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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5157-07T3

IN THE MATTER OF MICHAEL BROWN,
MONMOUTH COUNTY

Argued April 21, 2009 – Decided July 16, 2009

Before Judges Parker, Yannotti and LeWinn.

On appeal from a Final Administrative Action of the Merit System Board, DOP Docket No. 2005-1147.

Charles J. Sciarra argued the cause for appellant Michael Brown (Sciarra & Catrambone, attorneys; Mr. Sciarra, of counsel; Mr. Sciarra and Matthew R. Curran, on the brief).

Douglas J. Kovats argued the cause for respondent Monmouth County (Kenney, Gross, Kovats & Parton, attorneys; Mr. Kovats, of counsel; Daniel R. Roberts, on the brief).

PER CURIAM

Petitioner Michael Brown appeals from a final decision of the Merit System Board (Board) upholding the termination of his employment as a Monmouth County Corrections Officer after finding that he tested positive for marijuana. We reverse.

Petitioner was employed by Monmouth County (County) as a corrections officer for "approximately fifteen to seventeen years." Captain Thomas J. Philburn, Personnel Captain at the correctional facility, testified that petitioner was "a very low-keyed, soft-spoken individual" who did his job and had no prior disciplinary problems other than some minor "attendance-related issues."

The County uses National Safety Compliance (NSC), a safety services and compliance company certified by the Substance Abuse and Mental Health Administration, to perform random drug tests on its employees in accordance with the County's substance abuse policy. NSC, in turn, employs Lab One, located in Kansas, to perform the actual laboratory tests on the samples.

On July 13, 2004, petitioner was randomly selected for a drug test pursuant to the County's policy. When the test was reported as positive for marijuana use, the matter was heard internally and petitioner was found to have violated the County's substance abuse policy. After a final notice of disciplinary action was served on petitioner on August 24, 2004, the matter was transferred to the Office of Administrative Law (OAL) as a contested case.

A hearing was held before the OAL on December 7, 2005 and two witnesses testified on behalf of the County, Captain

Philburn and Ronald Raslowsky, President of NSC. Neither of the witnesses had any personal knowledge of the procedures used for the testing, nor could they establish a chain of custody from the time the sample was taken to the time it was purportedly tested at the laboratory in Kansas.

Raslowsky testified that he "believed" that the Attorney General guidelines for testing a law enforcement officer were followed, but had no personal knowledge as to whether they actually were. He did know, however, that the proper interview form was not used. He had no knowledge of who was present when petitioner was tested, who witnessed the test, whether the sample was properly labeled, packaged and shipped, or who participated in the shipping of the sample. Nevertheless, the Administrative Law Judge (ALJ) rendered an initial decision on October 20, 2006 sustaining the charges and ordering petitioner's removal.

The Board remanded the matter to the OAL because the proofs submitted by the County were so illegible and incomplete that it could not make a determination on petitioner's appeal. The Board directed the County to call additional witnesses to authenticate the validity of the documents or provide additional testimony. A second hearing was held via telephone on May 9, 2007, but no additional witnesses testified and no additional documents were

submitted in evidence, although the County did provide more legible copies of the same documents previously submitted.

After the remand hearing, the ALJ found that the documentation submitted established "a reasonable probability that the integrity of the sample had been maintained, and of the validity of the laboratory analyses that appellant's sample tested positive for marijuana." The ALJ acknowledged that the laboratory evidence from petitioner's sample was inadequately presented, and noted that the County's attorney reported that the medical officer who reviewed the laboratory reports was in China at the time of the hearing and that all records of the doctor's review had been disposed of one year after the review. Moreover, the laboratory was unable to locate any of the individuals who had personal knowledge of the testing. In short, no one could verify that the test was conducted in accordance with the Attorney General guidelines or that the sample was properly collected, properly labeled, properly shipped and properly tested. Nevertheless, after the Board reviewed the ALJ's remand decision, it agreed with his findings and recommendation.

In this appeal, petitioner argues that (1) the Board's final decision was arbitrary and capricious; (2) the case was entirely based upon hearsay evidence; (3) the documents were

entirely hearsay and unreliable on their face; (4) the Board erred in remanding the matter to the OAL; (5) the chain of custody for the sample was never established; (6) the Attorney General's drug testing guidelines were not followed; (7) the County's own drug testing guidelines were not followed; and (8) the County violated his constitutional right to privacy.

Our difficulty in reviewing this record is the lack of competent evidence. There were no witnesses who testified to first-hand knowledge of the procedures employed, and no witnesses who could verify that any of the essential elements of a fair and reliable testing procedure were followed.

We disagree with the ALJ's finding after the remand that the documents presented by the County satisfied N.J.R.E. 803(c)(6) in that "these writings record acts, events, conditions, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, and were made in the regular course of business and it was the regular practice of that business to make." There is insufficient evidence in the record to support that statement. The documents are entirely hearsay and there was no competent testimony from anyone with first-hand knowledge as to the preparation of those records or even to ascertain that they were made in the regular course of business. Raslowsky testified as

the President of NSC, not the custodian or the preparer of records, and he could not even verify that the Attorney General's guidelines were followed.

In short, the County's entire case was based upon incompetent, inadmissible evidence. Even under the relaxed evidentiary standard of an administrative hearing, In re Lalama, 343 N.J. Super. 560, 566 (App. Div. 2001), the testimony and the documentary evidence are so substantially lacking in reliability that they cannot support the County's case against petitioner.

Our scope of review of administrative decisions is narrowly circumscribed. In re Taylor, 158 N.J. 644, 656 (1999). Our role is to determine "'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record' considering 'the proofs as a whole,'" and "with due regard to the opportunity of the one who heard the witnesses to judge of their credibility." Ibid. (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); State v. Johnson, 42 N.J. 146, 162 (1964)). We "may not 'engage in an independent assessment of the evidence.'" Ibid. (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). We will accord a strong presumption of reasonableness, Smith v. Ricci, 89 N.J. 514, 525, appeal dismissed, 459 U.S. 962, 103 S. Ct. 286, 74 L. Ed. 2d 272 (1982), and give deference to administrative decisions. Johnson,

supra, 42 N.J. at 159. We do not, however, simply rubber stamp an agency's decision. Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). An administrative decision will be reversed when it is found to be "arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Ibid. (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)).

Here, the Board's decision is not supported by sufficient credible evidence in the record. Accordingly, we reverse and vacate the Board's final decision issued on May 22, 2008. We are constrained to add the following comment.

Ordinarily, we would remand the matter for further testimony. Both witnesses testified, however, that they did not know of anyone with personal knowledge of the testing and as we have already noted, the previous remand hearing produced no additional testimony, only the argument of counsel and the production of somewhat more legible copies of inadmissible documents. To remand the matter again would be a waste of resources for all concerned.

Reversed.