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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1664-22

PETER LOPRESTI,

Plaintiff-Respondent,

v.

TOWNSHIP OF OLD BRIDGE,

Defendant-Appellant.

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Argued September 28, 2023 – Decided October 20, 2023

Before Judges Mayer, Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-3227-22.

Robert J. Merryman argued the cause for appellant (Apruzzese, McDermott, Mastro & Murphy, attorneys; Robert Merryman, of counsel and on the briefs; Boris Shapiro, on the briefs).

Nicholas P. Milewski argued the cause for respondent (Mets, Schiro & McGovern, LLP, attorneys; Leonard C. Schiro, of counsel and on the brief; Nicholas P. Milewski, on the brief).

PER CURIAM

Defendant Township of Old Bridge (Township) appeals from a February 2, 2023 "Order For Judgment" (judgment). The judgment: (1) reversed and vacated plaintiff's Peter Lopresti's "termination and dismissal of . . . employment from the Township of Old Bridge Police Department (OBPD) . . . and the Departmental Hearing Decision and disciplinary conviction on which the removal action was predicated . . . " in their entirety; (2) "restored [plaintiff] to his office and employment as Captain in the [OBPD] and to all his rights pertaining thereto"; and (3) allowed plaintiff "to recover his salary from the date of his dismissal on June 27, 2022." We are satisfied the judge erred by applying the "exclusionary rule" in this civil proceeding and mistakenly characterizing the disciplinary hearing as quasi-criminal. Thus, we remand to the trial court for a new de novo review hearing.

I.

We recite the facts from the record before the trial court. "Plaintiff was a Captain with the OBPD." He "was charged with violations of the OBPD Rules and Regulations and the OBPD Policy concerning harassment in the workplace." "The charges arose out of a recorded conversation," between plaintiff and other police officers while on duty. The conversation included a

number of plaintiff's "sexist, harassing and discriminatory comments." Lt. Robert Schlueter recorded the conversation. (Schlueter recording).

At the disciplinary hearing, the Township introduced evidence, including the Schlueter recording, and presented witness testimony. Plaintiff did not testify or present any witnesses. The hearing officer concluded the Township proved the charges against plaintiff, warranting plaintiff's termination.

Plaintiff appealed the hearing officer's decision to the Superior Court. N.J.S.A. 40A:14-150. The judge conducted his de novo review and determined:

> [T]he [Schlueter] recording is declared to be inadmissible *ab initio* as it relates to the disciplinary actions taken against [plaintiff] . . . . There being no other independent evidence in the record to support the charges made against [plaintiff], those charges and his ensuing conviction must be dismissed and vacated in their entirety.

On the Township's motion, we granted a stay of the judgment pending appeal.

II.

This appeal involves the Township's challenge to the judge's de novo review under N.J.S.A. 40A:14-150. The statute, in pertinent part, provides:

> [a]ny member or officer of a police department or force . . . who has been tried and convicted upon any charge

> or charges, may obtain a review thereof by the Superior Court . . . . The court shall hear the cause de novo on the record below and may either affirm, reverse or modify such conviction.
>
> . . . .
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> Either party may supplement the record with additional testimony subject to the rules of evidence.
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> [N.J.S.A. 40A:14-150.]

Our Supreme Court has explained the:

> de novo hearing provides a reviewing court with the opportunity to consider the matter "anew, afresh [and] for a second time." Romanowski v. Brick Township, 185 N.J. Super. 197, 204 (Law Div. 1982), aff'd o.b., 192 N.J. Super. 79 (App. Div. 1983). In a de novo proceeding, a reviewing court does not use an "abuse of discretion" standard, but makes its own findings of fact. Romanowski, 185 N.J. Super. at 204; see Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). Conducting the review on the record and without the benefit of live testimony does not alter the standard. Rather, it is wholly consistent with the broad grant of power conferred upon the reviewing court to reverse, affirm or modify the disciplinary conviction. Evesham Township Board of Adjustment v. Evesham Township Council, 86 N.J. 295, 300 (1981). (de novo review on the record of board of adjustment decision is not bound by "abuse of discretion" test).
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> . . . .
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> On reviewing the record de novo, the court must only make reasonable conclusions based on a thorough review of the record. . . . To require a reviewing court

> to defer to the original findings would conflict with the fundamental purpose of a de novo proceeding under N.J.S.A. 40A:14-150: to ensure that a neutral, unbiased forum will review disciplinary convictions.
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> [In re Phillips, 117 N.J. 567, 578-80 (1990).]

The Court further explained:

> [a]n appellate court plays a limited role in reviewing the de novo proceeding. In State v. Johnson, 42 N.J. 146 (1964) [,] we explained that the court's "function on appeal is not to make new factual findings but simply to decide whether there was adequate evidence before the []Court to justify its finding of guilt." Id. at 161 (quoting State v. Dantonio, 18 N.J. 570, 575 (1955)). Thus unless the appellate tribunal finds that the decision below was "arbitrary, capricious or unreasonable" or "[un]supported by substantial credible evidence in the record as a whole," the de novo findings should not be disturbed. See Henry, 81 N.J. at 580; Campbell v. Department of Civil Serv., 39 N.J. 556, 562 (1963).
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> [Id. at 579.]

III.

The Township argues the judge erred by excluding the Schlueter recording as part of his review. We agree because the judge erred in applying the "exclusionary rule" in this civil proceeding, and mistakenly characterizing the disciplinary hearing as quasi-criminal.

"Evidence illegally obtained [even] in violation of the Constitution is generally deemed inadmissible [but] only in a criminal prosecution . . . ." Tartaglia v. Paine Webber, 350 N.J. Super. 142, 148 (App. Div. 2002) (citations omitted) (emphasis added).

"The exclusionary rule does not apply to civil actions." In re Civil Commitment of J.M.B., 395 N.J. Super. 69, 82, 95 (App. Div. 2007), aff'd, 197 N.J. 563 (2009) (photographs "seized without a warrant" were "suppressed in the criminal proceeding [but] could be considered in th[e] civil proceeding since the exclusion rule does not apply to civil actions"). Further, in Mercer v. Parsons, 95 N.J.L. 224 (E. & A. 1920), the "wife's illegal interception of husband's mail did not preclude its admission into evidence" and, in DelPresto v. DelPresto, 97 N.J. Super. 446 (App. Div. 1967), we "revers[ed] suppression of evidence obtained by illegal entry into husband's paramour's house in [a] matrimonial proceeding." See Tartaglia, 350 N.J. Super at 148-49.

Plaintiff asserts the judge's decision to exclude the Schlueter recording is supportable because the judge determined the recording was done in violation of: (1) the OBPD Rules and Regulations; (2) Township's Employee Handbook; (3) plaintiff's right to privacy; and (4) plaintiff's constitutional rights and protection against unlawful search and seizure. However, in light of the

controlling law, and because this was a civil proceeding, plaintiff's asserted violations do not compel exclusion of the Schlueter recording. Moreover, in an effort to overcome the inapplicability of the exclusionary rule in a civil proceeding, plaintiff argues that the judge did not actually invoke the rule but merely used it an as analogy to exclude the Schlueter recording. However, plaintiff's argument on this point ignores the actual substance of the judge's ruling.

Here, the judge erred by invoking the exclusionary rule in this civil proceeding. See In re J.M.B., 395 N.J. Super. at 95; Tartaglia, 350 N.J. Super. at 148. "Departmental disciplinary proceedings are civil in nature . . . ." Sabia v. Elizabeth, 132 N.J. Super. 6, 14 (App. Div. 1974).

In rendering his ruling, the judge understood the rule's limited application by noting that "this matter did not involve . . . the potential for application in a criminal prosecution . . . ." (emphasis in original). Therefore, the judge's analysis should have ended there because "[t]he exclusionary rule does not apply to civil actions." In re J.M.B., 395 N.J. Super. at 95.

However, the judge continued his analysis and mistakenly characterized this civil disciplinary proceeding as "the prosecution of a police officer in a quasi-criminal . . . disciplinary proceeding." Based on that characterization, the

judge applied the exclusionary rule to bar the Schlueter recording. However, "a departmental disciplinary proceeding is in no way a criminal or quasi-criminal proceeding . . . ." Sabia, 132 N.J. Super. at 14. Thus, the exclusionary rule should not have been invoked by the judge.

Therefore, we are satisfied that the judge erred in applying the exclusionary rule to this civil proceeding and in mistakenly characterizing the disciplinary proceeding as a quasi-criminal proceeding. We remand the matter for a new de novo review under N.J.S.A. 40A:14-150.

IV.

We turn to the Township's argument that the judge erred by sua sponte raising the admissibility of the Schlueter recording. First, a court's decision to decide an issue sua sponte[1] must meet the requirements of due process. See Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 84-85 (App. Div. 2001). "The minimum requirements of due process . . . are notice and the opportunity to be heard." Doe v. Poritz, 142 N.J. 1, 106 (1995). Here, we need not address the propriety of the judge raising the applicability of the exclusionary rule, sua sponte, because the rule has no application in this civil

[1] Sua sponte is defined as "[o]f his own or its own will or motion; voluntarily; without prompting or suggestion." Black's Law Dictionary 1424 (6th ed. 1990).

proceeding. We simply note that if a judge decides to dispose of an issue sua sponte, the judge must provide the appropriate advance notice and opportunity to be heard.

Second, parties are "entitled to be heard" regarding "the propriety of taking judicial notice and the nature of the matter noticed." N.J.R.E. 201(e). The rule allows for a hearing even "[i]f the court takes judicial notice before notifying a party . . . ." N.J.R.E. 201(e). Here, the judge took judicial notice of Schlueter's separate Law Division action filed against the Township and inferred Schlueter's motivation in making the recording was to bolster that suit. On remand, if there is a request to take judicial notice of a matter, the judge must: (1) notify the parties; (2) explain "the nature of the matter noticed"; and (3) allow the parties an opportunity to be heard. N.J.R.E. 201(e).

Lastly, we direct that the new de novo review be considered by a different judge. Although the judge here issued a thoughtful opinion explaining his decision, "out of an abundance of caution," we direct that a different judge be assigned to the new de novo review to avoid any claim of impartiality based on the reviewing judge's original findings and legal conclusions. See Graziano v. Grant, 326 N.J. Super. 328, 349 (App. Div. 1999) (stating the power to remand to a different judge "may be exercised when there is a concern that the trial judge

has a potential commitment to [the judge's] prior findings."); see also Luedtke v. Shobert, 342 N.J. Super. 202, 219 (App. Div. 2001) (recognizing "time and effort the court put into the case" but expressing concern that judge would be in "untenable position" on remand). However, we take no position on the outcome of this matter on remand.

Vacated and remanded for further proceedings consistent with our 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