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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0462-21**

PHILLIP IZZO,

Petitioner-Appellant,

v.

OFFICE OF REGULATORY
AFFAIRS,

Respondent-Respondent.

Argued April 25, 2023 – Decided June 19, 2023

Before Judges Geiger and Susswein.

On appeal from the New Jersey Department of
Community Affairs, Docket No. CAF 14686-16.

Gerd W. Stabbert Jr., argued the cause for appellant
(Bressler, Amery & Ross, PC, attorneys; Gerd W.
Stabbert and Ronald J. Campione, on the briefs).

George N. Cohen, Deputy Attorney General, argued
the cause for respondent (Matthew J. Platkin, Attorney
General, attorney; Sookie Bae-Park, Assistant
Attorney General, of counsel; George N. Cohen, on
the brief).

PER CURIAM

Petitioner Phillip Izzo appeals from a final agency decision by the Department of Community Affairs (DCA) to revoke his licenses as a building inspector. The DCA Commissioner adopted the initial decision issued by an Administrative Law Judge (ALJ), who, after assessing the credibility of the witnesses who testified at the evidentiary hearing, found petitioner violated the Uniform Commercial Code (UCC) and committed gross negligence or misconduct in the performance of his duties by pre-signing and pre-dating electrical inspection approval stickers without performing the inspections himself.

Petitioner contends the ALJ's findings are not supported by sufficient credible evidence and that the ALJ erred in refusing to draw an adverse inference against DCA investigators as they did not preserve interview notes and testified solely from memory. He also contends the revocation of all ten of his inspection licenses is a disproportionate sanction because he was only found to have improperly issued approval stickers for electrical inspections. After carefully reviewing the record in light of the governing legal principles, we affirm substantially for the reasons explained in the DCA's final agency decision and the initial decision rendered by the ALJ.

I.

We need only briefly summarize the procedural history and relevant facts, which are thoroughly recounted in the ALJ's initial decision. In May 2016, the DCA served petitioner with a notice of violation, alleging that on February 29, 2012, he did not actually perform electrical inspections at residential properties at Jenny Jump Court and Hackberry Place in Raritan Township despite recording that the inspections had been conducted. The notice of violation also alleged he improperly issued a certification of approval at a commercial facility.¹

The matter was referred to the Office of Administrative Law (OAL), and an ALJ convened an evidentiary hearing in May 2019. The record was closed in October 2019. On July 13, 2020, the ALJ issued a thirty-one-page initial decision, finding petitioner had failed to properly perform the two residential inspections in violation of N.J.A.C. 5:23-5.25(a)(1) and (a)(5). The ALJ found that petitioner did not complete the inspections himself and instead gave pre-

¹ The charges regarding the certification of approval for the commercial facility were dismissed by the ALJ, who found the DCA did not prove that allegation by a preponderance of credible evidence. The DCA Commissioner adopted that finding and thus that incident is not before us in this appeal.

signed and pre-dated approval stickers to a subordinate, Robert Trivett. Trivett, who was not qualified to do the electrical inspections at issue, was told to affix the pre-signed stickers to the relevant appliances. The ALJ accredited Trivett's testimony that this had happened on previous occasions. She also accepted as true Trivett's testimony that petitioner asked him to sign a statement in April 2012 indicating that petitioner had been present at the February 29, 2012 inspections. Trivett said he refused to sign the statement because it was not true.

The ALJ denied petitioner's motion for an adverse inference against the DCA based on the DCA's alleged failure to provide complete discovery. Specifically, petitioner argued the DCA withheld recordings of witness interviews, but there was no proof that any such recordings ever existed.

While acknowledging that petitioner had no other violations on his record, the ALJ determined that all of his licenses, not just his electrical inspection license, should be revoked. Petitioner urged the DCA Commissioner to reject the ALJ's decision as to the residential violations and revocation of his licenses but adopt the dismissal of the commercial property violation. See supra note 1. On September 1, 2021, the Commissioner adopted the ALJ's initial decision in its entirety.

Petitioner raises the following contentions for our consideration:

POINT I

[PETITIONER] DID NOT VIOLATE N.J.A.C. 5:23-5.25(a)(1) and (a)(5) IN HIS PERFORMANCE OF TWO RESIDENTIAL ELECTRICAL INSPECTIONS.

A. The Commissioner's Final Decision was arbitrary, capricious or unreasonable or lacked fair support in the evidence when she mischaracterized, ignored or otherwise did not consider facts in support of [petitioner]'s defenses.

1. The DCA's inspection of Jenny Jump and Hackberry Place took place months after [petitioner]'s inspections.

2. No reliable credible evidence exists that [petitioner] violated the UCC concerning Hackberry Place.

3. The Uniform Construction Code Requirements and New Jersey Municipal Procedures Manual Guidance on Inspection Stickers.

4. No reliable credible evidence exists that [petitioner] violated the UCC seven to nine times.

B. The ALJ and Commissioner erred in denying [petitioner]'s request for an adverse inference against the DCA when it withheld materials from its investigation of [petitioner].

POINT II

THE COMMISSIONER ERRED IN REVOKING ALL
OF [PETITIONER]'S BUILDING INSPECTION AND
CONSTRUCTION SUB-CODE OFFICIAL
LICENSES.

A. The punishment imposed on [petitioner] is so disproportionate to the offense, in light of all the circumstances, to shock one's sense of fairness when the allegations concerned one license implicated in two inspections out of [petitioner]'s two[-]decade professional history.

B. The Final Decision failed to properly consider factors mitigating the harsh penalty imposed, including [petitioner]'s numerous professional accolades and exemplary history.

II.

The scope of our review is narrow. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). That is particularly true "[i]n light of the executive function of administrative agencies." Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995). Accordingly, "[a]n agency's determination on the merits 'will be sustained 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, 206 N.J. at 27). The party challenging

the administrative action bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

On appeal, the judicial role in reviewing an administrative action is generally limited to three inquires:

(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.

[Allstars, 234 N.J. at 157 (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field."
In re Herrmann, 192 N.J. 19, 28 (2007).

"Reasonable credibility determinations are afforded similar deference."
In re Pontoriero, 439 N.J. Super. 24, 35 (App. Div. 2015); see also In re Brown, 458 N.J. Super. 284, 290 (App. Div. 2019) (noting deference to administrative decisions "largely emanates from our appreciation of the agency's expertise

combined with its opportunity to see and hear the witnesses when making credibility findings"). Moreover, an agency head may not "reject or modify" an ALJ's credibility findings "unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c).

III.

We first address petitioner's assertion that the DCA did not meet its burden of proving that the residential inspections were not conducted properly. He argues the ALJ's initial decision lacks "fair support in the evidence" because certain relevant facts and information were ignored. We find no abuse of discretion in the ALJ's findings of fact. We also note the ALJ dismissed one of the DCA's allegations when she determined the agency had not proved its case with respect to that specific incident.

This case boils down to a question of credibility. The ALJ found that petitioner had instructed his subordinate, Trivett—who was not qualified to perform electrical inspections or issue electrical inspection approvals—to place the approval stickers at the residential premises. We reiterate and stress Trivett testified that after the DCA investigation was launched, petitioner asked him to

sign a false statement regarding petitioner's role in performing the residential electrical inspections. The ALJ found Trivett to be credible. She also found petitioner was not truthful in his testimony. We do not believe the ALJ acted arbitrarily or capriciously in finding the pertinent facts or in relying on petitioner's efforts to cover up his transgressions by asking a subordinate to sign a false affidavit.

Nor are we persuaded by petitioner's contention that the evidence presented by the DCA was insufficient because the text of the UCC did not expressly preclude him from providing his subordinate with the inspection stickers to place on the electrical appliances. It is long settled that "[t]he powers of an administrative agency should be liberally construed to permit the agency to achieve the tasks assigned to it." In re Heller, 73 N.J. 292, 303 (1977) (quoting In re Comm'r of Banking & Ins. v. Parkwood Co., 98 N.J. Super. 263, 271–72 (App. Div. 1967)). The Court in Heller added, "[w]here, as here, the task of the regulatory agency is 'to protect the health and welfare of members of the public' by assuring that all licensed practitioners are qualified, competent and honest, the gr[ant] of implied powers is particularly important." Id. at 303–04 (quoting Rite Aid of N.J., Inc. v. Bd. of Pharmacy, 124 N.J. Super. 62, 66–68 (App. Div. 1973)).

Importantly for purposes of this appeal, our Supreme Court has also recognized that it would be impossible for the Legislature to list and specify every single "act or course of conduct" that would fall under the category of "bad moral character" or "unprofessional and dishonorable conduct"; thus, one could have engaged in unprofessional conduct that was not specifically identified beforehand. In re Polk, 90 N.J. 550, 574 (1982) (quoting Heller, 73 N.J. at 300–01).

Accordingly, although the UCC does not specifically state it is a violation to pre-approve inspection stickers, the DCA has the authority to determine what constitutes "unprofessional and dishonorable conduct" that would qualify as a violation of the code. Ibid. The agency did not act arbitrarily or capriciously in concluding that petitioner engaged in misconduct in the performance of his duties.

We also reject petitioner's contention that the ALJ abused her discretion by declining to draw an adverse inference against the DCA investigators based on non-disclosure of investigative notes and recordings purportedly made when they were interviewing witnesses. A spoliation inference may be drawn when an ALJ finds it appropriate to "infer that the evidence destroyed or concealed would not have been favorable to the spoliator" and such inference serves to

"even[] the playing field where evidence has been hidden or destroyed." Jersita v. Murray, 185 N.J. 175, 202 (2005) (quoting Rosenblit v. Zimmerman, 166 N.J. 391, 401–02 (2001)).

In this instance, the ALJ acted within her discretion in denying petitioner's motion and declining to draw an adverse inference. With respect to petitioner's claim that the DCA investigators destroyed interview recordings, he has not presented substantial credible evidence that such recordings were ever made. His spoliation claim is based on one witness's testimony that he thought the DCA investigators might have recorded his interview, but that witness was never shown a transcript or asked to review any recordings of his interview. We conclude the ALJ did not abuse her discretion in accrediting the testimony of DCA witnesses who testified from memory, notwithstanding the extended period of time between the interviews they conducted as part of their investigation and the evidentiary hearing.

Finally, we address petitioner's contention that the ALJ and the DCA acted arbitrarily and capriciously by revoking all ten of his inspector licenses, including licenses that had nothing to do with the electrical inspections at issue

in this matter.² As we have noted, we generally defer to an agency's expertise and knowledge of a particular field. So too, we owe deference to an agency with respect to the sanction imposed for an administrative violation. See Herrmann, 192 N.J. at 28.

In her initial decision, the ALJ concluded that revoking all of petitioner's licenses was appropriate because "[t]he public relies upon the accuracy of inspections to ensure that work done at their homes or at other property has been done properly and meets code requirements for safety." The ALJ found that given petitioner's years of experience and knowledge, he should have known better than to have an unlicensed individual complete inspections and affix pre-signed inspection stickers on electrical appliances. We are especially concerned that once he realized these incidents were under investigation, petitioner asked his subordinate to sign a false affidavit in an apparent attempt to conceal his wrongdoing.

In these circumstances, it was well within the DCA's prerogative to disqualify petitioner as a building inspector for all trades. Inspections must

² Petitioner held numerous licenses, including Construction Official, Building Subcode Official, Building Inspector, Electrical Subcode Official, Electrical Inspector, Fire Protection Subcode Official, Fire Protection Inspector, Plumbing Subcode Official, and Plumbing Inspector.

satisfy state procedural requirements not only to assure that inspected appliances and facilities were properly installed but also to assure public confidence in the safety of such equipment. Any manner of corruption, not just bribery, would undermine such confidence. In this instance, we are not dealing with a demonstrated lack of technical knowledge with respect to a single trade. Indeed, petitioner's technical qualifications with respect to any of his licenses are not in doubt. But this case is not about technical proficiency. Rather, it is about protecting the integrity of the inspection process.

To the extent we have not specifically addressed them, any remaining contentions raised by petitioner lack sufficient merit to warrant discussion. 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