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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5610-15T3

IN THE MATTER OF COREY CORBO,
UNION CITY POLICE DEPARTMENT.

Argued November 28, 2017 – Decided March 1, 2018

Before Judges Fasciale and Moynihan.

On appeal from the Civil Service Commission, Docket No. 2015-2471.

Steven J. Kaflowitz argued the cause for appellant (Caruso Smith Picini, PC, attorneys; Steven J. Kaflowitz, on the letter brief).

Kenneth B. Goodman argued the cause for respondent (O'Toole Fernandez Weiner Van Lieu, LLC, attorneys; Kenneth B. Goodman, on the brief).

PER CURIAM

Appellant Corey Corbo appeals from a final agency decision by the Civil Service Commission (CSC) upholding an administrative law judge's (ALJ) initial decision removing him as a Union City police officer because he ingested cocaine. He contends the CSC acted without a quorum and utilized unreliable hearsay to prove

the charges against him in violation of the residuum rule.[1] We agree that no competent evidence was adduced against Corbo and reverse the CSC's decision.

We apply the standard of review recently announced in In re Hendrickson, 451 N.J. Super. 262, 272-73 (App. Div.), certif. granted, 231 N.J. 143 (2017),[2] and will, in our limited role, affirm an ALJ's findings if "they are supported by substantial credible evidence in the record," but afford no deference to the ALJ's legal conclusions and review them de novo. As in Hendrickson, the ALJ's decision was deemed adopted[3] because the CSC, for reasons beyond its control, could not muster a quorum.[4]

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[1] N.J.A.C. 1:1-15.5.

[2] Hendrickson was published after the parties submitted their respective briefs.

[3] Although we reviewed Hendrickson, 451 N.J. Super. at 266, under N.J.S.A. 52:14B-10(c), and, in this case, consider N.J.S.A. 40A:14-204 – a statute specific to police discipline cases – both statutes require that an ALJ's decision be reviewed within forty-five days, and, unless the agency acts, the ALJ's decision is deemed adopted.

[4] As noted in Hendrickson, 451 N.J. Super. at 268 n.4, after the terms of two CSC members ended in December 2015, the CSC was left with one member. The CSC cancelled all meetings from January 2016 until October 19, 2016, when it resumed meetings after new members were appointed. Ibid. Here, the CSC's July 25, 2016 letter to the parties advised them it did not have a quorum and – not having obtained both parties' consent for additional extensions, N.J.A.C. 1:1-18.8(e), and declining to extend the time for good cause, N.J.S.A. 40A:14-204 – the ALJ's initial decision was deemed final.

But without the CSC's review, there is no extant "particular and superior expertise in the legislative arena in which [the agency] functions." Id. at 273. Thus we apply, not our usual "highly deferential review of agency decisions," but the less deferential bench trial standard of review. Ibid.

We determine Corbo's argument that the CSC's decision was invalid because it acted without a quorum is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). The CSC did not act without a quorum. The ALJ's decision was deemed adopted pursuant to N.J.S.A. 40A:14-204 without any action by the CSC.

The incident that triggered the City's action against Corbo began when police and emergency medical personnel responded to a residence in Monroe Township. Monroe police officer Jamey DiGrazio testified that medical personnel, who were upstairs in the residence performing CPR on an unconscious and intubated Corbo, told him that Corbo likely overdosed. DiGrazio went downstairs and engaged Corbo's then-girlfriend, Jessica Garcia — who at the time, like Corbo, was a Union City police officer — in conversation. DiGrazio described Garcia as "visibly upset" and "worked up, anxious, you know, breathing more heavily" during his initial conversation with her during which he gathered pedigree information. DiGrazio left Garcia to return upstairs and, after

observing Corbo, went back downstairs, sat with Garcia, told her Corbo's "health was failing," and asked her if she had information about anything Corbo may have ingested "that may help paramedics give him better care." Garcia told him that Corbo "did a bump about five days ago" and clarified that it was a bump of cocaine.[5]

The City's proofs presented before the ALJ against Corbo included Garcia's statements introduced through DiGrazio, hospital records, and a laboratory report containing the results of an immunoassay screening test performed at the hospital that indicated Corbo had cocaine in his system. Garcia's statements and the test results were both hearsay. Although the City was not bound by the rules of evidence in the administrative proceeding, N.J.S.A. 52:14B-10(a), and hearsay – subject to the ALJ's discretion – was admissible, N.J.A.C. 1:1-15.5(a), "some legally competent evidence must [have] exist[ed] 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).

> Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights

[5] DiGrazio stated he understood a "bump" to mean a "snort of a drug."

of a party, there must be a residuum of legal and competent evidence in the record to support it.

[Weston v. State, 60 N.J. 36, 51 (1972).]

The ALJ, in ruling Garcia's statement was admissible as an excited utterance, misapprehended N.J.R.E. 803(c)(2), "[t]he essential elements of [which] are 1) '[a] statement relating to a startling event or condition[,]' 2) 'made while the declarant was under the stress of excitement caused by the event or condition[,]' and 3) 'without opportunity to deliberate or fabricate.'" State v. Branch, 182 N.J. 338, 365 (2005) (third alteration in original) (quoting N.J.R.E. 803(c)(2)). Garcia's statement did not relate to Corbo's medical distress, but to his ingestion of "a bump" of cocaine five days prior to her statement. Although DiGrazio described Garcia as upset and anxious during their initial conversation, he did not describe her condition during the later conversation when she disclosed Corbo's prior ingestion. Moreover, Garcia was not under stress or excitement caused by the ingestion; any such condition – if it existed – was caused by the medical emergency. And, even though DiGrazio said he told Garcia about Corbo's failing health, we do not know if Garcia perceived Corbo's condition as described by DiGrazio; she was downstairs the entire time DiGrazio was in the residence. Further, time passed; although we do not know the time between their first and second

conversations, we do know Garcia talked to DiGrazio "about five days" after she said Corbo ingested cocaine. The ALJ's confusing statement that she did "not discount it for the additional statement [Garcia] made that it occurred five days earlier because her instinct to guard for self-defense could occur during the same excited utterance," does not account for the fact that there was certainly time to deliberate, reflect or misrepresent, see State v. Cotto, 182 N.J. 316, 330-31 (2005) (holding victims' statements made to police fifteen to twenty minutes after a robbery, burglary and assault should not have been admitted because the declarants had "at least several minutes to reflect" and the statements narrated past occurrences not coincident with the robbery). Also compelling is that the basis for Garcia's knowledge about the ingestion was never established, further calling into question the statement's reliability.

The ALJ, without explanation except to agree with the argument she read in respondent's brief, also held Garcia's statement was admissible under N.J.R.E. 803(c)(4) and 803(c)(25).

We determine the statement was not admissible under N.J.R.E. 803(c)(4) because it was not made by the patient, thus undermining the rationale for the rule that a patient – with first-hand information about his or her condition – would believe that a physician's effective treatment depends on the accuracy of that

information. R.S. v. Knighton, 125 N.J. 79, 87 (1991). Further, statements concerning causes of symptoms are usually not admitted under this rule. Cestaro v. Ferrara, 57 N.J. 497, 501 (1971). This caution is particularly fitting in this case because, again, the source of Garcia's purported knowledge was never made known.

The ALJ made no findings to buttress her ruling that Garcia's statement was against Garcia's interest, simply concluding that Garcia's statement was "so far contrary to [her] pecuniary, proprietary, or social interest, or so far tended to subject [her] to civil or criminal liability . . . that a reasonable person in [her] position would not have made the statement unless [she] believed it to be true." N.J.R.E. 803(c)(25). We therefore do not know what evidence in the record would support such a finding, and conclude no sufficient basis was established to justify the admission of the statement under that rule. See In re Tr. Created by Agreement Dated Dec. 20, 1961, 399 N.J. Super. 237, 253-54 (App. Div. 2006), aff'd o.b., 194 N.J. 276 (2008) (stating although a judge may rely upon reasons expressed by a party in issuing a decision, she must make "clear the extent of [her] agreement with and reliance on [the] proposed findings of fact and conclusions of law," demonstrating that she "carefully considered the evidentiary record and did not abdicate [her] decision-making responsibility").

We disagree with Corbo's argument that the medical reports were inadmissible because they were unauthenticated. N.J.R.E. 901. Although no witness authenticated the medical records, they were proved to be genuine and authentic by Union City police lieutenant Anthony Facchini's testimony that he ordered Corbo to produce the medical records; saw Corbo obtaining records in the hospital where Facchini was also attempting to obtain them; and that one of Corbo's prior attorneys delivered the medical records the next morning. See Konop v. Rosen, 425 N.J. Super. 391, 411 (App. Div. 2012) (acknowledging a long history of admitting documents that have been proved prima facie genuine and authentic).[6]

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[6] The ALJ noted Corbo did not object to the records at least ten days prior to the hearing and they were therefore presumed authentic. N.J.A.C. 1:1-15.6 provides:

> Any writing offered into evidence which has been disclosed to each other party at least [ten] days prior to the hearing shall be presumed authentic. At the hearing any party may raise questions of authenticity. Where a genuine question of authenticity is raised the judge may require some authentication of the questioned document. For these purposes the judge may accept a submission of proof, in the form of an affidavit, certified document or other similar proof, no later than [ten] days after the date of the hearing.

Corbo's counsel raised issues of authenticity for the first time at trial, but the ALJ did not require any further submission.

We previously recognized the business records hearsay exception, N.J.R.E. 803(c)(6), "routinely permits the admission of medical records." Konop, 425 N.J. Super. at 403. There must be proof, however, of three conditions:

> First, the writing must be made in the regular course of business. Second, it must be prepared within a short time of the act, condition or event being described. Finally, the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence.
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> [State v. Matulewicz, 101 N.J. 27, 29 (1985); see also Konop, 425 N.J. Super. at 403.]

Inexplicably, no hospital personnel – or any other witness – testified that the medical records met any of the requisite conditions. Absent any qualifying evidence, the records were not properly admitted as business records. The record is also bereft of any proofs regarding the admissibility of the laboratory results embedded in those hospital records. Our Supreme Court, considering the admissibility of a forensic chemist's laboratory report identifying a substance as marijuana under the predecessor business records rule,[7] instructed:

> [P]roofs should be adduced to reflect the relative degrees of objectivity and subjectivity involved in the procedure; the regularity with which these analyses are done; the routine quality of each analysis; the

[7] Evid. R. 63(13).

> presence of any motive to single out a specific analysis for the purpose of rendering an untrustworthy report, and the responsibility of each State Police chemist to make accurate and reliable analyses.
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> [Matulewicz, 101 N.J. at 30.]

The mentioned factors are not exhaustive, and a judge may require other proof regarding the trustworthiness of the evidence. Id. at 31. The ALJ did not perpend the laboratory results under the announced standard.

Both items of evidence utilized to discipline Corbo were hearsay. Hearsay cannot buttress hearsay under the residuum rule. In that no competent evidence was introduced to prove Corbo's ingestion of cocaine, we are compelled to reverse the decision removing him as a Union City police officer.

Finally, we determine the City's argument that an adverse inference against Corbo should have been drawn because he did not testify is without sufficient merit to warrant discussion here. R. 2:11-3(e)(1)(E). The record does not indicate the City gave notice to the court and opposing counsel of its request to invoke Clawans;[8] it first raised the issue in its written summation and the ALJ did not rule on it. See Clawans, 38 N.J. at 172 (noting "[t]he better practice . . . is for the party seeking [an adverse

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[8] State v. Clawans, 38 N.J. 162 (1962).

inference charge] to advise the trial judge and counsel out of the presence of the jury, at the close of his opponent's case, of his intent to so request").

Reversed.

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

CLERK OF THE APPELLATE DIVISION