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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3772-20**

**IN THE MATTER OF
STEPHEN OTTERBINE,
INVESTIGATOR 1, MOTOR
VEHICLE COMMISSION.**

Argued May 1, 2023 – Decided May 11, 2023

Before Judges Mawla and Smith.

On appeal from the New Jersey Civil Service Commission, Docket No. 2022-314.

Joshua Altman argued the cause for appellant Stephen Otterbine (Benedict and Altman, attorneys; Steven D. Altman and Joshua Altman, of counsel and on the brief).

Rebecca J. Karol, Deputy Attorney General, argued the cause for respondent New Jersey Motor Vehicle Commission (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Rebecca J. Karol, on the brief).

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

PER CURIAM

Petitioner Steven Otterbine appeals from the August 4, 2021 final agency decision of the Civil Service Commission imposing a five-day unpaid suspension. On appeal, petitioner argues the Commission's findings relied on an administrative hearing which violated principles of due process, and he seeks reversal of the final decision. We affirm, because there was sufficient credible evidence in the record to support the final decision, which was not arbitrary, capricious, or unreasonable.

I.

Petitioner has been employed by the New Jersey Motor Vehicle Commission (MVC) as an investigator in the Security and Investigations unit since August 20, 2012. He was involved in an incident that occurred at the Hazlet MVC on August 15, 2020. MVC Investigator Thomas R. Watters was assigned to investigate the incident.

After his investigation, Investigator Watters concluded petitioner entered the MVC without his state-issued identification and pushed past the security guard, David Doherty, making physical contact with him as he entered. Investigator Watters found petitioner's behavior "unprofessional, unproductive

. . . disrespectful" and "jeopardized the safety of the . . . employees and customers within the agency."

As a result, the MVC issued a Preliminary Notice of Disciplinary Action for a five-day suspension¹ on October 30, 2020, charging petitioner with: conduct unbecoming a public employee; and NJMVC Disciplinary Guidelines Section III, J, N.J.A.C. 4A:2-2.3(a)(6); workplace violence; NJMVC Disciplinary Guidelines Section III, D, N.J.A.C. 4A:2-2.3(a)(12)²; and failure to follow MVC policies and procedures, N.J.A.C. 4A:2-2.3(a)(12) and NJMVC Disciplinary Guidelines Section II, M.

At the departmental hearing, Investigator Watters testified regarding his investigation. Specifically, he testified regarding the statement he took from Doherty, who did not testify at the hearing. Investigator Watters also testified regarding the surveillance footage of the incident. MVC technicians Latoya Morgan, Diana Loukatos, and Aaron Brown each testified. Petitioner offered no evidence at the hearing.

¹ A five-day suspension is defined as "minor discipline." N.J.A.C. 4A:2-3.1.

² The record notes the charge was pursuant to N.J.A.C. 4A:2-2.3(a)(11). However, this regulation pertains to residency requirements, and we presume it is a typographical error.

Morgan testified she heard "tapping" at the front door. She next observed petitioner push past security guard Doherty and walk back to his station while ignoring Doherty's questioning. She initially thought petitioner could not hear Doherty, but then concluded petitioner was ignoring him.³ Loukatos testified she heard Doherty repeatedly ask for petitioner's identification, but she did not see petitioner push past him. Finally, Brown testified he heard Doherty tell petitioner to "stop," but did not see the interaction at the front door.

The hearing officer considered the record, including: video surveillance; eyewitness testimony; Doherty's statement; and Investigator Watters' testimony. The hearing officer found: petitioner was a longtime MVC employee bound by MVC's rules and regulations; petitioner entered the Hazlet MVC facility without identification, by pushing past Security Officer Doherty and refusing his repeated commands to stop and present identification; and that petitioner never presented his identification at work that day. After observing the surveillance video, the hearing officer found that MVC customers turned and looked towards the front door "well before Doherty [walked] toward it." The hearing officer

³ Watters' investigation notes revealed Morgan initially told him she did not see petitioner push past Doherty. However, at the hearing, Morgan testified she did see petitioner push past him. To clarify the inconsistency, Morgan further testified she did tell Watters she saw petitioner push past Doherty, but he recorded her answer as "no."

further found petitioner "showed a blatant disregard for the safety of MVC employees and customers," and imposed the recommended five-day suspension.

The Commission Director (Director) adopted the hearing officer's decision as final, noting petitioner elected to present no evidence.⁴ On appeal, petitioner argues the Director denied him due process because: Doherty did not testify in person; Investigator Watters improperly narrated the surveillance video at the hearing; and there was insufficient evidence to establish two of the three disciplinary charges against him.

II.

Our review of decisions by administrative agencies is limited. In re Stallworth, 208 N.J. 182, 194 (2011). "In order to reverse an agency's judgment, an appellate court must find the agency's decision to be 'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record

⁴ In adopting the results of the initial decision as final and rejecting petitioner's arguments, the Director primarily relied upon N.J.A.C. 4A:2-3.7(a), which permits the Commission to dismiss an appeal of a minor disciplinary action by an employee unless the "appeal presents issues of general applicability in the interpretation of law, rule, or policy." Additionally, the Director cited the Commission's agency practice not to disturb initial decisions concerning minor disciplinary actions unless "there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race, or gender bias or were in violation of Civil Service rules." The Director found petitioner presented no such evidence.

as a whole.'" Ibid. (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). In our review, we only determine:

(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 Carter, 191 N.J. 474, 482-83 (2007) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

"[I]f substantial evidence supports the agency's decision, a court may not substitute its own judgment for the agency's even though the court might have reached a different result[.]" Id. at 483 (citation omitted).

However, "we are 'in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue[.]'" Utley v. Bd. of Rev., 194 N.J. 534, 551 (2008) (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). Our review of a "strictly legal issue" is de novo. In re Langan Eng'g. & Env't Servs., Inc., 425 N.J. Super. 577, 581 (App. Div. 2012) (citing Utley, 194 N.J. at 551).

III.

While we are not constrained to do so in this appeal of petitioner's minor disciplinary action, we briefly address the merits of his arguments. N.J.A.C.

4A:2-3.7(a)(1). Petitioner essentially contends the Director's final decision should be reversed because the entire record was procedurally flawed due to the testimony of Investigator Watters. He posits the hearing officer should have found Watters not credible because of the inconsistency between LaToya Morgan's statement and her testimony at the disciplinary hearing. Petitioner next argues Watters' hearsay testimony regarding Doherty's statement was impermissible even in the context of an administrative hearing. Finally, petitioner argues he was unduly prejudiced by Watters' narration of the surveillance video. He also attacks the Director's final decision as grounded in "speculative and insufficient" proofs, warranting reversal. Petitioner's evidenced-based due process arguments miss the mark in this administrative setting, and we are not persuaded.

In contested administrative proceedings, "[t]he parties shall not be bound by rules of evidence whether statutory, common law, or adopted formally by the Rules of Court." N.J.S.A. 52:14B-10(a)(1). With certain exceptions, "[a]ll relevant evidence is admissible" N.J.A.C. 1:1-15.1(c).

Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature,

character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

[N.J.A.C. 1:1–15.5(a).]

However, the "residuum rule" provides: "[n]otwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1–15.5(b).

In Weston v. State, the Court explained "in the final analysis[,] for a court to sustain an administrative decision[] which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." 60 N.J. 36, 51 (1972) (citing Gillian v. Int'l Paper Co., 24 N.J. 230, 236 (1957)). "The risks of relatively free use of hearsay and other forms of evidence not sanctioned by the Rules of Evidence are mitigated by a correlative standard requiring the existence of some legally competent evidence as the foundation of every adjudicative determination made by an administrative agency." DeBartolomeis v. Bd. of Rev., 341 N.J. Super. 80, 84 (App. Div. 2001).

Here, the record shows Investigator Watters conducted an independent investigation which consisted of, among other things, taking statements from

the security officer directly involved in the incident, as well as from three eyewitnesses. He prepared and submitted a detailed and comprehensive seventeen-page report detailing the result of his investigation. Three eyewitnesses testified at the hearing, each describing what they saw and heard. The record also contains four surveillance videos, each showing different angles of the incident. The hearing officer viewed them. We find there is residuum of legal and competent evidence in the record to support the admitted hearsay evidence, N.J.A.C. 1:1-15.5(b), as well as the five-day suspension of the petitioner. The Commission's final decision was not arbitrary, capricious, or unreasonable.

Affirmed.

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



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