SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1487-21

L.K. and T.K., on behalf of minor child, A.K.,

Petitioner-Appellants,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, BURLINGTON COUNTY,

Respondent-Respondent.

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COMMISSIONER OF EDUCATION,

Respondent.

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Submitted September 20, 2023 – Decided October 17, 2023

Before Judges Currier and Susswein.

On appeal from the New Jersey Commissioner of Education, Docket No. 82-3/16.

David R. Giles, attorney for appellant.

Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, LLC, attorneys for respondent Board of Education of the Township of Mansfield (Casey P. Acker, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent Commissioner of Education (Sadia Ahsanuddin, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Petitioners L.K. and T.K.[1] appeal from a revised final agency decision by the Commissioner of Education upholding the determination by the Mansfield Township Board of Education (Board) that their seven-year-old daughter, A.K., engaged in conduct constituting harassment, intimidation, and bullying (HIB)[2] of another second-grade student, N.V., who was transitioning from expressing herself as male to female.[3] This case returns to us after we remanded for the Commissioner to provide further reasons to support the agency's decision rejecting some of the factual and credibility findings of the Administrative Law

[1] We use initials to refer to the petitioners and the children involved to protect their privacy.

[2] HIB is defined in N.J.S.A. 18A:37-14, which is part of the Anti-Bullying Bill of Rights Act (Act), N.J.S.A. 18A:37-13 to 32.1.

[3] Out of respect for N.V.'s gender expression, we refer to N.V. using feminine pronouns.

Judge (ALJ), who had concluded the Board's determination was arbitrary, capricious, or unreasonable. We stated in our prior decision that we expected the Commissioner on remand to explain in detail why the ALJ's assessment of the pertinent testimony was deficient. We are satisfied the Commissioner's latest decision provides suitably detailed reasons for diverging from the ALJ's factual findings and, therefore, we affirm.

The extensive procedural history and pertinent facts are thoroughly recounted in our prior opinion and need only be briefly summarized here. In September 2015, while on a school bus, A.K. questioned N.V. about why she was wearing a dress. That upset N.V., who told A.K. that she would report the incident. That, in turn, upset A.K., and both students exited the school bus crying.

The school's anti-bullying specialist (ABS) met with both children. The ABS then contacted A.K.'s mother, T.K., and discussed the school bus incident. That night, T.K. spoke with A.K. and attempted to explain that N.V. does not like being questioned about her clothes and A.K. should no longer do so. The next day, during lunch, A.K. again interacted with N.V. and commented about N.V.'s decision to "tell[] on" her.

To provide context for this protracted litigation, we note the circumstances pertaining to the initial incident on the school bus are not disputed. The circumstances of the ensuing incident at lunch, in contrast, remain hotly disputed.

The Board initiated an HIB investigation. A report was prepared and provided to the school superintendent, who presented it to the Board at its October 19, 2015 meeting. The Board voted to accept the superintendent's recommendation that HIB occurred.

Petitioners challenged that determination at a hearing before the Board on November 16, 2015. In December 2015, petitioners were informed the Board upheld its initial decision. Petitioners next appealed to the Commissioner, and the matter was submitted to the Office of Administrative Law (OAL) as a contested case.

The ALJ took testimony on five dates between September 2017 and February 2018. In January 2019, the ALJ issued a forty-two-page written opinion reversing the Board's decision and ordering the HIB finding against A.K. be removed from her student file. In April 2019, the Commissioner rejected the ALJ's decision and dismissed petitioners' administrative appeal.

A.K.'s parents appealed the final agency decision. We issued an opinion in November 2020 holding the Commissioner's rejection of the ALJ's credibility-based factual findings was not adequately explained. We remanded the matter to the Commissioner "to make explicit findings as to whether the ALJ's assessment of the testimony regarding A.K.'s allegedly persistent conduct was arbitrary, capricious, or unreasonable, or was not supported by sufficient, competent, and credible evidence in the record." We did not retain jurisdiction.

In December 2021, the Commissioner again rejected the ALJ's conclusions, issuing a fourteen-page written decision with substantially more detail than the first agency decision. The present appeal followed. Petitioners contend the Commissioner failed to show the ALJ's findings regarding A.K.'s disputed repetitive conduct, and regarding the impact on N.V., are arbitrary, capricious, or unreasonable, or are not supported by sufficient credible evidence. Petitioners also contend the Commissioner's decision on remand improperly relies on new grounds to uphold the Board's HIB determination. That is, even if the lunch incident had not occurred, the school bus incident was sufficient by itself to constitute HIB.

The scope of our review of an administrative agency's final decision is limited. In re Herrmann, 192 N.J. 19, 27 (2007). The "final determination of

an administrative agency . . . is entitled to substantial deference." In re Eastwick Coll. LPN- RN Bridge Program, 225 N.J. 533, 541 (2016) (citing Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 48 (2007)); see also In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (finding a "'strong presumption of reasonableness attaches to the actions of the administrative agencies.'") (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994)).

An appellate court "ordinarily should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-W. Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008); see also Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (noting the abuse of discretion standard is established "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'") (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

When a contested case is submitted to the OAL for a hearing, the agency head must review the record submitted by the ALJ and give attentive

consideration to the ALJ's initial decision. N.J. Dep't of Pub. Advoc. v. N.J. Bd. of Pub. Util., 189 N.J. Super. 491, 506 (App. Div. 1983). The agency head nonetheless remains the primary factfinder and maintains the ultimate authority to reject or modify findings of fact, conclusions of law, or interpretations of agency policy. Id. at 507 (citing N.J.S.A. 52:14B-10(c)).

ALJs, however, are not "second-tier players or hold an inferior status as factfinders." In re Hendrickson, 235 N.J. 145, 160 (2018). "When an ALJ has made factual findings by evaluating the credibility of lay witnesses, the [agency head] may no longer sift through the record anew to make its own decision . . . ." Cavalieri v. Bd. of Trs. of Pub. Emps. Ret. Sys., 368 N.J. Super. 527, 534 (App. Div. 2004). Accordingly, when an agency head strays from the factual findings of an ALJ, we need not accord the agency head the level of deference we ordinarily recognize in reviewing final administrative decisions. See H.K. v. State of N.J. Dep't of Hum. Servs., 184 N.J. 367, 384 (2005) (noting it is "not for . . . the agency head to disturb" ALJs' credibility determinations based upon live witness testimony); Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587-88 (1988) (declining to defer to the agency head's assessment of witness credibility when the ALJ was the one who heard the live testimony).

Importantly for purposes of this appeal, an agency head may not reject or modify findings of fact as to issues of credibility of lay witness testimony unless the agency head determines from a review of the record that the ALJ's 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). If the agency head chooses to exercise the authority to reject or modify such findings, the agency decision must "state clearly [and with particularity] the reasons for doing so." Ibid.

Applying these foundational principles to the matter before us, we are satisfied the Commissioner adequately stated reasons for rejecting the ALJ's factual findings with respect to whether a second HIB incident occurred after A.K. had been told not to repeat the initial behavior that upset N.V. The Commissioner noted the ALJ's finding was based, in part, on what the ALJ characterized as inconsistent testimony by school officials. The Commissioner found, however, that the three school administrators who were involved—the ABS, the school principal, and the district superintendent—all agreed a second incident occurred. The Commissioner determined further corroborative evidence of the lunch incident was not required.

In sum, given the Commissioner's detailed consideration of the evidence, we decline to substitute our judgment and thus conclude the Commissioner's determination that the second episode occurred was not arbitrary, capricious, or unreasonable. In these circumstances, we need not address petitioners' contention that it was improper for the Commissioner to find for the first time in the remand decision that the school bus incident was sufficient by itself to justify a finding of HIB. We note nothing in the Act requires proof of a pattern of behavior as a prerequisite for a finding of HIB. To the contrary, the statutory definition of HIB expressly provides the term includes any gesture or verbal or physical act that satisfies the elements of the definition, "whether it be a single incident or a series of incidents. . . ." N.J.S.A. 18A:37-14.

To the extent we have not specifically addressed them, any remaining contentions raised by petitioners lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.