SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1987-20

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

Petitioner-Respondent,

v.

ADVOCATE PUBLIC ADJUSTERS
and SHANNON R. BELLAMY,

Respondents-Appellants.

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Argued October 25, 2022 – Decided January 9, 2023

Before Judges Sumners and Susswein.

On appeal from the New Jersey Department of Banking and Insurance, OAL Docket No. BKI-13161-15.

John B. Kearney argued the cause for appellants (Kearney & Associates, PC, attorneys; John B. Kearney, on the briefs).

Nicholas Kant, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney

General, attorney; Donna Arons, Assistant Attorney General, of counsel; Nicholas Kant, on the briefs).

Dennis M. Patterson, attorney for amicus curiae American Association of Public Insurance Adjusters (Dennis M. Patterson, on the brief).

PER CURIAM

The Commissioner of the New Jersey Department of Banking and Insurance issued a six-count order to show cause against Advocate Public Adjusters (APA) and its owner, Shannon R. Bellamy, (collectively, "respondents") seeking to impose monetary penalties, investigation costs, and restitution, as well as to revoke their public adjuster licenses for alleged violations of the New Jersey Public Adjusters' Act (the Act), N.J.S.A. 17:22B-1 to -20, and related regulations. Based upon its investigation of respondents' business activities, the Department asserted their contracts with New Jersey insureds—separately or together—violated state law by:

- specifying APA was a licensed public adjuster when it was not;
- being entered into within twenty-four hours after a loss occurred;
- negotiating or settling a claim for loss or damage between 6:00 p.m. and 8:00 a.m. during the twenty-four hours after the loss occurred;
- failing to prominently include a section specifying the procedures that an insured may use to cancel the contract;
- not including the time and date executed;

- not containing the signature of a licensed public adjuster;
- failing to contain the signature of the insured and the public adjuster;
- failing to detail the rights and obligations of the parties if the contract is canceled at any time;
- failing to indicate the costs to the insured or the calculation for services rendered;
- failing to adhere to the compensation provisions with the insured;
- not indicating the right to compensation from any insured for services rendered based on a written contract or memorandum, signed by the parties, and specifying or clearly defining the services to be rendered and the amount of the compensation;
- failing to clearly define the amount or the extent of their compensation for the public adjuster services; and
- containing a fee structure for public adjuster services authorizing the potential to collect more than one-hundred percent of the amount secured by the insureds.

The Department also alleged respondents collected two separate fees for recoverable depreciation, and their conduct demonstrated incompetency, lack of integrity, bad faith, dishonesty, financial irresponsibility, or untrustworthiness.

After the matter was transmitted as a contested case to the Office of Administrative Law (OAL), an Administrative Law Judge (ALJ) granted partial summary decision to the Department for five of the counts and, citing Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 137-139 (1987),

recommended that APA and Bellamy be jointly assessed monetary penalties totaling $36,250 and restitution in the amount of $27,516.72. The ALJ also recommended that APA be solely assessed a $250 fine relating to an unsigned contract. As detailed in a sixteen-page decision, the ALJ determined summary decision was appropriate as "no affidavits disputing any of the facts alleged by the Department have been provided by [APA and Bellamy]" and the certifications and documents provided by the Department were "largely self-explanatory."[1]

As for the remaining unresolved count, another ALJ heard the parties' respective motions for summary decision. He granted the Department's motion, issuing a sixteen-page initial decision incorporating the first ALJ's partial summary decision, affirming the recommended monetary penalties, and recommending an additional joint monetary penalty of $9,500 and investigation

[1] Respondents filed a motion for reconsideration, contending there was no legal right for a consumer to terminate a contract past the three-day right to cancel period detailed in the contract, and the monetary penalty was so severe that it would bankrupt them. The ALJ denied the motion, finding that while the OAL could consider evidence related to the remaining count of the order to show cause, the regulations prohibited reconsideration and reopening of the record after partial summary decision was granted to the Department on the other five counts.

costs of $275. The ALJ also recommended the revocation of respondents' public adjuster licenses.

Both parties filed exceptions to the initial decision. In her 117-page final agency decision, the Commissioner mostly adopted the initial decision, including the revocation of the respondents' licenses. The Commissioner, however, modified the initial decision, determining respondents violated additional statutory and regulatory provisions; the $250 fine solely assessed against APA relating to an unsigned contract should be joint and several with Bellamy because she was the only representative of APA; and two more contracts had contradictory language regarding how the fee would be calculated. In total, the Commissioner assessed penalties of $48,500, restitution of $33,812.60, and investigative costs of $275.

In their appeal, respondents contend:

> POINT I
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> THE DEPARTMENT'S FINAL ORDER IS ARBITRARY, CAPRICIOUS, AND UNREASONABLE.
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> POINT II
>
> THE DEPARTMENT ERRED BY DEPRIVING RESPONDENTS OF THEIR DUE PROCESS RIGHT OF NOTICE.

A. COUNT THREE
B. COUNT SIX

POINT III

THE DEPARTMENT ERRED BY INTERPRETING [APA]'S CONTRACT LANGUAGE AS CONTRADICTORY.

POINT IV

THE DEPARTMENT ERRED BY GRANTING ITSELF MORE POWER THAN THE SOURCE STATUTE PERMITS.

POINT V

THE DEPARTMENT ERRED BY ESTABLISHING RULES THROUGH LITIGATION AND CIRCUMVENTING THE REQUIRED RULEMAKING PROCEDURE.

POINT VI

THE DEPARTMENT ERRED BY FINDING THAT RESPONDENT APA ACTED AS AN ADJUSTER WHILE UNLICENSED AND BY NOT BRINGING THEIR ACTION ALLEGING THE UNLICENSED PRACTICE OF PUBLIC ADJUSTER IN THE SUPERIOR COURT.

A. THE DEPARTMENT ERRED BY FINDING THAT RESPONDENT APA ACTED AS AN ADJUSTER WHILE UNLICENSED.

B. THE DEPARTMENT ERRED BY NOT BRINGING THE UNLICENSED PRACTICE OF A PUBLIC ADJUSTER CLAIM IN THE SUPERIOR COURT.

POINT VII

THE DEPARTMENT ERRED BY IMPOSING ARBITRARY AND UNREASONABLE PENALITIES.

The American Association of Public Insurance Adjusters (Association) was granted amicus status. It argues:

I.

WHEN THE CANONS OF STATUTORY INTERPRETATION ARE APPLIED TO N.J.A.C. 11:1-37.13(b)(5)(ii) IT IS CLEAR THAT THE DEPARTMENT'S READING AND APPLICATION OF THAT REGULATION IS WRONG.

II.

THE COMMISSIONER MISTAKENLY RELIES UPON A COMMENT, WHICH IS NOT A PROPER REGULATION ENTITLED TO DEFERRENCE.

III.

THE POWER OF THE STATE TO REGULATE INDIVIDUAL, PRIVATE CONTRACTS IS CONSTRAINED.

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 to penalties,

> [i]n exercising . . . authority to alter a sanction imposed by an administrative agency, the [c]ourt can do so only when necessary to bring the agency's action into conformity with its delegated authority. The [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.
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> [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).

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 find no basis to disturb the Commission's decision. The ALJ's factual findings, which the Commission adopted 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).

Affirmed.