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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3165-20**

CAPTAIN LOUIS BETTINELLI,

Plaintiff-Appellant,

v.

**NEW JERSEY MARITIME
PILOT & DOCKING PILOT
COMMISSION, TIMOTHY
DACEY, BRIAN MCEWING,
JACOB SHISHA, BJOERN KILS,
DENNIS LOMBARDI, BRENDAN
ROBERTS, and CHARLES
WOWKANECH,**

Defendants-Respondents.

Argued March 21, 2023 – Decided July 24, 2023

Before Judges Messano, Gilson and Rose.

On appeal from the Superior Court of New Jersey,
Chancery Division, Essex County, Docket No.
C-000063-21.

Joel N. Kreizman argued the cause for appellant
(Scarinci & Hollenbeck, LLC, attorneys; Joel N.
Kreizman, on the briefs).

Amy Chung, Deputy Attorney General, argued the cause for respondents (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Brian J. Ashnault, Deputy Attorney General, on the brief).

PER CURIAM

This appeal presents an unusual procedural course. Although we conclude plaintiff's appeal was untimely filed – and he waived any argument concerning a June 21, 2021 Chancery Division order that transferred his verified complaint to this court – we nonetheless address the merits of plaintiff's appeal, which challenges a February 16, 2021 final decision of the New Jersey Maritime Pilot and Docking Pilot Commission. Having considered plaintiff's contentions in light of the record and applicable legal principles, we affirm.

I.

We begin with the protracted procedural history. On July 27, 2021, plaintiff Captain Louis Bettinelli filed an amended notice of appeal (NOA) from a June 21, 2021 Chancery Division order, granting defendants' motion to transfer his April 15, 2021 verified complaint to this court pursuant to Rule 2:2-3(a)(2).¹

¹ The NOA erroneously reflects that plaintiff appeals from a "State Agency decision entered on 06/21/2021." (Emphasis added). The NOA also lists the Chancery Division judge's name and the trial court's docket number; it does not reference the Commission's February 16, 2021 final decision.

Plaintiff's complaint averred the Commission violated the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by punishing him for his alcohol use disorder and that the parties' April 6, 2018 settlement agreement was made under duress. However, the trial court was not persuaded that plaintiff had asserted tort and contract claims, sought relief against private parties, or that his claims warranted "development of a full record and judicial fact finding." Instead, the court found plaintiff's complaint challenged the Commission's February 16, 2021 final decision that denied plaintiff's application to reinstate his docking pilot license pursuant to the terms of the settlement agreement. The court thus concluded it lacked jurisdiction over plaintiff's action.

Before filing his merits brief, plaintiff filed two successive motions. Plaintiff first moved to remand the matter to the trial court to develop a factual record on his claims that the Commission's "enforcement of an unconscionable settlement agreement . . . effectively punishes him for his alcoholism by permanently revoking his pilot docking license" in violation of the LAD and the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -7. We denied plaintiff's motion on August 26, 2021.

Plaintiff thereafter moved to supplement the record with his verified complaint and supporting certifications. Plaintiff contended this evidence

demonstrated "duress and bias" surrounding the execution of the settlement agreement at issue. We denied plaintiff's motion on November 29, 2021. Thereafter, plaintiff filed his merits brief.

Although plaintiff's NOA identifies the June 21, 2021 Chancery Division order from which he appeals, his merits brief does not address the trial court's decision. Instead, plaintiff raises the following points, challenging the Commission's final decision:

POINT I

THE PUBLIC POLICY OF THE STATE OF NEW JERSEY IS TO REFRAIN FROM PUNISHING PERSONS WHO SUFFER FROM ALCOHOL USE DISORDER.

POINT II

[PLAINTIFF]'S PURPORTED SETTLEMENT WITH THE COMMISSION IS NOT SACROSANCT. IT CAN BE AND SHOULD HAVE BEEN SET ASIDE.

POINT III

THIS COURT IS NOT REQUIRED TO GIVE SPECIAL DEFERENCE TO THE PILOT COMMISSION'S DETERMINATION.

In their responding brief, defendants first contend plaintiff's appeal of the Commission's decision is untimely. Noting the Commission served its final decision on plaintiff's counsel on February 18, 2021, and plaintiff did not file

his verified complaint in the Chancery Division until April 15, 2021, defendants claim plaintiff failed to meet the forty-five-day limit to appeal from a state administrative agency decision under Rule 2:4-1(b). Defendants further note plaintiff failed to move for an extension of time to file his appeal from the agency's decision or otherwise explain his reasons for the delay.² Defendants nonetheless address the merits of plaintiff's appeal.

For the first time in his reply brief, plaintiff suggests the trial court failed to permit the development of the record in lieu of transferring the matter. He contends the matter "raises issues of public interest and importance" including whether penalties against someone with alcohol use disorder are warranted after a psychologist deems those issues resolved.

As a preliminary matter, to the extent plaintiff now challenges the trial court's transfer order, we need not consider his contentions because they were not raised in his merits brief. See, e.g., Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001) ("Raising an issue for the first time in a reply brief is improper."); L.J. Zucca, Inc. v. Allen Bros.

² Defendants did not move before us to dismiss plaintiff's appeal as untimely. The parties did not provide the transcript of oral argument before the trial court. Accordingly, it is unclear from the record whether defendants raised a timeliness argument before that court.

Wholesale Distributions, Inc., 434 N.J. Super. 60, 87 (App. Div. 2014) (determining that an argument raised for the first time in a reply brief is "deem[ed] . . . to have been waived"). For the sake of completeness, however, we agree with the trial court's conclusion that plaintiff's complaint challenged the Commission's final decision. As such, plaintiff's action was properly transferred to this court.

We further note plaintiff's appeal from the Commission's decision was untimely. Pursuant to Rule 2:4-1(b), appeals from final decisions of state administrative agencies must be filed "within [forty-five] days from the date of service of the decision or notice of the action taken." See also Nw. Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 135 (2001) (quoting R. 2:4-1(b)). Rule 2:4-4(a) permits a maximum thirty-day extension of time "upon motion" and "a showing of good cause and the absence of prejudice." As we have stated, "[t]his same forty-five-day limit applies to a challenge to a state agency action that is improperly filed in a trial court and transferred to the Appellate Division pursuant to Rule 1:13-4," which governs the transfer of actions among courts. Bouie v. N.J. Dep't of Cmty. Affs., 407 N.J. Super. 518, 527 (App. Div. 2009).

Plaintiff argues his eleven-day-late appeal should not be dismissed on a mere technicality and that the Commission was not prejudiced by the delay because the agency "was fully informed of [plaintiff]'s position and suffered no

consequences." Although plaintiff did not move for a thirty-day extension under Rule 2:4-4(a), given the atypical procedural history in this matter, we will relax the forty-five-day limit set forth in Rule 2:4-1(b). See R. 1:1-2(a) ("Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending unless adherence to it would result in an injustice."). Accordingly, we consider the merits of plaintiff's appeal.

II.

The facts in support of plaintiff's application to reinstate his piloting license are set forth at length in the Commission's comprehensive final decision and can be summarized here. In essence, plaintiff was licensed by both the Commission and the United States Coast Guard. In February 2018, the Commission conducted an investigation following a report that plaintiff had consumed alcohol while on duty; attempted to pilot a tanker while intoxicated; failed to cooperate with breathalyzer testing; utilized the services of an unregistered pilot apprentice; and failed to report the incident. The Commission's proposed revocation of plaintiff's license was resolved through a settlement agreement suggested by plaintiff's attorney.

Pursuant to the terms of the April 6, 2018 settlement agreement, plaintiff agreed to the "permanent" and immediate "surrender of his New Jersey State

Docking Pilot License and credentials." He also "agree[d] to waive his rights to an appeal of th[e a]greement to any court or other finder of fact." In exchange, the Commission agreed to take "no further action . . . related [to] the alleged misconduct aboard the [tanker]."

Two years after executing the agreement, plaintiff sought reinstatement of his license. Plaintiff informed the Commission he had completed mandatory rehabilitative treatment for his alcoholism pursuant to a settlement agreement with the United States Coast Guard, which had included the surrender of his Merchant Marine Credential for twelve months. On June 29, 2020, the Commission denied plaintiff's request, citing the terms of the parties' agreement.

On November 4, 2020, plaintiff, through counsel, filed a formal application to restore his license. Attributing the February 2018 incident to his alcoholism, plaintiff argued "the Commission's proposed action was therefore discriminatory" under the LAD and federal law. Plaintiff's application was supported by the March 29, 2019 and January 27, 2020 reports of a clinical psychologist, who treated plaintiff after the February 2018 incident and diagnosed him with "Alcohol Use Disorder in Sustained Remission [greater than twelve] months (Resolved)."

On February 16, 2021, the Commission issued its final decision, denying plaintiff's application. The Commission reemphasized the terms of the settlement agreement, finding plaintiff's application "in effect, s[ought] to circumvent [its] provisions." The Commission elaborated:

The legal brief and certification, provided in support of the application, grossly misstate the factual history underlying [plaintiff]'s willful surrender of his [l]icense - misconstruing the loss of the [l]icense as a unilateral act by the Commission rather than the result of a mutual agreement between the parties. Indeed, the legal brief and certification appear to ignore the existence of the [s]ettlement [a]greement altogether and provide no argument for why the terms of the [s]ettlement [a]greement, including its waiver provision, do not bar [plaintiff]'s post hoc arguments of discrimination.

Addressing the governing law, the Commission accurately explained New Jersey courts have long espoused the policy of resolving litigation through settlements. See, e.g., Puder v. Buechel, 183 N.J. 428, 437-38 (2005); Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div. 1983). Quoting Lerner v. Laufer, 359 N.J. Super. 201, 217 (App. Div. 2003), the Commission recognized: "Courts have held that 'so long as the parties acknowledge that the agreement was reached voluntarily and is for them, at least, fair and equitable' it should be enforced."

The Commission found the violations stemming from the February 2018 incident "did not solely stem from [plaintiff]'s intoxication while on duty and/or his alcoholism." Instead, "[plaintiff] also committed serious violations of regulations dictating the use of services of an 'unregistered pilot' and regulations requiring the reporting of incidents by pilots as well as specimen collection/chemical drug testing." In view of the totality of the violations, "the Commission proposed the revocation of [plaintiff]'s [l]icense." The Commission noted "[plaintiff] fail[ed] to address any of the non-alcohol[-] related violations."

Moreover, the Commission was persuaded that, represented by counsel, "[plaintiff] chose to amicably resolve the matter" through the settlement agreement without a hearing. Accordingly, the Commission found plaintiff waived his right to challenge the Commission's proposed action as discriminatory.

The crux of plaintiff's overlapping points on appeal is that the Commission's decision was arbitrary, capricious, and unreasonable by failing to reinstate his license in view of his successful rehabilitation of his alcohol use disorder and the restoration of his federal license. Plaintiff asserts the Commission's decision therefore punishes his alcohol use disorder

contrary to state and federal law, and public policy. The Commission counters that plaintiff did not raise his alcohol use disorder "when he was subject to discipline in 2018." Nonetheless, the Commission asserts that plaintiff was not subject to punishment for his alcohol use disorder. Instead, the proposed violations related to performing his job while intoxicated and other non-alcohol-related misconduct emanating from the February 2018 incident.

Having considered plaintiff's contentions in view of the circumstances that led to the settlement agreement between the parties and the governing law, we are unpersuaded. Pursuant to our limited standard of review, Russo v. Board of Trustees, Police & Firemen's Retirement System, 206 N.J. 14, 27 (2011), we affirm substantially for the reasons expressed in the Commission's decision, which "is supported by sufficient credible evidence on the record as a whole," R. 2:11-3(e)(1)(D). In doing so, we determine the Commission's decision was not arbitrary, capricious, or unreasonable. In re Stallworth, 208 N.J. 182, 194 (2011). We conclude plaintiff's contentions are without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), beyond the brief remarks that follow.

The LAD prohibits "any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful

employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment." N.J.S.A. 10:5-4.1. In Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 594 (1988), our Supreme Court recognized alcoholism is a handicap within the meaning of the LAD and, as a general matter, an employer may not lawfully discriminate against a person suffering from that disease.

Here, plaintiff's alcohol-induced incident clearly "preclude[d] the performance of [his] particular employment." See N.J.S.A. 10:5-4.1; see also N.J.A.C. 16:64-9.15(b)(1)(i) (permitting the revocation of a pilot's license for "pilotage operations performed while intoxicated"). Moreover, plaintiff faced revocation of his license for violations that included both alcohol- and non-alcohol-related violations. The settlement agreement resolved all contemplated charges and was proposed by plaintiff's counsel prior to the informal hearing before the Commission. In exchange for the permanent surrender of plaintiff's license, the Commission agreed to take "no further action" regarding "the alleged misconduct aboard the [tanker]." We discern no reason to disturb the Commission's decision upholding that agreement and declining to consider plaintiff's post-agreement arguments.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION