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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4259-09T2

LACQUAN HUDSON,

Appellant,

v.

NEW JERSEY TRANSIT
POLICE DEPARTMENT,

Respondent.

Argued December 20, 2011 – Decided

Before Judges Yannotti and Kennedy.

On appeal from the New Jersey Transit Police Department, New Jersey Transit Corporation, Docket No. NJT 11453-08.

Kevin E. Barber argued the cause for appellant (Smith Mullin, P.C. and Niedweske Barber, L.L.C., attorneys; Mr. Barber and Nancy Erika Smith, of counsel and on the brief).

Kathleen Roseme, Deputy Attorney General, argued the cause for respondent (Paula T. Dow, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Roseme, on the brief).

PER CURIAM

Laquan Hudson (Hudson) appeals from a final determination of the New Jersey Transit Police Department (NJTPD or department), which upheld the termination of his employment for conduct unbecoming a police officer and use of intoxicating beverages or drugs. We reverse.

I.

Hudson began his employment with the NJTPD on July 30, 2001. On March 9, 2007, Hudson underwent a drug screening urinalysis. On that date, the Essex County Prosecutor's Office (ECPO) informed the NJTPD that Hudson's urine sample had tested positive for amphetamines. On the same day, Joseph C. Bober (Bober), Chief of Police of the NJTPD, served a letter upon Hudson, informing him that he was suspended without pay as a result of his violation of the NJT Drug and Alcohol Policy. Bober wrote that the suspension was in accordance with the Attorney General's Law Enforcement Drug Testing Police.

On March 12, 2001, Bober issued a letter to Hudson terminating his employment. Hudson appealed to this court from the decision to terminate his employment. Among other things, Hudson argued that he had been denied administrative due process because he was terminated without a hearing as required by N.J.S.A. 27:25-15.1c.

We reversed the NJTPD's decision because Hudson had not been provided with notice of the proposed disciplinary action and the opportunity for a hearing to contest the charges. In re Laquan Hudson, No. A-3646-06 (App. Div. Aug. 1, 2008) (slip op. at 9). We remanded the matter to the agency so that it could proceed with a formal disciplinary action, with notice to Hudson and the opportunity for a hearing to contest the allegations. Ibid.

On August 11, 2008, the NJTPD served Hudson with notice of proposed disciplinary action, charging him with conduct unbecoming an officer and use of intoxicating beverages or drugs. The notice indicated that the basis for the charges was the results of Hudson's March 9, 2007 drug screening urinalysis, which "confirmed positive for amphetamines." The notice also indicated that, if sustained, the charges could result in a suspension of six or more days or termination. Hudson pled not guilty to the charges, and the matter was referred to the Office of Administrative Law (OAL) for a hearing before an Administrative Law Judge (ALJ).

In the OAL, Hudson moved for dismissal of the charges on the ground that the NJTPD failed to file a complaint against him within forty-five days after obtaining information to support the charges, as required by N.J.S.A. 27:25-15.1c. Hudson argued

that, while the NJTPD had received information regarding the positive results of his drug screen on March 9, 2007, the department did not serve him with notice of the charges until August 11, 2008. NJTPD opposed the motion. The ALJ denied the motion, finding that Bober's letters of March 9 and March 12, 2007 provided Hudson with notice of the charges and the basis therefore within the time required by the statute.

At the hearing, Hudson testified that in 2005, Dr. Mauricio Sanchez treated him for obesity and prescribed phentermine, xenical and lasix at that time. Hudson explained, however, that he stopped taking the phentermine pills and started taking ephedrine. He testified that on Mondays through Friday, his wife would ordinarily prepared his breakfast, pack his lunch, and hand him his diet supplements/appetite suppressants, vitamins and drinks as they both left the house.

Hudson stated that he had no idea what his wife was handing him because this was his daily routine. He said that he would not have noticed if his wife had given him phentermine rather than ephedrine. He stated that they tasted the same, and the capsules were "the same size [and] same color."

Sabina Hudson (Sabina), Hudson's wife, testified that, at the time of her husband's suspension, she had been taking a Brazilian diet supplement called "Emigrace Sim," which is also

known as "Herbal Thin." Sabina had purchased this substance on the internet. Sabina stated that "Emigrace Sim" contained an active ingredient, fenproporex. She said that she did not have any more ephedrine and started taking her husband's phentermine caplets. She added that she may have mistakenly given Hudson the "Emigrace Sim" that she had been taking.

Robert Havier, Ph.D (Havier), a forensic toxicologist at the New Jersey State Toxicology Laboratory, testified that Hudson had tested positive for the "class amphetamine, meth amphetamine." He said that Hudson's ingestion of fenproporex would result in a positive test for amphetamine.

Havier explained that urine samples submitted to the Toxicology Laboratory are subjected to two screening tests. A positive result on the screening tests would be confirmed by a gas chromatography, mass spectrometry (GCMS) test. This test consists of "chemical treatment of the urine sample."

Havier said that ephedrine, which is used as a decongestant and as a dietary supplement, would produce a positive test result for amphetamines on the initial test. However, emphedrine would not test positive on the second screening test. He also said that phentermine would test positive for amphetamines on the first and second screening tests but would be eliminated on the confirmatory GCMS test. Havier further testified that

fenproporex would give positive results on the secondary screening test as well as the GCMS.

The ALJ issued an initial decision on November 18, 2009. The ALJ noted that Havier had testified that he could not determine whether the levels of amphetamines found in Hudson's urine came from fenproporex or from the ingestion of an amphetamine or another amphetamine producing drug. The ALJ also noted that the positive results on Hudson's drug screen could have been caused by the ingestion of fenproporex rather than a banned substance. The ALJ found, however, that while Hudson and Sabina had testified credibly, neither witness had provided testimony indicating that Hudson had, in fact, ingested fenproporex.

The ALJ said that Hudson had the burden of providing a credible explanation for the positive test result on the drug screen. The ALJ said that while Hudson and Sabrina had testified credibly, their testimony was "merely congecture" and it was insufficient to rebut the positive results from the laboratory tests. The ALJ concluded that the evidence supported the charges.

On April 2, 2010, Joseph D. Kelly, III (Kelly) of the NJTPD issued a final agency decision in the matter. Kelly adopted the ALJ's determination that the NJTPD had served Hudson with the

charges within forty-five days after receiving information to support the charges, as required by N.J.S.A. 27:25-15.1c. Kelly also determined that the record supported the ALJ's finding that Hudson's urine sample had tested positive for amphetamines, and testimony that Sabina might have given Hudson a diet supplement containing fenproporex "by accident" was "mere conjecture" which was insufficient to "refute a positive laboratory test result."

Kelly determined that the charges had been sustained. Kelly therefore upheld the termination of Hudson's employment for conduct unbecoming a police officer and use of intoxicating beverages or drugs. This appeal followed.

Hudson argues that: 1) the NJTPD's complaint should be dismissed because it was not filed within the time prescribed by N.J.S.A. 27:25-15.1c; 2) the NJTPD and its Chief of Police did not have statutory authority to review the ALJ's initial decision; 3) even if NJTPD had authority to review the ALJ's decision, Kelly should not have rendered the final decision in this matter because he was not a neutral and unbiased decision maker; 4) the court should review the agency's decision de novo; 5) the ALJ and the NJTPD erroneously interpreted the burden of proof on two evidentiary issues; 6) there was insufficient evidence to support the finding that the secondary test eliminated ephedrine as a positive result; and 7) he produced

sufficient evidence to rebut the positive laboratory test result.

II.

Hudson argues that the NJTPD's complaint should be dismissed because the department failed to file a formal complaint charging him with conduct unbecoming a police officer and use of intoxicating drugs within the time prescribed by N.J.S.A. 27:25-15.1c. We do not agree.

N.J.S.A. 27:25-15.1c provides that a person employed by the NJTPD as a police officer shall not be disciplined "unless a complaint charging a violation of [the department's] rules and regulations is filed no later than the [forty-fifth] day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based." The statute further provides that "[a] failure to comply with this section shall require a dismissal of the complaint." Ibid.

It is undisputed that on March 9, 2007, the NJTPD had sufficient information to file charges against Hudson for conduct unbecoming a police officer and use of an intoxicating drug. That was the day the ECPO informed the NJTPD that Hudson's urine sample had tested positive for amphetamines. The NJTPD did not serve a formal complaint upon Hudson until August 11, 2008,

which was ten days after we issued our opinion in Hudson's appeal, remanding the matter to the agency for the institution of formal disciplinary proceedings. In re Laquan Hudson, supra, slip op. at 2-3. According to Hudson, the NJTPD did not file the complaint until September 28, 2010, when it was submitted to the ALJ.

However, as we stated previously, Bober issued a letter to Hudson on March 9, 2007, informing him that he was suspended because he had violated the NJT's policy on alcohol and drug use. In addition, Bober issued a letter to Hudson on March 12, 2007, informing him that he was terminated for this reason. The NJTPD argues that Bober's letters represent substantial compliance with the requirements of N.J.S.A. 27:25-15.1c. We agree.

The "substantial compliance doctrine" applies when a statute establishes strict limitations on the time in which legal proceedings must be initiated. D.R. Horton, Inc. v. N.J. Dept. of Envtl. Prot., 383 N.J. Super. 405, 407 (App. Div. 2006). The doctrine applies "even though a limitations period has been characterized as 'mandatory and jurisdictional.'" Id. at 408 (citing Schaible Oil Co. v. N.J. Dept. of Envtl. Prot., 246 N.J. Super. 29, 31 (App. Div.), certif. denied, 126 N.J. 387 (1991).

The party that invokes the doctrine must show: (1) lack of prejudice to the those who would defend the claim; (2) it has taken steps to comply with the statute; (3) general compliance with the statute's purpose; (4) the defending party had reasonable notice of the claim; (5) the party has provided a reasonable explanation for its failure to strictly comply with the statutory requirements. Id. at 409 (citing Negron v. Llarena, 156 N.J. 296, 305 (1998)).

We are satisfied that the NJTPD has established grounds for application of the substantial compliance doctrine in this case. The record shows that the department took steps to comply with the statute by issuing its letters of March 9 and March 12, 2009, which placed Hudson on notice of the charges against him and the basis of those charges. The department's letters generally complied with the purpose of the statute, which is to guard against the delay in instituting disciplinary actions against officers in the NJTPD. Furthermore, the NJTPD reasonably explained that it did not file a formal complaint because it had issued the letters informing Hudson of the charges, the basis for the charges, his suspension and termination.

Hudson nevertheless argues that he was prejudiced because NJTPD delayed in filing a formal complaint. He contends that because he was not afforded a timely hearing on the charges,

there was a lack of recollection on his part and on the part of his wife with regard to his possible mistaken ingestion of fenproporex. According to Hudson, this lack of recollection led the ALJ to conclude that the testimony that he may have ingested fenproporex was "mere conjecture."

However, Hudson was on notice as of March 9, 2007, that his urine sample had tested positive for amphetamines. Hudson was suspended that day and informed that the positive drug test result was the basis for the suspension. In addition, Hudson was terminated on March 12, 2007, because of the positive test on the drug screening.

Although the NJTPD did not serve it formal complaint until August 2008, and the hearing on the charges was not held until March and April of 2009, Hudson had the opportunity to collect all relevant evidence regarding the positive test results on the drug screen within days of its occurrence. We are therefore satisfied that Hudson was not prejudiced because a formal complaint was not served within the time prescribed by N.J.S.A. 27:25-15.1c.

III.

Next, Hudson argues that the NJTPD is not a "state agency" under N.J.S.A. 52:14B-2(a), and the NJTPD's Chief of Police is not the "head of the agency" under N.J.S.A. 52:14B-2(d). Hudson

therefore contends that the NJTPD and its Chief of Police did not have statutory authority to adopt, reject or modify the ALJ's initial decision pursuant to N.J.S.A. 52:14B-10(c).

The Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -25, provides that, when an administrative agency refers a "contested case" to the OAL for an administrative hearing, the ALJ shall conduct the hearing and thereafter issue an initial decision with recommended findings of fact and conclusions of law. N.J.S.A. 52:14B-10(c). The APA further provides that, upon review of the record and any exceptions or objections filed by the parties, the head of the agency "shall adopt, reject or modify" the ALJ's decision. N.J.S.A. 52:14B-10(c).

The terms "State agency" and "agency" are defined in the APA to mean:

> each of the principal departments in the executive branch of the State Government, and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments now existing or hereafter established and authorized by statute to make, adopt or promulgate rules or adjudicate contested cases, except the office of the Governor.
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> [N.J.S.A. 52:14B-2(a).]

In addition, the term "head of the agency" is defined in N.J.S.A. 52:14B-2(d) to mean and include "the individual or group of individuals constituting the highest authority within

any agency authorized or required by law to render an adjudication in a contested case."

Hudson argues that, for purposes of reviewing the ALJ's initial decision in this case, the New Jersey Transit Corporation (the NJTC) is the "State agency" and the NJTC's Board of Directors is the "head of the agency." We do not agree.

The NJTC was established by the Public Transportation Act of 1979 (the Act), N.J.S.A. 27:25-1 to -34. The NJTC was established as a body corporate and politic within the Executive Branch of the State Government and allocated within the Department of Transportation. N.J.S.A. 27:25-4(a). The NJTC is governed by a seven-member board. N.J.S.A. 27:25-4(b).

The NJTC has the power to "do all acts necessary and reasonably incident to the carrying out of the objectives of this act[.]" N.J.S.A. 27:25-5. Those objectives include the provision of public transportation services. N.J.S.A. 27:25-2. The NJTC is authorized to adopt, amend and repeal rules and regulations as it may deem necessary to effectuate the purposes of the Act. N.J.S.A. 27:25-5(e).

In 1989, the Act was amended by L. 1989, c. 291, which was codified as N.J.S.A. 27:25-15.1. N.J.S.A. 27:25-15.1(a) states that the NJTPD is established in the NJTC and it shall be

"headed by a chief of police." This statute further provides that the NJTC's

> police department shall have police and security responsibilities over all locations and services owned, operated, or managed by the corporation and its subsidiaries. The executive director of the New Jersey Transit Corporation, through the chief of police of the New Jersey Transit Police Department, shall have the power and authority to appoint and employ such number of transit police officers as he deems necessary to act as transit police officers of the corporation and to administer to the transit police officers an oath or affirmation faithfully to perform the duties of their respective positions or offices.
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> [N.J.S.A. 27:25-15.1.]

The NJTPD does not possess the authority to adopt rules and regulations. However, under N.J.S.A. 27:25-15.1a, the Executive Director of the NJTC, through the NJTPD's Chief of Police, has the power and authority to appoint police officers. In our view, the power to "appoint and employ" police officers necessarily encompasses the power to discipline and terminate the employment of any officer in the NJTPD, when appropriate.

Moreover, the statute implicitly authorizes NJTC's Executive Director, acting through the Chief of Police of the NJTPD, to suspend or terminate police officers who test positive for the use of illegal drugs. Among other things, N.J.S.A. 27:25-15.1a states that, "The members of the [NJTPD] shall

comply with all policies established by the Attorney General, including rules and regulations, directives, advisory opinions, and other guidelines."

The Attorney General's Law Enforcement Drug Testing Policy provides, among other things, that when a sworn law enforcement officer tests positive for the use of an illegal drug, the officer shall be immediately suspended and terminated from employment upon final disciplinary action. The Attorney General's Policy further provides that the officer shall be reported to the State Police's Central Drug Registry and permanently barred from future employment in law enforcement in this State.

We are convinced that, with regard to the appointment of police officers and disciplinary actions taken in regard to those officers, the NJTPD is a "State agency" under N.J.S.A. 52:14B-2(a), and the Executive Director of the NJTC, acting through the NJTP Chief of Police, is the "head" of the agency under N.J.S.A. 52:14B-2(d). We therefore conclude that the NJTPD's Chief of Police has the authority under N.J.S.A. 52:14B-10(d) to review the ALJ's initial decision and render the final agency decision in this case.

IV.

Hudson further argues that, even if the NJTPD's Chief of has the statutory authority to render the final agency decision in this matter, that authority should not have been exercised by Acting Chief Kelly.

"Administrative due process requires a fair hearing before a neutral and unbiased decisionmaker." In re General Disciplinary Hearing of Trooper Thomas M. Carberry, 114 N.J. 574, 584 (1989) (citing Withrow v. Larkin, 421 U.S. 35, 46-47, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712, 723-24 (1975)). If an "agency head is tainted by actual bias, then he or she should not hear the matter." Id. at 585. "The probability of actual bias is grounds for disqualification when the decisionmaker has a pecuniary interest in the outcome of the matter or has been the target of personal criticism from one seeking relief." Id. at 586 (citing Withrow, supra, 421 U.S. at 47, 95 S. Ct. at 1464, 43 L. Ed. 2d at 723; Rosko v. Pagano, 466 F.Supp. 1364, 1370 (D.N.J. 1979)).

The record shows that on March 26, 2009, Hudson and other individuals filed a complaint in the Law Division and asserted claims under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49 (NJLAD). The NJTC, Bober, Kelly and others were named as defendants in the complaint action. The

plaintiffs alleged that the NJTC, Bober, Kelly and the other defendants engaged in a continuing pattern and practice of harassment, disparate treatment, discrimination and retaliation against African-American and female employees in violation of the NJLAD. The plaintiffs claimed that Kelly, as an "upper manager" of NJTC, had aided and abetted the unlawful harassment, discrimination and retaliation.

Count six of the complaint sets forth Hudson's allegations. He claims that he has been the victim of and witness to a pattern and practice of discrimination, harassment and retaliation against African-Americans. Hudson alleges that he was subjected to a hostile work environment, disparate treatment and terminated because of his race.

He further alleges that Kelly summoned him to Bober's office on March 9, 2007, and Kelly was present that day when Bober suspended him. Hudson claims that someone told him that a white captain tested positive for marijuana but was not disciplined, whereas "'a black detective tested positive for amphetamine which is common in appetite suppressants and he gets fired.'"

We note that, in the complaint, plaintiff Melvin Webb (Webb) alleges that, when Kelly was a patrolman, he confronted a group of African-American youths and called them racially

derogatory names. Webb alleges that Kelly's "racist conduct" was covered up by Internal Affairs. He claims that "Kelly went on to be promoted and to participate with Bober in discriminatory, harassing and retaliatory conduct at the highest levels of command" at NJTC.

We are convinced that Kelly's involvement in the lawsuit raises serious concerns as to his ability to render an unbiased decision in this case. Although Hudson's allegations do not directly implicate Kelly in the decision to terminate his employment, Hudson claims that he was terminated on the basis of his race in violation of the NJLAD, and all of the plaintiffs in the lawsuit allege that Kelly aided and abetted unlawful racial discrimination. In our view, Kelly had a sufficient personal interest in the lawsuit to require that he step aside and not render a final decision in this case.

Accordingly, we reverse the NJTPD's final decision and remand the matter to the Executive Director of the NJTC and direct that he designate another person to act as Acting Chief of Police for purposes of rendering the department's final decision in this matter.

Reversed and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.