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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2530-21**

**IN THE MATTER OF KIMY
VELAZQUEZ, DEPARTMENT
OF TRANSPORTATION.**

Submitted June 7, 2023 – Decided June 26, 2023

Before Judges Vernoia and Firko.

On appeal from the New Jersey Civil Service Commission, Docket No. 2021-904.

George G. Horiates, attorney for appellant Kimy Velazquez.

Matthew J. Platkin, Attorney General, attorney for respondent New Jersey Department of Transportation (Sookie Bae-Park, Assistant Attorney General, of counsel; Jensen E. Vizzard, Deputy Attorney General, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent New Jersey Civil Service Commission (Craig S. Keiser, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Appellant Kimy Velazquez appeals from a Civil Service Commission final agency decision upholding the New Jersey Department of Transportation's (NJDOT) termination of his employment as a bridge operator due to job abandonment. We have carefully considered the record, the parties' arguments, and the applicable legal principles. Because we are convinced the Commission's decision is supported by substantial credible evidence and is not arbitrary, capricious, or unreasonable, we affirm.

I.

The salient facts are not disputed and may be simply stated. NJDOT employed Velazquez as a bridge operator commencing in or about 2002. On August 3, 2017, Velazquez and his wife were arrested and charged with theft and receiving stolen property. Velazquez did not notify NJDOT of his arrest and continued to report to work.

On August 21, 2017, NJDOT served Velazquez with a preliminary notice of disciplinary action (PNDA) suspending him indefinitely in accordance with N.J.A.C. 4A:2-2.7 "[p]ending [d]isposition of [the] [c]riminal charges." The PNDA advised Velazquez the suspension was "without pay" and that he could request a departmental hearing on the suspension before NJDOT within fourteen days.

By letters dated August 24, 2017, and November 9, 2017, to NJDOT, Velazquez's counsel requested a departmental hearing on the suspension. Counsel's November 9, 2017 letter also demanded that suspension "be lifted" and sought "retroactive pay" for Velazquez. The letter threatened "legal proceedings if corrective actions are not taken immediately." NJDOT did not respond to counsel's requests, and Velazquez did not take any further action challenging NJDOT's failure to respond to his request for a departmental hearing or its decision to indefinitely suspend him pending disposition of the criminal charges.

In October 2018, during the proceedings on the criminal charges, the court admitted Velazquez to the pretrial intervention program for a period of two years. The court discharged Velazquez from the program one year later on November 21, 2019, and dismissed the criminal charges against him that day.

Almost twelve months later, NJDOT issued an October 26, 2020, PNDA asserting Velazquez had resigned not in good standing under N.J.A.C. 4A:2-6.2(b).¹ The PNDA asserted NJDOT learned on September 21, 2020 that the

¹ N.J.A.C. 4A:2-6.2(b) states: "[a]ny employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned [their] position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied."

court discharged Velazquez from the pretrial intervention program on November 21, 2019, but he "did not return to work and did not notify [NJDOT] regarding the status of the program." The PNDA further averred that as a result of Velazquez's failure to notify NJDOT of the discharge from the program, he had "been absent from work without authorization for five or more consecutive business days" and therefore was "considered to have abandoned [his] position as a [b]ridge [o]perator" under N.J.A.C. 4A:2-6.2(b).

On November 12, 2020, NJDOT issued a final notice of disciplinary (FNDA) action repeating the allegations in the October 26, 2020 PNDA and terminating Velazquez's employment effective November 29, 2019. The FNDA explained NJDOT determined Velazquez resigned not in good standing under N.J.A.C. 4A:2-6.2(b) because he had been absent from work without authorization for more than five business days following the dismissal of the criminal charges the previous year on November 21, 2019.

Velazquez appealed from the FNDA, and the Civil Service Commission referred the matter to the Office of Administrative Law as a contested case. The matter was assigned to an Administrative Law Judge (ALJ) who conducted a one-day hearing during which Velazquez testified on his own behalf and NJDOT called its former director of human resources, Michele Shapiro, as a witness.

In his written decision, the ALJ noted Velazquez did not challenge NJDOT's issuance of the first PNDA imposing the indefinite suspension pending disposition of the criminal charges against him. The ALJ therefore determined the only issue presented for disposition was the validity of the November 12, 2020 FNDA terminating Velazquez's employment for a resignation not in good standing by abandoning his position following the dismissal of the criminal charges one year earlier.

The ALJ summarized Velazquez's testimony, explaining Velazquez stated that on August 3, 2017, he and his wife were charged with theft and receiving stolen property based on the use of "internet codes to illegally obtain department store merchandise that [was] then sold online for cash." The ALJ noted Velazquez denied knowledge of "his wife's activities or involvement in the scheme" but admitted "stolen merchandise was found in the home he shared with his wife and daughter."

The ALJ also noted Velazquez testified he did not advise NJDOT of his arrest and was later told to report to NJDOT on August 21, 2017, at which time NJDOT presented him with the first PNDA suspending him indefinitely. Velazquez testified he retained an attorney who, in 2017, sent two letters to NJDOT requesting a hearing on the suspension, but no hearing was held. The

ALJ noted Velazquez testified he thereafter took no further action regarding the indefinite suspension.

The ALJ additionally explained Velazquez testified he did not become aware of his discharge from the pretrial intervention program until January 2020 and did not hear from his collective negotiations representative until November 2020 that NJDOT intended to terminate his employment.

The ALJ also summarized the testimony of NJDOT's witness, Shapiro, who explained Velazquez did not inform NJDOT of his arrest and NJDOT first learned of the arrest "through the media coverage." Shapiro testified NJDOT determined that if defendant was convicted of the charges, either through a plea or by a jury at trial, "he would be subject to forfeiture of public office." The ALJ explained Shapiro testified she authorized and signed the first PNDA, suspending Velazquez indefinitely without pay. As the ALJ detailed in his written decision, Shapiro acknowledged Velazquez requested a departmental hearing on his indefinite suspension and that a hearing did not take place.

The ALJ explained Shapiro also testified NJDOT monitors the status of employees who have been suspended due to pending criminal charges. Shapiro testified it was not until September 2020 that NJDOT first learned the court discharged Velazquez from the pretrial intervention program on November 21,

2019, and that Velazquez thereafter did not contact NJDOT to advise the criminal charges had been dismissed or to seek to return to work.

The ALJ also noted Shapiro testified NJDOT decided to issue the second PNDA charging Velazquez with a resignation not in good standing under N.J.A.C. 4A:2-6.2(b) by abandoning his position following the dismissal of the criminal charges. NJDOT sent the second PNDA to Velazquez's last known address, but he did not file a timely appeal from the second PNDA. NJDOT then issued the November 13, 2020 FNDA terminating Velazquez's employment for a resignation not in good standing by abandoning his position.

Following his summary of the testimony, the ALJ made credibility determinations, findings of fact, and conclusions of law. The ALJ found Shapiro's testimony concerning the facts leading to the disciplinary actions, and the procedures employed to implement the actions, credible.

In contrast, the ALJ found Velazquez's failure to accept any fault in the circumstances leading to the disciplinary actions "negatively impacted his credibility." For example, the ALJ noted Velazquez "blamed his wife for the criminal charges" and accepted "only . . . some blame because stolen items were found in the marital residence." The ALJ also noted that although he testified he met with his collective negotiations representative and two NJDOT human

resources staff members, Velazquez "claimed he was unaware of why he was being suspended and whether it was with or without pay." The ALJ further observed Velazquez blamed NJDOT for not having a hearing after issuing the first PNDA, but he never attempted to seek assistance through his collective negotiations representative to obtain a hearing, even though he testified he was familiar with the work rules and regulations. The ALJ also noted Velazquez blamed his probation officer for not timely advising him he was discharged from the pretrial intervention program.

Based on its credibility determinations, the ALJ made the following findings of fact. NJDOT employed Velazquez as a bridge operator for fifteen years prior to his August 3, 2017 arrest for theft and receiving stolen property. On August 21, 2017, NJDOT served Velazquez with a PNDA imposing an indefinite suspension pending resolution of the criminal charges pursuant to N.J.A.C. 4A:2-2.7. Velazquez's counsel made two written requests for a departmental hearing on the PNDA imposing the indefinite suspension, but no hearing was held. Velazquez did not take any further action challenging the indefinite suspension or the first PNDA.

The ALJ also found Velazquez was admitted to the pretrial intervention program on October 29, 2018, for a two-year period. Velazquez completed the

program one year early, and the criminal charges against him were dismissed on November 21, 2019. Velazquez never notified NJDOT the charges were dismissed and never sought to return to his employment with NJDOT following the dismissal of the charges.

The ALJ further determined NJDOT first learned on September 14, 2020 that the charges against Velazquez had been dismissed the previous year and he "had failed to notify [NJDOT] of his status or whether he wanted to return to work as a bridge operator."

NJDOT then issued the second PNDA to Velazquez charging a resignation not in good standing in violation of N.J.A.C. 4A:2-6.2(b). The notice was sent to Velazquez's last known address. Velazquez did not respond to the notice, and, on November 13, 2020, NJDOT issued the FNDA sustaining the charges against him and terminating his employment. Velazquez appealed from the FNDA to the Civil Service Commission.

Based on those factual findings, the ALJ determined NJDOT indefinitely suspended Velazquez in August 2017, "pending the outcome of the criminal charges." The ALJ further concluded Velazquez was eligible to have the suspension lifted on November 12, 2019, when the criminal charges were dismissed, but "from that date until September 14, 2020[]" (when NJDOT learned

the criminal charges were dismissed) [Velazquez] made no attempt to contact NJDOT."

The ALJ also determined Velazquez "failed to advise NJDOT that the criminal charges had been dismissed, or that he was ready to return to work." The ALJ noted Velazquez did not "provide a reasonable explanation regarding his failure to notify NJDOT" and "[h]is claim that there was no one to contact at NJDOT is simply without merit." The ALJ sustained NJDOT's determination Velazquez violated N.J.A.C. 4A:2-6.2(b) by "failing to return to work after the final disposition of the criminal charges, thereby abandoning his position" as a bridge operator.

Velazquez filed exceptions to the ALJ's decision and recommendation. In its final agency decision, the Civil Service Commission accepted and adopted the ALJ's findings and conclusions and determined NJDOT's termination of Velazquez's employment as a resignation not in good standing was justified. This appeal followed.

II.

"Our review of administrative agency action is limited[,]" Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011), but we are not "relegated to a mere rubber-stamp of agency action[,]" Williams v. Dep't of

Corrs., 330 N.J. Super. 197, 204 (App. Div. 2000). Rather, we engage in a "careful and principled" examination of the agency's findings. Ibid. (quoting Mayflower Sec. v. Bureau of Sec., 64 N.J. 85, 93 (1973)).

A reviewing court "ordinarily should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). In the absence of such a showing, we accord substantial deference to an agency's findings of fact and legal conclusions, recognizing "the agency's 'expertise and superior knowledge of a particular field.'" Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). It is generally not the function of a reviewing court "to weigh the evidence, to determine the credibility of witnesses, to draw inferences and conclusions from the evidence, and to resolve conflicts therein." In re Grossman, 127 N.J. Super. 13, 23 (App. Div. 1974).

"The burden of demonstrating that the agency's action was arbitrary, capricious[,] or unreasonable rests upon the [party] challenging the

administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006). Where an agency decides an issue of law, its "decision do[es] not carry a presumption of validity" because "it is for this court to decide whether those decisions are in accord with the law." Parsippany-Troy Hills Educ. Ass'n v. Bd. of Educ., 188 N.J. Super. 161, 165 (App. Div. 1983).

Velazquez's arguments on appeal are centered exclusively on claims the ALJ, and, by adoption, the Civil Service Commission, failed to properly weigh the evidence, made erroneous credibility determinations, and ignored his testimony in making the findings that supported the legal conclusion he abandoned his position and thereby resigned not in good standing in violation of N.J.A.C. 4A:2-6.2(b). More particularly, Velazquez claims the ALJ ignored evidence favorable to him, including: evidence the two PNDAs did not include hearing dates in the available spaces on the PNDA forms for hearing dates; his testimony he did not immediately learn of the dismissal of the criminal charges because he was homeless at that time; and NJDOT did not provide the hearing his counsel twice requested in 2017 on the indefinite suspension imposed by the first PNDA. Velazquez further argues there are "overwhelming issues of credibility that inure to [his] sole benefit" that were not addressed by the ALJ or Civil Service Commission.

Velazquez also claims the ALJ erred by finding Shapiro credible because she offered only "conjecture" as to why NJDOT did not provide a departmental hearing in response to his counsel's two 2017 requests on the initial PNDA's imposition of the indefinite suspension. He contends Shapiro was not a credible witness because she testified she intentionally left blank the hearing dates on the PNDA forms,² and she testified the FNDA included a box checked indicating he did not request a hearing.³

Velazquez further argues the ALJ's finding he failed to provide a reasonable explanation for his failure to notify NJDOT the criminal charges were dismissed is not supported by the evidence. He claims the ALJ's rejection of his testimony "there was no one to contact at NJDOT" and the ALJ's finding

² We observe that, in making the claim, Velazquez ignores Shapiro's testimony the dates for the putative hearings are never filled in the PNDA forms by NJDOT because NJDOT does not schedule the hearings until an appeal from a PNDA is filed.

³ As noted, the FNDA terminated Velazquez's employment based on his failure to report the dismissal of the criminal charges, which occurred eleven months earlier, and failure to report to work following the dismissal of the charges as asserted in the second PNDA. As set forth in the FNDA, the record shows Velazquez did not request a hearing on the charge in the second PNDA, which NJDOT sent to his last known address. As recognized by the ALJ, Velazquez faulted NJDOT for not properly serving him with the second PNDA, but he admitted he never informed NJDOT of his change of address following his indefinite suspension.

"he could have contacted his [collective negotiations] representative for assistance" but simply chose to take no action are contrary to the evidence.

Velazquez therefore argues this is the "rare instance" where the administrative agency "ignored each and every fact deduced" and therefore erred by applying the law to the facts. He contends he did not abandon his employment, but, instead, NJDOT abandoned him through its actions. We are not persuaded.

Velazquez does not dispute N.J.A.C. 4A:2-6.2(b) expressly provides an "employee who is absent from duty for five or more consecutive days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing." He also does not dispute that following the dismissal of the criminal charges in November 2020, he was eligible to return to work but failed to either inform NJDOT of the dismissal of the charges or, more importantly, to return to work. In other words, Velazquez does not offer any argument that his failure to return to work within five working days of the dismissal of the criminal charges in November 2019, or as soon as he received notice of the dismissal of the charges, does not constitute an abandonment of his position and a resignation not in good standing under N.J.A.C. 4A:2-6.2. See Drinker Biddle & Reath LLP v. N.J.

Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 496 n.5, (App. Div. 2011) (explaining an issue not addressed in a party's merits brief is deemed waived on appeal).

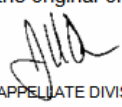
Defendant argues only the ALJ should have interpreted the evidence differently and should have made different credibility determinations. Our scope of review, however, permits only a determination of whether the agency's credibility determinations and factual findings are supported by substantial credible evidence, In re Stallworth, 208 N.J. 182, 194 (2011), and our review of the record confirms each of the ALJ's findings and credibility determinations are amply supported by the evidence. We cannot substitute our analysis of the evidence in place of agency determinations that are supported by substantial credible evidence, Grossman, 127 N.J. Super. at 23, and, for those reasons, we reject Velazquez's challenges to the Commission's findings and conclusions.

In sum, there is substantial credible evidence supporting the Commission's determinations: Velazquez knew he was eligible to return to work following the dismissal of the criminal charges; he learned of the dismissal of the charges many months prior to the issuance of the second PNDA in October 2020; and he

failed to return to work within five days of being eligible to do so.⁴ Velazquez therefore abandoned his position under N.J.A.C. 4A:2-6.2(b), and the Commission correctly determined he resigned not in good standing.⁵

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

⁴ Despite Velazquez's claim he did not receive immediate notification of the dismissal of the charges in November 2019, he testified he received notice of his discharge from the pretrial intervention program and dismissal of the charges in January 2020. He further testified his counsel then made attempts to contact NJDOT to advise it concerning the dismissal of the charges. As we have explained, the court found Velazquez's testimony not credible about the purported efforts to inform NJDOT the charges had been dismissed. However, we note his testimony concerning his receipt of notification of his discharge from the pretrial intervention program and dismissal of the charges because the ALJ accepted that testimony as credible, and the testimony supports the Commission's conclusion Velazquez failed to return to work within five days of his eligibility to do so and thereby resigned not in good standing under N.J.A.C. 4A:2-6.2(b).

⁵ We note Velazquez's oft-repeated claim we should reverse the Commission's decision because he was not granted the requested departmental hearing in 2017 on the initial PNDA imposing the indefinite suspension pending disposition of the criminal charges lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(D). The criminal charges against Velazquez included a second-degree theft charge, and he does not challenge on appeal the merits of NJDOT's decision to indefinitely suspend him without pay pending disposition of the charges.