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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4844-15T1

IN THE MATTER OF
KEVIN PRATT, CAMDEN
COUNTY DEPARTMENT OF
PUBLIC WORKS.

Submitted October 12, 2017 – Decided January 12, 2018

Before Judges Haas and Rothstadt.

On appeal from the New Jersey Civil Service
Commission, Docket No. 2015-2744.

Jacobs & Barbone, PA, attorneys for appellant
Kevin Pratt (Louis M. Barbone and John R.
Stein, on the brief).

Christopher A. Orlando, Camden County Counsel,
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brief).

Christopher S. Porrino, Attorney General,
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brief).

PER CURIAM

Kevin Pratt appeals from the Civil Service Commission's
(Commission) final determination sustaining the decision of his

employer, the Camden County Department of Public Works (County) to terminate his employment as a truck driver based upon charges that included conduct unbecoming a public employee and violating, for the second time, County policies concerning an employee's obligation to notify the County of any license suspensions. On appeal from the Commission's decision, Pratt argues its findings were not supported by the evidence, his conduct did not rise to the level of unbecoming conduct, he was unaware his actions were improper, and that there is no policy informing an employee on how to handle the particular situation that gave rise to the charges against him. We affirm.

The Commission's final decision was based upon the evidence presented to an Administrative Law Judge (ALJ) whose Initial Decision affirming the County's actions was deemed adopted by the Commission pursuant to N.J.S.A. 52:14B-10(c). We summarize the facts found by the ALJ.

In August 2003, the County hired Pratt as a laborer. About three years later, Pratt was promoted to the position of truck driver. Truck drivers, such as Pratt, are instructed to leave new trucks in a heated garage every night, unless it is attached to a trailer in which case the trucks are left outside, next to the garage. Also, they are required by County employment policies to maintain an active driver's license and commercial driver's

license (CDL), and to notify the County if their privileges are ever suspended or if there are other changes in the status of their ability to comply with any job requirement.¹

On November 20, 2014, Pratt reported for duty and was assigned to one of the newer trucks. At the end of the workday, Pratt's foreman, Chris Merulla, instructed him to leave early to dump frozen debris that Merulla noticed in the back of the truck bed. Pratt drove back to the yard and spent approximately twenty minutes trying to empty the truck to no avail. He decided to let the frozen debris thaw outside, by the dump pile away from the garage, leaving the truck bed in an upright position outside in the sun. In doing so, Pratt failed to engage the safety bracket that held up the truck bed.

¹ As explained by the ALJ:

All [County] truck drivers are required to possess a valid driver's license and a Commercial Driver's License (CDL) at all times. Pursuant to [the County's] Policy number 401C, every employee is required to notify [the County] in writing within twenty-four hours of being notified of any suspension or revocation of his driving privileges[.] Failure to do so can lead to discipline. . . . Pursuant to [the County's] Policy number 34.0, it is the responsibility of each employee to notify their supervisor within thirty days of any change in status of a job requirement which includes the loss of a license

Before he left work, Pratt checked the office for a supervisor or foreman and none were in sight. Merulla later observed a truck by the dump pile, but did not know it was the one assigned to Pratt or that it was unattended.

Although Pratt planned to move the truck when he returned to work the next day, he fell ill and called out sick. When he spoke to Merulla on the phone, Pratt did not mention that he left the truck outside at the dump pile. When the truck was later discovered, it was taken out of service for the entire next day because it had to be sent for a maintenance check to ensure it was suitable for use.

When Pratt returned to work on November 24, 2014, Merulla asked him to provide a written account about his experience with the truck on November 20. Pratt reported that someone else placed the frozen debris on the truck and that he did not tell anyone he left the truck with the body up because he did not think it was a "big thing."

Following this incident, Pratt injured his back while helping a co-worker. Due to his injury, he was out of work from November 24, 2014 to March 13, 2015.

During his leave of absence, Pratt neither reported to work nor operated any County vehicles. While he was out, his driver's license and CDL were suspended from December 5, 2014 to January

5, 2015, but he did not advise the County about the suspension as required by its policies.

The 2014 license suspension was the second time Pratt failed to notify the County he lost his license. In 2012, Pratt's licenses were suspended and he failed to notify the County. As punishment, and with Pratt's agreement, the County suspended Pratt for four weeks, with the understanding that if he lost his license again and failed to notify the County, it would seek his termination.

In February 2015, the County conducted a bi-annual review of every truck drivers' abstract through the Motor Vehicle Commission. The County learned about Pratt's license suspension, and his failure to notify the County for a second time in violation of two County policies and the prior warning.

At the time the County discovered Pratt's second license suspension, Pratt's disciplinary history included two temporary suspensions from work for 30 days each, lesser discipline for other incidents, and written warnings. As to the new violation arising from leaving the truck outside, the County issued to Pratt a Preliminary Notice of Disciplinary Action (PNDA), charging him with "conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(6); and as to the violation of the two County policies requiring employees to notify the County of license suspensions and changes

in vital information, it charged him with "other sufficient cause," N.J.A.C. 4A:2-2.3(12). After a departmental disciplinary hearing, the County issued a Final Notice of Disciplinary Action (FNDA), terminating Pratt from his employment, effective immediately.

Pratt appealed to the Commission, which referred the matter to the Office of Administrative Law for a hearing before the ALJ. At the hearing, the County presented the testimony of Merulla and its Director of Administration, Brian Eisen. Pratt testified on his own behalf and presented testimony of truck driver, Jose Reyes.

Merulla testified that Pratt should have put the truck in its "designated bay," in the heated garage, "at the end of the day." His testimony was corroborated later by Reyes, who briefly testified about the County's procedures. Eisen testified about the policies relating to a driver's license suspension. He stated that the County's policy did not address whether it applies to an employee out on medical leave. Nevertheless, he confirmed that truck drivers are required to possess a valid driver's license and CDL.

Pratt testified that he never received any rules, procedures or policies about the operation of the County trucks or any written rules about this particular situation. Turning to the license suspensions and the notification requirement, Pratt testified that he was aware his license and CDL were suspended and acknowledged

that he did not notify the County of the suspension. He also testified that his driving privileges were restored prior to returning to work in March 2015.

In a thorough written decision, the ALJ affirmed the County's decision to terminate Pratt's employment. The judge held that Pratt's conduct was unbecoming a public employee as he failed to notify his supervisor that he left a new truck outside overnight, and that he violated County policies by not notifying the County of his license and CDL suspensions while out on medical leave.

While the ALJ acknowledged that the County did not have a "written policy on the proper overnight storage of its trucks," he still found that Pratt's actions on November 20, 2014 "[rose] to a level of conduct unbecoming a public employee." Specifically, the judge stressed that Pratt left the truck overnight without notifying a supervisor, and he failed to notify his employer again the next day when he called out sick. The judge also held that Pratt's actions affected the "morale and efficiency" at the County because he did not advise anyone that the truck's bed was left upright overnight, and that he ultimately left the truck in the care of other employees. Finally, the judge found that Pratt violated County policies as he "failed to notify his employer of the suspension of his license," which is also deemed a change in vital information.

With respect to the penalty imposed upon Pratt, the ALJ explained that "determining the appropriate penalty," includes factual findings about Pratt's offense, "the concept of progressive discipline," and Pratt's past record. Relying on In re Herrmann, 192 N.J. 19, 33 (2007), the ALJ considered the severity of Pratt's actions and decided not to reduce the penalty of removal. He stated that a failure to report a suspended license to the County "has the potential of causing serious consequences if that employee" operated an employer-owned vehicle. After reviewing the current infractions and prior disciplinary actions, including a previous suspension of driving privileges, the judge held that removal was appropriate "even though [Pratt] was out on medical leave at the time of the suspension and had his privileges restored prior to returning to work."

The ALJ's decision was later deemed adopted as the Commission's final agency decision, pursuant to N.J.S.A. 52:14B-10(c), due to a lack of quorum created by vacancies. This appeal followed.

On appeal, Pratt argues that the evidence did not support the ALJ's factual findings or his conclusion that Pratt's conduct constituted the acts charged. Admitting that he left the truck outside overnight and failed to inform Merulla when he called out sick the next day, he nevertheless refutes the notion that his

conduct rose to the level of unbecoming conduct. Finally, he asserts that he was unaware his actions were improper, and that there is no policy on point informing an employee on how to handle this particular situation.

Typically, where an agency issues a final decision, our review is limited. Lavezzi v. State, 219 N.J. 163, 172 (2014). We will not disturb the final determination of an agency unless shown that it was "arbitrary, capricious or unreasonable, or it is not supported by substantial credible evidence in the record as a whole." Id. at 171 (citing Prado v. State, 186 N.J. 413, 427 (2006)). That deference extends to decisions relating to employee discipline and punishment, including termination. Herrmann, 192 N.J. at 28; see also In re Carter, 191 N.J. 474, 486 (2007).

However, "when the lack of a quorum attributable to vacancies cause[s] the agency inaction [in response to an ALJ's recommendation], the current version of the deemed-adopted statute does not require" that we review an ALJ's deem-adopted decision deferentially. In re Hendrickson, 451 N.J. Super. 262, 266 (App. Div.), certif. granted, ___ N.J. ___ (2017). Instead, we apply "the standard of review for bench trials[,]" where we will affirm an ALJ's factual findings "to the extent they are supported by substantial credible evidence in the record." Id. at 273 (citing Zaman v. Felton, 219 N.J. 199, 215 (2014)). "No deference will

be accorded to . . . legal conclusions; they will be reviewed de novo." Ibid. (citing Zaman, 219 N.J. at 216).

Applying this standard of review, we turn first to the ALJ's determination that the County properly terminated Pratt for unbecoming conduct. "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6), is an "elastic" phrase encompassing "any conduct which adversely affects . . . morale or efficiency . . . [or] which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services." Karins v. Atl. City, 152 N.J. 532, 554 (1998) (citations omitted). Conduct that "has the tendency to destroy public respect for [public] employees and public confidence in the operation of" the public entity is intolerable. Id. at 557.

We conclude the evidence supported the ALJ's determination that Pratt violated the regulation. Pratt was aware of the County's procedure for newer trucks and the need to protect them. The fact that he left his truck outside and unattended overnight, while incorrect and threatening to the equipment, was not the worst part of his conduct. Rather, Pratt failed to take any action to insure the truck was properly garaged by his repeated failure to inform his supervisor on two occasions about leaving the truck at the dump pile, once on the date of the incident and again the

next day when he called out sick. He chose to ignore his obligation and did not tell anyone.

Pratt was also charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause," based upon his undisputed failure to notify the County of his license suspensions and changes in vital information as required by the County's policies that gave Pratt up to thirty days to notify Merulla "of a change in [the] status of a job requirement," here, a CDL. We find no merit to his contention that while he was still employed but on medical leave, he was somehow relieved of his obligation to keep his employer informed about his driver's license and CDL statuses. The County's concern about its drivers being properly licensed or kept off the roads is self-evident and justified.

We find equally without merit Pratt's challenge to his termination. In light of Pratt's prior disciplinary record and threat to public safety caused by his failure to properly maintain the truck, or to keep his employer notified of the status of his licenses, his violations were sufficiently severe that termination without following progressive discipline was appropriate, especially considering his prior suspension for the very same reason. See In re Stallworth, 208 N.J. 182, 196-97 (2011); Herrmann, 192 N.J. at 33-34.

To the extent, we have not expressly addressed any of Pratt's remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION