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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3637-20**

**DEPARTMENT OF COMMUNITY
AFFAIRS, DIVISION OF CODES
AND STANDARDS, BUREAU OF
HOUSING INSPECTION,**

Petitioner-Respondent,

v.

**KENNETH D. ROBERTS, 301
DUPONT AVENUE, APARTMENT 8,
SEASIDE HEIGHTS, NEW JERSEY,**

Respondent-Appellant.

Submitted December 14, 2022 – Decided January 5, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the New Jersey Department of
Community Affairs, Docket No. CAF 15219-16.

Rothstein, Mandell, Strohm, Halm & Cipriani, PA,
attorneys for appellant (Jean L. Cipriani and Robin La
Bue, on the briefs).

Matthew J. Platkin, Attorney General, attorney for
respondent (Sookie Bae-Park, Assistant Attorney

General, of counsel; Craig S. Keiser, Deputy Attorney General, on the brief).

PER CURIAM

Kenneth D. Roberts appeals from a July 29, 2021 final decision from the Commissioner of the Department of Community Affairs (Department) adopting in part and rejecting in part a June 3, 2020 initial decision issued by an administrative law judge (ALJ). The Commissioner found Roberts violated regulations adopted under the Hotel and Multiple Dwelling Law (HMDL), N.J.S.A. 55:13A-1 to -31. As a result, the Department imposed a two-month suspension of Roberts's HMDL license. We affirm.

We derive the facts from the hearing record before the ALJ. Roberts was a code enforcement and zoning officer for the Borough of Seaside Heights (Borough). The Borough adopted the HMDL as its municipal property maintenance code. Thus, the Borough required Roberts to obtain an HMDL license from the Department's Bureau of Housing Inspection (Bureau) as a condition of his employment.

This appeal relates to Roberts's issuance of certificates of occupancy (CO) and other determinations regarding a three-story, fifty-unit motel, formerly known as the Travel Inn, located in the Borough. In September 2015, the Borough's Planning Board held a hearing to discuss the redevelopment of

various properties in the municipality, including the Travel Inn. At the hearing, Roberts testified that the third floor of the Travel Inn suffered from water infiltration and mold issues and was "unsanitary, unsightly, and unsafe." Roberts further testified that there were "serious questions" regarding the overall safety of the structure due to the hotel's age and dilapidated condition.

Initially, the Borough proposed to demolish the structure. However, because the Borough lacked housing for its seasonal summer employees, the Borough decided to allow J-1 visa students to occupy the Travel Inn during the summer of 2016. To accomplish that objective, the Borough exercised its power of eminent domain to take the hotel.

Notwithstanding his previous testimony before the Planning Board questioning the habitability of the Travel Inn, in May 2016, Roberts issued the CO for several units on the first floor of the building. Roberts issued the CO without determining if there were any Uniform Fire Code (UFC) violations or other safety issues regarding the building.

Moreover, Roberts issued the CO despite an inspection by the Division of Fire Safety in February 2016, which identified multiple violations of the UFC and other deficiencies at the Travel Inn related to "life safety issues." As a result

of that inspection, Dwayne Breeden, a Division of Fire Safety inspector, issued a notice of violation for the Travel Inn.

On September 1, 2016, Breeden again inspected the Travel Inn and issued another notice of violation of the UFC, finding the same violations identified in his February 2016 inspection and several additional violations. He then issued an abatement order to the Borough, citing fire protection issues. After the second notice of violation, the Borough relocated the students occupying the Travel Inn.

Three weeks later, Roberts received a notice of violation and order to revoke from the Bureau, informing Roberts that he failed to comply with the HMDL regulations and revoking his HMDL license. The Bureau found Roberts violated the HMDL regulations by issuing the CO for the Travel Inn because he knew the building was unsafe per his September 2015 testimony to the Planning Board. Despite such knowledge, Roberts allowed the hotel to be occupied notwithstanding unresolved fire and life safety issues.

Roberts appealed the Bureau's decision. On October 6, 2016, the Bureau transmitted the matter to the Office of Administrative Law for a hearing. The ALJ assigned to the case held hearings on April 25, April 26, and June 27, 2018.

In a June 3, 2020 written decision, the ALJ determined Roberts was subject to discipline by the Bureau. The ALJ concluded the Bureau's issuance of a license to Roberts constituted a "sufficient basis for subjecting [him] to discipline under the HMDL licensing rules because, . . . he could not have performed [his] duty [as the Borough's code enforcement officer] without an HMDL inspector license."

The ALJ found Roberts knew that fire inspection certificates from the Division of Fire Safety must be posted in multi-dwelling buildings but did not confirm whether the Travel Inn had such a certificate prior to issuing the CO. The ALJ further concluded Roberts made a misleading statement in authorizing the CO without confirming the Travel Inn complied with all local and state laws. In addition, the ALJ determined Roberts failed to adhere to the HMDL regulations by verifying that the Travel Inn complied with the UFC. Based on his findings, the ALJ recommended a suspension of Roberts's license for two months.

On July 29, 2021, the Department adopted the ALJ's decision in part. The Department agreed with the ALJ that Roberts violated the HMDL regulations "by failing to ascertain . . . whether the Travel Inn was in compliance with the Uniform Fire Code before issuing the certificates of occupancy, and also by

failing to report to the local construction official a change in the means of egress[.]" According to the Department, "[t]hese omissions posed safety risks for the residents of the Travel Inn and constituted negligence by Roberts."

On appeal, Roberts argues the Bureau lacked authority to suspend his HMDL license. He contends he was not acting as a Bureau inspector or on behalf of a local enforcement agency for the purpose of enforcing the HMDL when he issued the CO for the Travel Inn. Because he acted as the Borough's code enforcement officer, Roberts claims the Bureau had no jurisdiction to punish him for his actions performed in that capacity. We disagree.

Our review of an agency's final decision is limited. Hayes v. Bd. of Trs., Police & Firemen's Ret. Sys., 421 N.J. Super. 43, 51 (App. Div. 2011). Our function is to review "agency decisions under an arbitrary and capricious standard." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). We will uphold an agency's determination "'unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). We examine whether the findings of the agency could have been reached on the credible evidence in the record, considering the

proofs as a whole. Close v. Kordulak Bros., 44 N.J. 589, 598-99 (1965). "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) (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002)).

In reviewing an agency's decision, we "must be mindful of, and deferential to, 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)), and "'may not substitute [our] own judgment for the agency's.'" In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)). We defer to an agency's interpretation of its own regulations and applicable statutes. In re M.M., 463 N.J. Super. 128, 137-38 (App. Div. 2020).

The purpose of the HMDL is to "protect[] . . . the health and welfare of the residents of this State in order to assure the provision therefor of decent, standard and safe units of dwelling space." N.J.S.A. 55:13A-2. In enacting the HMDL, the Legislature intended to provide "stronger and more detailed measures . . . for the protection of tenants." Trentacost v. Brussel, 82 N.J. 214, 230 (1980).

To achieve those goals, the HMDL empowers the Department to promulgate regulations "deem[ed] necessary to assure that any hotel or multiple dwelling will be maintained in such manner as is consistent with, and will protect, the health, safety, and welfare of the occupants or intended occupants thereof, or of the public generally." N.J.S.A. 55:13A-7. As applicable here, one such regulation is the HMDL's incorporation of the UFC to ensure multiple dwelling structures and hotels comply with fire safety requirements. N.J.A.C. 5:10-1.6.

The HMDL is liberally construed and grants broad authority to the Department to regulate hotels and multiple dwellings throughout New Jersey. Rothman v. Dep't of Cmty. Affairs, 226 N.J. Super. 229, 232 (App. Div. 1988) (citing N.J.S.A. 55:13A-2). The HMDL expressly grants to the Department's Commissioner "all the powers necessary and appropriate to carry out and execute the purposes of [the HMDL]." N.J.S.A. 55:13A-6.

Those powers include the Department's authority to protect occupants of hotels and multiple dwellings with respect to the issuance and suspension or revocation of HMDL licenses. Ibid.; see also N.J.A.C. 5:10-1B.1.

The Department's Commissioner has the power to carry out the purposes of the HMDL pertaining to both the issuance and revocation of licenses. The

HMDL regulations identify ten circumstances authorizing the Department's suspension or revocation of a license. See N.J.A.C. 5:10-1B.7(a).

However, an agency's authority to suspend or revoke a license is not solely limited to language in a statute or regulation identifying specific misconduct by the license holder. See In re Heller, 73 N.J. 292, 304-05 (1977). Agencies charged with protecting the public health and safety may "take action based upon general statutes, without necessarily limiting their powers to the express provisions of a particular enabling statute." Id. at 302; see also In re Polk, 90 N.J. 550, 574 (1982) (rejecting a license holder's argument that revocation of his license was improper because the applicable statute failed to expressly proscribe the conduct upon which the license was revoked).

In this case, the ALJ found Roberts issued the CO for the Travel Inn without inquiring whether the structure complied with the UFC or other applicable laws. Similar to the revocation of the licenses in Heller and Polk, Roberts's license was suspended for having committed an act of misconduct not specifically enumerated in the HMDL statute or regulations but which jeopardized the health and the safety of the hotel's occupants.

While Roberts was not officially acting on behalf of the Bureau or a local enforcement agency when he issued the CO to the Travel Inn, he had a duty to

ensure compliance with all local and state laws, including the Borough's property maintenance code, which adopted the HMDL. The Department concluded Roberts's conduct "posed safety risks for the residents of the Travel Inn and constituted negligence" (emphasis added). In issuing the CO, Roberts needed to ascertain whether the Travel Inn complied with all state and local laws—specifically, the UFC and the Borough's property maintenance code. In suspending Roberts's license, the Department fulfilled its statutory duties by protecting the health and welfare of multiple dwelling residents and furthering the express purposes of the HMDL.

Here, the parties agree that the Bureau has the authority to issue a HMDL license. However, Roberts claims the Bureau may not pursue discipline against him because he was not acting as a Bureau inspector or an inspector for a local enforcement agency when he issued the CO to the Travel Inn. Additionally, he asserts he never committed any of the acts constituting a violation of N.J.A.C. 5:10-1B.7(a) to support suspension or revocation of his HMDL license. We reject his arguments as inconsistent with both Heller and Polk.

It is well-settled that agency regulations are "subject to the same canons of construction and the same constitutional imperatives as is a statute." Essex Cty. Welfare Bd. v. Klein, 149 N.J. Super. 241, 247 (App. Div. 1977). As with

statutes, "[a] 'regulation should be construed in accordance with the plain meaning of its language and in a manner that makes sense when read in the context of the entire regulation.'" J.H. v. R&M Tagliareni, LLC, 239 N.J. 198, 214 (2019) (quoting Medford Convalescent & Nursing Ctr. v. Div. of Med. Assistance & Health Servs., 218 N.J. Super. 1, 5 (App. Div. 1985)).

Nothing in the regulations or the HMDL suggests that the Bureau has the power to issue a HMDL license but lacks the power to suspend or revoke such a license when the license holder's conduct was contrary to the public's health, safety, or welfare. To adopt Roberts's argument, that the Bureau has the power to issue a HMDL license but not the power to suspend or revoke such a license, would lead to an absurd result. See H.K. v. Div. of Med. Assistance & Health Servs., 379 N.J. Super. 321, 328 (App. Div. 2005) (holding courts should avoid interpretation of a statute or regulation that leads to absurd results).

Moreover, an administrative agency has the discretion to exercise its statutory authority, including the revocation or suspension of an agency issued license, by adjudication or rulemaking. Dep't of Labor v. Titan Constr. Co., 102 N.J. 1, 13 (1985) (citing SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947)). Courts generally afford an agency discretion in choosing the appropriate form for carrying out its statutory duties. Id. at 19.

Whether the agency action involves rulemaking or adjudicating determines the procedure for enforcement. See Ardan v. Bd. of Review, 231 N.J. 589, 606 (2018). Adjudication is appropriate where the problem presented to the agency is unforeseeable and not otherwise remedied by an existing rule. See Chenery Corp., 332 U.S. at 202 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.").

The Bureau need not fashion a formal rule to address every idiosyncratic situation. Here, the Bureau rendered a determination limited to these unique facts, suspending Roberts's license because he failed to comply with the Borough's property maintenance code (which adopted the HMDL) when he issued the CO for the Travel Inn. Because he held a HMDL license, Roberts was required to comport with the rules and regulations governing the HMDL.

As a result of the safety risks posed by allowing occupancy of several rooms in a hotel deemed structurally unsound and unsafe, Roberts failed to protect the health, safety, and welfare of the public consistent with the purposes of the HMDL. Having reviewed the record, the Department's decision to suspend Roberts's license was supported by substantial credible evidence and

was not arbitrary, capricious, or unreasonable. The Department properly disciplined Roberts for his failure to comply with the HMDL and its regulations.

We are satisfied the Department's determination in this case is limited to these parties and idiosyncratic facts. Nothing in this opinion should be construed to expand the Bureau's authority to revoke or suspend a HMDL license beyond the circumstances here—where an official fails to enforce a municipality's property maintenance code that explicitly adopts the HMDL.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION