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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4289-10T2

IN THE MATTER OF
CHRISTOPHER McDONALD.

Argued March 5, 2012 – Decided March 23, 2011

Before Judges Parrillo, Grall and Hoffman.

On appeal from the Waterfront Commission of New York Harbor, No. L-3690-W.

Daniel J. Zirrith argued the cause for appellant Christopher McDonald (Fox and Fox, L.L.P., attorneys; Mr. Zirrith, of counsel and on the briefs).

Phoebe S. Sorial, General Counsel, argued the cause for respondent Waterfront Commission of New York Harbor (Ms. Sorial, on the brief).

PER CURIAM

Appellant Christopher McDonald appeals from the March 22, 2011 order of the Waterfront Commission of New York Harbor (Commission) denying his re-application for registration. For the following reasons, we affirm.

On December 3, 1996, McDonald filed an application to register as a maintenance man, a type of longshoreman, with the Commission, a bi-state corporate and politic entity created by

compact between the States of New York and New Jersey, N.J.S.A. 32:23-1 to -225.[1] His employer at the time was American Maritime Service of New York, Inc. (AMS), who sponsored his application. For McDonald to work as a longshoreman, as his application so indicated, his name must be included on the longshoreman's register. N.J.S.A. 32:23-27.

In that regard, the Act empowers the Commission to issue licenses and registrations to those individuals applying to work on the waterfront. N.J.S.A. 32:23-86. The Commission may, in its discretion, deny licensure or registration as it deems in the public interest for certain misconduct, including the commission of "fraud, deceit or misrepresentation in connection with any application . . . submitted to or any interview . . . conducted by the Commission." N.J.S.A. 32:23-92(3). The Commission may also reject an applicant if his "presence at the piers or other waterfront terminals . . . constitute[s] a danger to the public peace or safety." N.J.S.A. 32:23-29(c). In addition, to maintain one's registration, the applicant cannot violate any other provisions of the Act, including the requirement that only registered longshoremen work as longshoremen on the waterfront. N.J.S.A. 32:23-27, -92(4).

[1] Otherwise known as the Waterfront Commission Act (Act).

As a result of his application, McDonald was issued a registration card and his name was included in the Register of the Commission. He commenced work as a Trailer Interchange Receipt (TIR) inspector in Port Newark and Port Elizabeth, responsible for inspecting containers and chassis entering the Port for damage. He remained there until July 2000, when he commenced working at the New York Container Terminal for Island Securing and Maintenance, Inc. (Island Securing), who assumed sponsorship of its new employee. Because his registration was active and his employment transition seamless, McDonald was not required to reapply to the Commission for registration.

That was not the case on February 19, 2010 when he resigned from Island Securing, contemplating a return to his old employer, AMS. Having been advised by McDonald of his voluntary resignation, Island Security informed the Commission that the company was withdrawing its sponsorship of McDonald for registration with the Commission as a maintenance man via letter dated February 19, 2010.

As a result of this notification, the Commission placed McDonald on inactive status because of his lack of employer sponsorship. Once a longshoreman is placed on inactive status, he is no longer able to work on the Waterfront until he obtains a new sponsor and reapplies for registration with the

Commission. Consequently, on February 23, 2010, the Commission sent a letter to McDonald informing him that since his sponsorship had been withdrawn, he was required to return his registration card pursuant to N.J.S.A. 32:23-32. Claiming not to have received the letter until late that week because his infant son was in the hospital, McDonald reported to work at AMS on February 23, 2010, without being registered and subsequently mailed back his registration card.

On March 2, 2010, about a week after he commenced his new employment, McDonald went to the Commission office to deliver his sponsorship letter from AMS. At that time, he was advised that he needed to file a re-application for registration with the Commission, which he completed in the office that day. McDonald had wanted to fill out the twenty-two-page application at home because he did not have his employment file with him and might not be able to answer all questions from memory, but was instructed that he had to fill it out in the office.

In response to a question (#27) on the application inquiring into employment history, McDonald answered that he was unemployed from February 19, 2010 to the present, when in fact he was at the time employed by AMS, albeit by then he had only worked there one day due to his son's hospitalization. He also indicated in question #23 that his last date working on the

waterfront terminal was February 19, 2010. Another question (#28) asked whether he had "ever been disciplined in any manner ([e.g.]: suspended, demoted, reprimanded, fined, penalized or terminated)[,]" to which McDonald responded "yes[,]" citing only one instance: "NYCT[,] do not remember date[,] missing damage on a container around 2004[,]" in reply to a further question asking for specific details.

On May 11, 2010, McDonald was called to appear before the Commission as part of the re-application process and was asked to produce all relevant employment documents, which he did when he attended the scheduled interview on May 19, 2010. At that time, he acknowledged working for AMS upon his resignation from Island Securing and explained the discrepancy in his answer to question #23 by claiming that at the time he was working in Woodbridge "off-pier[,]" which was outside the Commission's jurisdiction. However, a subsequent Commission investigation proved McDonald's representation wrong. A July 28, 2010 pier inspection by Commission investigators of AMS's waterfront facility in Elizabeth uncovered McDonald allegedly "hiding" in the women's bathroom. The investigation also confirmed that while working for AMS, McDonald had been assigned as a TIR inspector in Port Newark and a TIR inspector and chassis-

counter/traffic coordinator in Elizabeth, but never in Woodbridge, as he had claimed during the interview.

The documents produced by McDonald belied his other claim to have been disciplined only once. During his ten-year tenure with Island Securing, McDonald had been cited a number of times for making faulty inspections, leaving work early without permission, and recording fictitious license plate numbers.

Specifically, McDonald was cited for making four faulty inspections, several of which resulted in disciplinary sanctions. For instance, on May 8, 2003, he recorded that a chassis had two tattle caps per wheel location but in fact it had no tattle caps. On September 6, 2005, he recorded that a chassis was in good condition, yet there was a hole on the left side. After this second incident, he was reprimanded by letter of September 16, 2005. There was a third faulty inspection on April 11, 2008, wherein McDonald noted that a damaged container was intact. This incident resulted in a two-week suspension, although McDonald was allowed to return to work earlier. And on December 29, 2009, McDonald recorded no damage to a container that in fact had a three-foot-long tear in its roof. For this, he was reprimanded by letter of January 4, 2010 and suspended for three weeks, although the suspension was later lifted in a January 12, 2010 memo.

In addition to faulty inspections, McDonald was also sanctioned for leaving work prior to his official quitting time. Following three such instances on December 15, 2006, October 8 and November 7, 2007, McDonald was given a one-week suspension. On another occasion, on January 20, 2010, he was suspended for one week for unexcused absences from January 5 to 8, 2010. McDonald was also found to have recorded fictitious license plate numbers for tractors carrying containers that he was responsible for inspecting on January 13, 2009. He was initially suspended for three weeks, though the suspension was eventually overturned in arbitration.

After his interview, on July 16, 2010, McDonald was given notice of an August 24, 2010 hearing on his re-application for registration. The notice of hearing outlined its purpose: the "determin[ation] [of] . . . [w]hether you committed fraud, deceit, and misrepresentation in connection with your reapplication of March 2, 2010 . . . within the meaning of the Waterfront Commission Act, Part II, Section 5-h(3)" with respect to questions 27 and 28(a) and "whether [his] presence at the piers or other waterfront terminals in the [P]ort of New York district constitutes a danger to the public peace or safety

within the meaning of the Waterfront Commission Act, Part 1, Article VIII, Section 3(c) . . . ."[2]

At the administrative hearing held pursuant to N.J.S.A. 32:23-47, Thomas Fallon, Vice-President of Island Securing, testified to, among other things, the disciplinary measures taken against McDonald while employed there. McDonald also testified and denied any intent to deceive or misrepresent. At the close of evidence, the administrative judge (AJ), discrediting McDonald's account, found that the applicant committed multiple instances of fraud, deceit and misrepresentation and was a danger to the public peace and safety. Accordingly, the AJ recommended that McDonald's re-application for registration be denied. The Commission's March 22, 2011 order adopted the AJ's findings and conclusions, from which this appeal is taken.

McDonald's essential argument is twofold: the Commission's findings are not supported by sufficient credible evidence and its sanction of denial was too severe and disproportionate to the misconduct charged. We disagree with both contentions.

[2] Subsequently, the Commission amended the Notice of Hearing on September 30, 2010 to include additional charges that from February 23, 2010 to September 1, 2010, McDonald was a longshoreman without registration and therefore a danger to the public peace or safety.

I.

"Under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -24, a [hearing officer], who has been assigned to review a disputed matter involving a State agency, is charged with issuing a decision that contains recommended findings of fact and conclusions of law that are 'based upon sufficient, competent, and credible evidence.'" In re Taylor, 158 N.J. 644, 655 (1999) (quoting N.J.S.A. 52:14B-10(c)). "Once the agency has issued its final decision, 'the Appellate Division's initial review of that decision is a limited one.'" Taylor, supra, 158 N.J. at 656 (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988)). We only decide "'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility.'" Taylor, supra, 158 N.J. at 656 (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)) (internal quotations omitted). Stated otherwise, we will not upset the ultimate determination of an agency unless shown that it was "arbitrary, capricious or unreasonable, . . . or that it violated legislative policies expressed or implied" in the act governing the agency. Campbell v. Dep't of

Civil Serv., 39 N.J. 556, 562 (1963); see also In re Application of Holy Name Hosp., 301 N.J. Super. 282, 295 (App. Div. 1997).

Here, we defer to the AJ's finding that McDonald was not credible in explaining his failure to disclose all the disciplinary measures taken against him. In the first place, we reject outright his claim that the Fallon memos memorializing McDonald's deficient work performance do not constitute reprimands because that term is not used therein. Simply put, the re-application process is governed by the Act and question #28 clearly requests instances where the applicant was "suspended, demoted, reprimanded, fined, penalized or terminated." In this regard, McDonald was suspended on at least three separate occasions -- once for one week in December 2007; again for two weeks in May 2008; and another one week on January 20, 2010.[3] As the AJ properly recognized, it is simply not believable that McDonald, "the apparent sole source of support

[3] McDonald was suspended yet again for three weeks on January 4, 2010, but that suspension was rescinded. Nevertheless, there is no evidence contradicting the facts stated in Fallon's January 4, 2010 memo, upon which that suspension was initially based. The two-page memo with attached TIR reports, photos, and a container repair estimate, documents McDonald's failure to report a three-foot-long tear in the roof of a container. The memo clearly cited McDonald for "neglect and not performing" his job which caused the company "financial ramifications" and "major embarrassment . . . ." As the AJ stated in his report and recommendation, this was clearly a severe reprimand.

for an ever growing family, forgot so quickly the loss of one week's pay."

As for not mentioning the May 2008 suspension because he was allowed to return to work after only two days, the fact remains that McDonald's early return to work was conditioned on his "understanding that the suspension was still in effect for the two (2) full weeks" and he agreed to "change [his] ways and perform [his] job function as TIR writer with due diligence and work as directed by the foreman." Further, the May 20, 2008 Fallon memo reiterated that McDonald was subject to the "Metro Contract Disciplinary Process which after completion of [his] two (2) week suspension any incident within the next 12 months resulting in disciplinary letters [he would] receive a three (3) week suspension" and after that, termination. Also, a letter dated December 1, 2008, stated as a result of the suspension his name was removed from consideration for the 2008 Safety Pride and Professionalism Award. Thus, given the tone of the memo, the conditions imposed on early reinstatement, and later ramifications, it is simply implausible to suggest this was not considered "discipline" disclosable on re-application. Equally unjustified is McDonald's failure to disclose the January 20, 2010 suspension for unexcused absences simply because of the pending grievance he filed challenging this sanction.

Similarly incredible was McDonald's explanation for representing on the application that he was unemployed at the time he actually commenced working for AMS. In fact, a subsequent Commission investigation uncovered the falsehood of his excuse that he was working outside the Commission's jurisdiction in Woodbridge. Contrary to McDonald's express representation, at the relevant time he was working as a longshoreman within the Commission's jurisdiction in Elizabeth, where he was found purportedly "hiding" in the women's bathroom.

Based on these affirmative misrepresentations, the sheer number of disciplinary measures taken against him, and perhaps most significant, his failure to disclose them on re-application, the Commission properly denied McDonald's registration. We are satisfied sufficient, credible evidence supports this determination.

II.

We are also satisfied the denial of re-application was an appropriate penalty. "[W]hen reviewing administrative sanctions, 'the test . . . is whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.'" In re Herrmann, 192 N.J. 19, 28 (2007) (quoting In re Polk, 90

N.J. 550, 578 (1982)) (internal quotations omitted). "The threshold of 'shocking' the court's sense of fairness is a difficult one, not met whenever the court would have reached a different result." Herrmann, supra, 192 N.J. at 29.

> [A]ppellate review of an agency's choice of sanction is limited. Courts generally afford substantial deference to the actions of administrative agencies such as the Board. Matturri v. Bd. of Trs. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002). Deference is appropriate because of the "expertise and superior knowledge" of agencies in their specialized fields, Greenwood v. State Police Training C[tr.], 127 N.J. 500, 513 (1992) . . . .
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> [In re License Issued to Zahl, 186 N.J. 341, 353 (2006).]

A court will intervene

> only when necessary to bring the agency's action into conformity with its delegated authority. The Court 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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> [Polk, supra, 90 N.J. at 578.]

McDonald argues that the Commission's denial of his reapplication was too harsh as it entails a six-month wait to reapply for registration, in addition to the six-month work ban prior to the Commission's March 22, 2011 order. We disagree.

In Knoble v. Waterfront Comm'n. of N.Y. Harbor, 67 N.J. 427, 430 (1975), the Court reversed our decision, which held that the Commission's revocation and denial of licensure for falsifying employment records "was unduly severe and therefore arbitrary and unreasonable[,]" and reinstated the original penalties. Id. at 430-31. The Court reasoned that:

> [t]he Commission was created to purge the waterfront of the evils that were plaguing legitimate port operations. To require honesty as a condition of employment from those engaged in the sensitive work of safeguarding property on the piers is essential if the Commission is to carry out its purposes. We must recognize the Commission's long standing experience with waterfront problems and ordinarily defer to its judgment as to the appropriate penalty or discipline to be imposed in a given situation.
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> [Id. at 431-32.]

Similarly, here, the Commission found that McDonald's lack of honesty and poor work performance, which endangered the public's safety, warranted a denial of his re-application. We do not deem this punishment too harsh. McDonald was properly denied registration under N.J.S.A. 32:23-29 (c) and N.J.S.A. 32:23-31 (b), after a hearing in accordance with N.J.S.A. 32:23-47, in which he was found to have committed numerous violations of the Act.

The cases relied upon by McDonald for a contrary proposition are distinguishable. In In re Bell v. Waterfront Comm'n of N.Y. Harbor, 228 N.E. 2d 758 (N.Y. App. Div. 1967), the court reversed the Commission's permanent revocation of the petitioner's registration because the punishment was too severe. The Commission's basis for the revocation was the petitioner's denial that he belonged to a subversive organization when in fact he was an active member in the Communist Party over eighteen years ago. Id. at 760, 764. The court properly reasoned the punishment was too severe because his deceit was most likely due to "ignorance and misplaced fears[,]" his long history as a longshoreman, and his lack of "unlawful or subversive activities or . . . anything else, apart from his deception in the interviews, which would justify revoking his longshoreman's registration and depriving him of his livelihood." Id. at 764.

Unlike Bell, the sanction here was neither permanent nor irrevocable in nature. Moreover, it was applied directly to his work as a longshoreman as opposed to actions outside the employment environment, as in Bell. Furthermore, many of the incidents here were very proximate, and in one instance current, to the re-application process, in comparison to the eighteen-

year interregnum in Bell. The distinctive features of this case therefore render Bell of no support.

In In re Mennella v. Waterfront Comm'n of N.Y. Harbor, 39 A.D. 2d 578 (N.Y. App. Div. 1972), the court reviewed two determinations by the Commission. One concerned the denial of petitioner's application based on fraud committed in the Commission interview, and the consequent lack of good character and integrity, which determination the court confirmed. However, a later Commission decision, which denied the petitioner's application for leave to re-apply in sixty days was modified by the court to allow him to apply forthwith. Id. at 578-79. In its very brief opinion, the court reasoned that the sixty-day waiting period was unreasonable and an abuse of discretion. Id. at 579.

This case is also distinguishable from the present. As in Bell, the petitioner in Mennella did not possess a long disciplinary history, nor engage in numerous deceits, unlike what the record in the instant matter discloses. Given the number of work infractions committed by McDonald, his affirmative misrepresentations and intentional omissions, the Commission's decision to deny registration and therefore requiring him to wait six months to reapply is neither arbitrary, capricious nor unduly harsh.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION