of this section and requesting the following information:
>
> > . . . .
> >
> > (2) A statement as to whether the applicant:
> >
> > > (a) was the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families, unless the investigation resulted in a finding that the allegations were false or the alleged incident of child abuse or sexual misconduct was not substantiated;
> > >
> > > (b) was disciplined, discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct . . . .

The Pass the Trash law, in turn, imposes obligations on entities, such as the HBOE, who are contacted by schools conducting background investigations on prospective employees under N.J.S.A. 18A:6-7.7(b)(2)(b). Pursuant to N.J.S.A. 18A:6-7.9, a school district receiving a questionnaire from another district concerning an individual with whom the district has had an employment relationship within the last twenty years, "shall disclose the information requested" no later than twenty days after receiving the request.

Initially, we observe the HBOE did not make any factual findings or adjudication as to whether A.B. engaged in sexual misconduct when it responded to the CBOE's statutorily mandated inquiry. Rather, it responded affirmatively to inquiries as to whether A.B. was the subject of a sexual misconduct investigation during the time she was employed by the HBOE and that she resigned from employment while an investigation was pending. As such, the HBOE's process of responding to the CBOE's questionnaire did not require a hearing. Moreover, although there was no requirement for the HBOE to conduct a hearing before responding to the CBOE's inquiry, A.B. was provided an opportunity to challenge the HBOE's actions before the Commissioner. As the Commissioner noted, the HBOE "complied with the

requirement of the [Pass the Trash] Act, and [A.B.] has been afforded the opportunity to challenge the [HBOE's] action in this forum."

Lastly, we address A.B.'s contention she was not provided notice of the HBOE's proposed responses to the CBOE. The Pass the Trash law does not impose any requirement on the HBOE to notify A.B. about what it planned to report to another entity. N.J.S.A. 18A:6-7.9 only required the HBOE to respond to the CBOE within twenty days. Moreover, A.B. has not cited to any controlling authority requiring such notice.

C.

A.B. contends her conduct did not meet the statutory definition of sexual misconduct, and therefore the HBOE was precluded from reporting the social media posts. In short, A.B. asserts there was no "allegation" of sexual misconduct that would trigger the HBOE's reporting obligations under N.J.S.A. 18A:6-7.7(b)(2)(b). Allegation is not defined in the statute. A.B. notes "allegation" is defined as "a claim of fact not yet proven to be true."[4]

Based on our review of the record, we are satisfied there was "a claim of fact" against A.B. in 2013, though it was "not yet proven to be true." In fact,

[4] Allegation, Legal Info. Inst. at Cornell L. Sch., https://www.law.cornell.edu/wex/allegation (June 2022).

Montesano's certification specifically noted, A.B. "was alleged to have made sexually explicit social media posts." Clearly, there was an allegation that prompted an investigation.[5]

Moreover, A.B. overlooks other provisions of the Pass the Trash law, such as N.J.S.A. 18A:6-7.7(b)(2)(a), which does not use the term allegation. Instead, it requires disclosure when the applicant "was the subject of any . . . sexual misconduct investigation by any employer . . . ." Ibid. This was the first question answered affirmatively by the HBOE on the CBOE's questionnaire. In short, although there were allegations implicating reporting obligations under N.J.S.A. 18A:6-7.7(b)(2)(b), even if there were no such allegations, there was at the very least an investigation, which required disclosure under N.J.S.A. 18A:6-7.7(b)(2)(a).

A.B. further contends there was "no credible evidence" in the record to demonstrate her posts were "directed toward" or "designed" to establish a sexual

[5] Although the Commissioner did not specifically address whether there was an allegation of misconduct, it is apparent from the final agency decision she believed there was an allegation: "[T]he fact that the principal reached out to law enforcement further demonstrates that an investigation was underway – even if it was in the early stages – when [A.B.] reached a settlement agreement with the Board and resigned her teaching position in the wake of the sexual misconduct allegations." (emphasis added).

relationship with any student pursuant to N.J.S.A. 18A:6-7.6. The Commissioner discussed A.B.'s alleged sexual misconduct under N.J.S.A. 18A:6-7.6 in the context of addressing the HBOE's responses to the CBOE inquiry, stating:

> Considering the definition of sexual misconduct, the Commissioner finds that it is reasonable that the [HBOE] conducted an investigation into sexual misconduct based on [A.B.'s] actions. [A.B.'s] social media posts could meet the definition of electronic communications that are directed toward or with a student that are designed to establish a sexual relationship with the student, such as making sexually suggestive comments.

Because the Commissioner noted the HBOE did not find A.B. had "committed sexual misconduct," she determined it was "not necessary to conduct a full analysis of whether [A.B.'s] actions met the definition of sexual misconduct; it [was] sufficient that her actions could meet the definition and that the [HBOE] therefore opened an investigation."

We need not address whether A.B., in fact, was involved in sexual misconduct. There has been no determination A.B. engaged in sexual misconduct. Moreover, the HBOE never advised the CBOE there had been any such adjudication. Instead, the HBOE responded to the questionnaire advising

that A.B. had been the subject of an investigation and resigned while the investigation was pending.

D.

We next address A.B.'s assertion there was no pending investigation when she resigned. More fundamentally, A.B. also argues the record is devoid of proof there was even an investigation for sexual misconduct conducted by the HBOE. We are unpersuaded by these arguments.

As noted previously, Salkin had no personal knowledge of an investigation, and the Bergen County Prosecutor's Office advised McGovern no action was taken after its initial review. These facts do not, however, establish the lack of an investigation by the school under N.J.S.A. 18A:6-7.7. Moreover, Salkin's and McGovern's certifications are not dispositive as to whether the HBOE had a statutory reporting obligation under N.J.S.A. 18A:6-7.7 and -7.9. The Commissioner concluded that "even though [A.B.] was not the subject of a sexual misconduct investigation by law enforcement, the [HBOE] answered yes because [A.B.] had been the subject of an investigation at the school level." The Commissioner further noted, "the fact that the principal reached out to law enforcement further demonstrates that an investigation was underway – even if it was in the early stages – when [A.B.] reached a settlement agreement with the

[HBOE] and resigned her teaching position in the wake of the sexual misconduct allegations." We are convinced the Commissioner did not misapply her discretion in reaching this conclusion.

E.

Petitioner next argues the Legislature intended to preserve employment settlement agreements entered prior to June 1, 2018, from the purview of the newly enacted Pass the Trash statute.

N.J.S.A. 18A:6-7.12 states:

> a. On or after the effective date of this act, a school district, charter school, nonpublic school, or contracted service provider may not enter into a collectively bargained or negotiated agreement, an employment contract, an agreement for resignation or termination, a severance agreement, or any other contract or agreement or take any action that:
>
> > (1) has the effect of suppressing or destroying information relating to an investigation related to a report of suspected child abuse or sexual misconduct by a current or former employee;
> >
> > (2) affects the ability of the school district, charter school, nonpublic school, or contracted service provider to report suspected child abuse or sexual misconduct to the appropriate authorities; or
> >
> > (3) requires the school district, charter school, nonpublic school, or contracted service provider to expunge information about allegations or

> finding of suspected child abuse or sexual misconduct from any documents maintained by the school district, charter school, nonpublic school, or contracted service provider, unless after investigation the allegations are found to be false or the alleged incident of child abuse or sexual misconduct has not been substantiated.
>
> b. Any provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date of this act and that is contrary to this section shall be void and unenforceable.

A.B. asserts that because the Legislature deemed void any settlement agreement that contravenes the provisions of N.J.S.A. 18A:6.7.12, it follows that agreements executed before June 1, 2018, are exempt from disclosure, and that if the Legislature intended for all settlement agreements to be subject to the Pass the Trash requirements, it would have so indicated. The HBOE counters that the Legislature would have explicitly stated if it intended to exclude such agreements from disclosure.

"[W]hether a statute applies retroactively 'is a purely legal question of statutory interpretation.'" State v. J.V., 242 N.J. 432, 442 (2020) (quoting Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 386 (2016)). Thus, as with all questions of law, we review issues of statutory interpretation de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"When interpreting a statute, 'our overriding goal must be to determine the Legislature's intent.'" Johnson, 226 N.J. at 386 (quoting Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 586 (2013)). "[G]enerally, the best indicator of [the Legislature's] intent is the statutory language." Garden State Check Cashing Serv., Inc. v. N.J. Dep't of Banking & Ins., 237 N.J. 482, 489 (2019) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). "If the plain language leads to a clear and unambiguous result, then our interpretative process is over." Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018) (quoting Johnson, 226 N.J. at 386).

Retroactive application is appropriate where "the Legislature provided for retroactivity expressly, either in the language of the statute itself or its legislative history, or implicitly, by requiring retroactive effect to 'make the statute workable or to give it the most sensible interpretation.'" J.V., 242 N.J. at 444 (quoting Gibbons v. Gibbons, 86 N.J. 515, 522 (1981)). "Implied retroactivity may be found from the statute's operation when retroactive application is necessary to fulfill legislative intent." James v. N.J. Mfrs. Ins. Co., 216 N.J. 522, 564 (2014).

We conclude the Legislature intended the statute to apply retroactively. Although the statute is silent as to whether it applies retroactively, N.J.S.A.

18A:6-7.7(a)(1)(b) provides the school district shall not employ any person unless the district requires the applicant to provide "all former employers within the last [twenty] years that were schools." (emphasis added). Likewise, N.J.S.A. 18A:6-7.7(a)(1)(c) requires the applicant to identify "all former employers within the last [twenty] years where the applicant was employed in a position that involved direct contact with children . . . ." (emphasis added). Moreover, N.J.S.A. 18A:6-7.9(a) mandates that a school district receiving a questionnaire from another district concerning an individual with whom the district has had an employment relationship within the last twenty years, "shall disclose the information requested." No exception is made for any prior settlement agreements.

The legislation was designed to ensure the safety of children. It would be illogical for the Legislature to have exempted a class of teachers because of a confidentiality clause in a settlement agreement. This is evidenced by the broad statutory language above requiring disclosure from prior employers for a twenty-year period. In short, the most sensible interpretation is that the Legislature did not intend to preserve A.B.'s settlement agreement. Accordingly, we conclude the Commissioner did not abuse her discretion in

finding "[i]t would be contrary to the spirit and purpose of the legislation to permit the shielding of information prior to the Act's effective date."

F.

As we have noted, the Commissioner did not misapply her discretion in finding the HBOE properly responded to the CBOE under the Pass the Trash law. Therefore, we need not determine whether the HBOE was further authorized to respond to the CBOE's inquiry—separate and apart from N.J.S.A. 18A:6-7.7 and -7.9—pursuant to the release executed by A.B. authorizing the HBOE to disclose information and investigative reports under N.J.S.A. 18A:6-7.6 to -13.

III.

We discern no basis to disturb the Commissioner's findings and conclude the decision was not arbitrary, capricious, or unreasonable. To the extent we have not specifically addressed any of A.B.'s remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(D) and (E).

Affirmed.