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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis County Hoyt Lakes and Babbitt Minnesota.

Court File No. 62-CV-19-4626
Judge John H. Guthmann

RELATORS' MOTION IN LIMINE TO ADMIT EVIDENCE PURSUANT TO THE MINNESOTA ADMINISTRATIVE PROTECTIVE ACT'S RULES OF EVIDENCE

The Court made clear during the parties' Rule 16 Conference that "[t]his is not a proceeding under the Minnesota Rules of Civil Procedure. This is a proceeding under the Minnesota Administrative Protective Act. . . . That's what governs what we're doing." (Rule 16 Conference Tr. ("Hr'g Tr.") 34:13-18, Aug. 7, 2019). Consistent with this holding, Relators Fond du Lac Band of Lake Superior Chippewa, WaterLegacy, Minnesota Center for Environmental Advocacy, Center for Biological Diversity, and Friends of the Boundary Waters Wilderness (collectively "Relators") now move the Court to conduct the parties' upcoming evidentiary hearing pursuant to the Minnesota Administrative Protective Act's ("MAPA") Rules of Evidence. Minn. R. 1400.7300. Application of MAPA's evidentiary rules would be consistent with the purpose of the hearing—to develop facts for the appellate record—and this Court's jurisdiction under Minn. Stat. § 14.69.

BACKGROUND

On August 7, 2019, the Court determined that the Court of Appeals' transfer order under Minn. Stat. § 14.68 is the sole basis for its jurisdiction in this matter. (Hr'g Tr. 92:6-9). In so holding, the Court explained that "[t]he whole idea behind a Section 14.68 transfer order is to

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reopen an otherwise closed appellate record so extra record materials may be developed. . . . What gets developed at the district court level then becomes part of the appellate record." (*Id*. 94:8-18.) Given this limited jurisdiction, the Court "reject[ed] the notion that the Rules of Civil Procedure control this process and that the discovery ordinarily permitted by Rule 26 and other rules in the Rules of Civil Procedure is allowed." (*Id.* 93:11-16.) This was particularly the case given the absence of any "express provision for discovery" within section 14.68. (*Id.*)

Section 14.68 does, however, contain an express provision dictating the admissibility of evidence following a transfer from the Court of Appeals: "The district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure." Notably, section 14.68 and its related provisions fall within the administrative procedures for the judicial review of *contested cases*, which are governed by evidentiary rules set forth under MAPA itself, *not* the Minnesota Rules of Evidence. Under MAPA's evidentiary rules, a Court "may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs."[1] Minn. R. 1400.7300. "These provisions make it clear that the normal civil rules of evidence do not apply in administrative proceedings." *In re Resident Agency License of Nw. Title Agency, Inc*., No. A13-1643, 2014 WL 2013436, at *3-4 (Minn. App. May 19, 2014); *see also In re Dudley*, No. A07-

[1] The rules of evidence within MAPA itself are nearly identical: "In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs." Minn. Stat. § 14.60; *see also In re Resident Agency License of Nw. Title Agency, Inc*., No. A13-1643, 2014 WL 2013436, at *4 (Minn. App. May 19, 2014) ("The administrative law judge properly admitted the documents into evidence under Minnesota Statutes section 14.60, subdivision 1, and Minnesota Rule 1400.7300, subpart 1.")

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1795, 2008 WL 2888951, at *4 (Minn. App. July 29, 2008) (rules of evidence applicable to administrative hearings are "less restrictive" and "relaxed.").[2]

Given the Court of Appeals' referral for the evidentiary hearing under section 14.68 and the Court's characterization of the rules under which this proceeding will be governed, it is entirely reasonable and logical that the hearing be conducted pursuant to MAPA's Rules of Evidence.

ARGUMENT

The evidentiary hearing should be governed by MAPA's Rules of Evidence for the simple reason that Minn. Stat. § 14.68 requires that they be applied. Section 14.68, which the Court has conclusively held is the sole basis for its jurisdiction, governs contested-case hearings in which MAPA's Rules of Evidence are applied. *See* Minn. R. 1400.7300. That should end the Court's analysis. Indeed, it would make no sense to conduct an evidentiary hearing pursuant to MAPA, explicitly disclaim the Minnesota Rules of Civil Procedure, and still apply the Minnesota Rules of Evidence. As the Court, for purposes of the hearing, is "an arm of the Court of Appeals" tasked with completing the evidentiary record, the evidentiary hearing should be conducted consistent with all of MAPA's rules and requirements—evidentiary or otherwise. (Hr'g Tr. 12:14-17).

Separate from the plain language of section 14.68, application of MAPA's Rules of Evidence is necessary to accomplish the primary mandate of the evidentiary hearing—building a record for the Court of Appeals. MAPA's Rules of Evidence were designed for proceedings before a single judge rather than jury trials. *Padilla v. Minn. State Bd. of Med. Examiners*, 382 N.W.2d 876, 882 (Minn. App. 1986). Here, because the Court sits as the fact finder developing the

[2] Relators attach courtesy copies of unreported cases cited within this motion *in limine*.

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administrative record, the Minnesota Rules of Evidence would not provide "a fairer hearing than the rules contained in Minn. Stat. § 14.67 and the accompanying rules, Minn. R. 1400.7300." *Id.*

The Court of Appeals transferred this matter solely to resolve whether there were procedural irregularities not shown in the administrative record regarding MPCA's issuance of the NPDES permit to PolyMet. (Hr'g Tr. 94:4-14); *see also* Minn. Stat. § 14. 68. Those procedural irregularities include the absence of information in the administrative record, a record traditionally developed pursuant to the MAPA's Rules of Evidence. Minn. Stat. §§ 14.57-62. Given that the Court is now tasked with considering whether irregular procedures caused improper gaps in the administrative records, a record that would properly be developed through application of MAPA's Rules of Evidence in the first instance, the Court should apply those same rules here.

Public policy considerations similarly favor MAPA's Rules of Evidence. Here, Relators did not get the benefit of full discovery and merely seek to build an administrative record (rather than seek a final legal determination). Consequently, Relators did not have the benefit of oral depositions, interrogatories, and other discovery tools that traditionally allow a party to meet the Minnesota Rules of Evidence's strict hearsay and foundation requirements. Thus, fundamental fairness and due process dictate that the parties comply with MAPA's "flexible" Rules of Evidence, particularly when those rules would have applied in the initial contested case hearing but-for MPCA's denial. *See, e.g.*, *Peterson v. Gateway Building Systems, Inc.*, OAH 65-1901-23109, 2013 WL 1743058, at *8 (Off. Admin. Hr'gs Apr.11, 2013) (allowing un un-notarized affidavit even though it would be excluded under the Minnesota Rules of Civil Procedure and Evidence); *In re Risk Level Determination of Harley B. Morris*, OAH 1-1100-11701-2, 1998 WL 879166, at *2 (Off. Admin. Hr'gs Sept. 1998). The Court, in reopening the administrative record for the Court of Appeals, should now apply those rules.

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CONCLUSION

For the foregoing reasons, Relators respectfully request that the Court conduct the evidentiary hearing pursuant to MAPA's Rules of Evidence, Minn. R. 1400.7300, and admit all evidence permitted therein.

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DATED: December 27, 2019

MASLON LLP

/s/ Evan A. Nelson
WILLIAM Z. PENTELOVITCH (#0085078)
MARGARET S. BROWNELL (#0307324)
EVAN A. NELSON (#0398639)
90 South Seventh Street
3300 Wells Fargo Center
Minneapolis, MN 55402-4140
Phone: (612) 672-8200
Email: bill.pentelovitch@maslon.com
margo.brownell@maslon.com
evan.nelson@maslon.com

MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY

/s/ Elise L. Larson
ELISE L. LARSON (#0393069)
KEVIN REUTHER (#0266255)
1919 University Avenue West
Saint Paul, MN 55105
Phone: (651) 223-5969
Email: elarson@mncenter.org
kreuther@mncenter.org

NILAN JOHNSON LEWIS PA

/s/ Daniel Q. Poretti
DANIEL Q. PORETTI (#185152)
MATTHEW C. MURPHY (#0391948)
120 South Sixth Street, Suite 400
Minneapolis, MN 55402-4501
Phone: (612) 305-7500
Email: dporetti@nilanjohnson.com
mmurphy@nilanjohnson.com

Attorneys for Relators Center for Biological Diversity, Friends of the Boundary Waters Wilderness, and Minnesota Center for Environmental Advocacy

JUST CHANGE LAW OFFICES

/s/ Paula Maccabee
PAULA G. MACCABEE (#0129550)
1961 Selby Avenue
Saint Paul, MN 55104
Phone: (651) 646-8890
Email: pmaccabee@justchangelaw.com

Attorney for Relator WaterLegacy

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

/s/ Sean Copeland
SEAN W. COPELAND (#0387142)
1720 Big Lake Road
Cloquet, MN 55720
Phone: (218) 878-2607
Email: seancopeland@fdlrez.com

VANESSA L. RAY-HODGE (*pro hac vice)*
500 Marquette Avenue NW, Suite 660
Albuquerque, NM 87102
Phone: (505) 247-0147
Email: vrayhodge@abqsonosky.com

MATTHEW L. MURDOCK (*pro hac vice*)
1425 K Street N.W., Suite 600
Washington, D.C. 20005
Phone: (202) 682-0240
Email: mmurdock@sonosky.com

Attorneys for Relators Fond du Lac Band of Lake Superior Chippewa

2014 WL 2013436
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In the Matter of the RESIDENT AGENCY LICENSE OF NORTHWEST TITLE AGENCY, INC.; the Resident Insurance Producer's License of Wayne B. Holstad; the Notary Commission of Wayne B. Holstad; and Northwest Abstract Company.

No. A13–1643.
|
May 19, 2014.

Synopsis

Background: Licensees sought judicial review of Commissioner of Commerce's retroactive revocation of insurance-agency and insurance-producer licenses and imposition of fines.

Holdings: The Court of Appeals, Randall, J., held that:

[1] Department of Commerce's search and seizure did not violate constitutional protection against unreasonable searches and seizures;

[2] rules of evidence did not strictly apply to administrative proceedings;

[3] agency and agent failed to report disciplinary actions in other states;

[4] agency acted as closing agent without a license;

[5] agency engaged in business of title insurance without appointment by insurer; and

[6] imposition of sanctions was warranted.

Affirmed.

West Headnotes (6)

[1] Searches and Seizures
Administrative Inspections and Searches; Regulated Businesses

Department of Commerce's search and seizure of documents of insurance agency did not violate constitutional protection against unreasonable searches and seizures, where Department was statutorily-authorized to search and seize documents of regulated, licensed title insurance entities, and no employees of agency objected when Department investigators arrived at agency office. U.S.C.A. Const.Amend. 4; M.S.A. § 45.027.

[2] Insurance
Proceedings

Rules of evidence did not strictly apply in administrative proceedings before the Department of Commerce concerning insurance licenses, and therefore purportedly irrelevant evidence was admissible pursuant to the Administrative Procedure Act (APA). M.S.A. § 14.60.

[3] Insurance
Discipline

Insurance agency and agent failed to report disciplinary actions in other states, so as to warrant revocation of insurance-agency and insurance-producer licenses; non-disclosure based on purported advice of counsel did not excuse non-compliance with reporting requirement. M.S.A. § 60K.54.

[4] Deposits and Escrows
Depositaries

Insurance
Discipline

Insurance agency acted as closing agent without a license, so as to warrant revocation

of insurance-agency and insurance-producer licenses, where title insurer had terminated its agency contract with agency and agency continued to act as closing agent following termination of contract. M.S.A. § 82.641.

[5] Insurance

Discipline

Insurance agency engaged in business of title insurance without appointment by insurer, so as to warrant revocation of insurance-agency and insurance-producer licenses, where agency issued commitment-protection letters without the authority to issue them on behalf of an insurer. M.S.A § 60K.49.

[6] Deposits and Escrows

Depositaries

Insurance

Discipline

Insurance agency's and agent's failure to report disciplinary actions, acting as closing agents without license, and engaging in business of title insurance without appointment of insurer warranted imposition of sanctions by Department of Commerce in amount of $23,500, where agency and agent faced penalties up to $80,000 total. M.S.A. § 45.027.

Commissioner of Commerce, File No. 2–1004–23080.

Attorneys and Law Firms

Frederic W. Knaak, Holstad & Knaak, PLC, St. Paul, MN, for relators.

Lori Swanson, Attorney General, Michael J. Tostengard, Assistant Attorney General, St. Paul, MN, for respondent.

Considered and decided by Smith, Presiding Judge; Connolly, Judge; and Randall, Judge.

UNPUBLISHED OPINION

RANDALL, Judge [*].

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

***1** Relators Northwest Title Agency and Wayne Holstad appeal the retroactive revocation of their insurance-agency and insurance-producer licenses and the fines imposed by the Minnesota Department of Commerce Commissioner, asserting that (1) the government illegally seized documents from their office, (2) the administrative law judge improperly admitted evidence at the hearing, (3) the evidence at the hearing was insufficient to support the commissioner's conclusions, and (4) the commissioner's sanctions against them were too severe. We affirm.

FACTS

Relator Northwest Title Agency (NWTA) is owned by relator Wayne Holstad. Holstad has been a licensed attorney in the state of Minnesota since 1980 and was a licensed insurance producer until March 2012, when he permitted his insurance license to lapse voluntarily. NWTA was a licensed insurance producer, operating in Minnesota and several other states. NWTA also conducted real-estate closings. NWTA was not permitted to issue title insurance without a valid contract with an underwriter. Until December 12, 2011, NWTA had a contractual agency relationship with Stewart Title Insurance Co. (Stewart Title), a licensed title insurance underwriting business. As such, NWTA was exempt from the closing-agent licensing requirement.

In November or December of 2011, NWTA's chief financial officer, Tom Foley, informed Holstad that Foley had improperly transferred $130,000 from NWTA's escrow account to its operating account. Foley also informed Stewart Title of the improper disbursements. After conducting an audit, on December 12, 2011, Stewart Title terminated its contract with NWTA.

NWTA then hired Alan Kantrud, who was an attorney and a title agent through Old Republic Title Insurance Company (ORTIC). ORTIC is a licensed title insurance underwriting business similar to Stewart Title. On December 19, 2011, ORTIC declined NWTA's application to become a policy issuing agent for ORTIC. Two days later, ORTIC terminated its agency relationship with Kantrud because he improperly

allowed NWTA employees to issue commitment-protection letters on behalf of ORTIC.

In December 2011, the Minnesota Department of Commerce (department) received a tip regarding NWTA's alleged escrow improprieties and began conducting an investigation. As part of the investigation, the department discovered that NWTA had engaged in unlicensed real-estate-closing activities after Stewart Title had terminated its agency contract with NWTA. NWTA performed two closings for which it was paid on December 30, 2011 and January 4, 2012. The department also discovered that NWTA issued commitment-protection letters through Kantrud on behalf of ORTIC between December 16 and 19, 2011 without permission from ORTIC.

In addition, the department learned that the State of Nebraska Department of Insurance and the State of Kansas Commissioner of Insurance took disciplinary actions against Holstad. The State of Nebraska Department of Insurance issued an order stating that "Holstad handled escrow and/or security deposits in conjunction with real estate closings for property located in Nebraska without a surety bond, letter of credit, certificate of deposit, or a deposit of cash or securities" in violation of Nebraska law. As a result, Holstad was ordered to pay a $500 fine. The State of Kansas Commissioner of Insurance issued an order revoking NWTA's insurance license for not reporting the Nebraska disciplinary proceedings to Kansas. Holstad did not report either of these disciplinary actions in Minnesota.

***2** On September 4, 2012, the department commenced an administrative enforcement action against Holstad and NWTA under chapter 14 of the Minnesota Statutes. NWTA and Holstad were charged with eighteen counts, including (9) being subject to administrative actions in other jurisdictions, in violation of Minnesota Statutes section 60K.43, subdivision 1(9) (2010); (10) failure to report administrative actions from other jurisdictions, in violation of Minnesota Statutes section 60K.54, subdivision 1 (2010), and Minnesota Rule 2795.0700, subpart 2 (2009); (11) engaging in unlicensed real estate abstracting activities, in violation of Minnesota Statutes sections 386.62 (2010) and 386.76 (2010) and Minnesota Rule 2830.0030 (2009); (12) engaging in unlicensed real estate closing activities, in violation of Minnesota Statutes section 82.641 (2010); and (13) engaging in unlicensed title insurance activities, in violation of Minnesota Statutes section 60K .49, subdivision 2 (2010), and Minnesota Rule 2795.0800 (2009). The commissioner summarily suspended Holstad's insurance-producer license and NWTA's agency license, pending final determination of the administrative enforcement action.

In October 2012, Holstad moved to dismiss counts 9, 11, and 12, and NWTA moved to dismiss counts 9, 10, 11, and 12. In December 2012, the administrative law judge dismissed count 12 as to Holstad because, as an attorney, he is exempt from certain licensing requirements. The administrative law judge did not dismiss count 12 as to NWTA because it concluded that NWTA was a separate corporate entity that could not rely on Holstad's attorney license for an exemption to the licensure requirements. The administrative law judge also dismissed part of count 9 against Holstad, "insofar as [it] appl[ies] to actions by the Kansas Department of Insurance," another part of count 9 against NWTA, "as [it] appl[ies] to actions by the Nebraska Department of Insurance," and count 11 against NWTA.

On February 28 and March 1, 2013, an administrative law judge conducted hearings on the charges. On April 16, 2013, the administrative law judge recommended to the commissioner that counts 9 and 10 against Holstad and NWTA and counts 12 and 13 against NWTA were supported by a preponderance of the evidence. The administrative law judge recommended for the remaining charges to be dismissed. On August 5, 2013, the commissioner adopted the findings of fact, conclusions, and recommendations of the administrative law judge. The commissioner's order revoked NWTA's insurance-agency license and imposed a $20,000 civil penalty on NWTA. The commissioner's order also revoked Holstad's insurance-producer license and imposed a $3,500 civil penalty on Holstad. This appeal followed.

DECISION

I. Seizure

[1] Relators contend that state agents obtained evidence against them in violation of their constitutional rights. We hold that the department properly obtained the documents. The relators' argument does not persuade us.

***3** Minnesota law authorizes the department to conduct searches and to seize documents of regulated entities, such as licensees. Minnesota Statutes section 45.027, subdivision 1(5) (2012), states,

> [T]he commissioner of commerce may ... examine the books, accounts, records, and files of every licensee, and of every person who is engaged in any activity regulated; the commissioner or a designated representative shall have free access during normal business hours to the offices and places of business of the person, and to all books, accounts, papers, records, files, safes, and vaults maintained in the place of business[.]

Minnesota Statutes section 45.027, subdivision 1a (2012) also explains,

> An applicant, registrant, certificate holder, licensee, or other person subject to the jurisdiction of the commissioner shall comply with requests for information, documents, or other requests from the department within the time specified in the request, or, if no time is specified, within 30 days of the mailing of the request by the department. Applicants, registrants, certificate holders, licensees, or other persons subject to the jurisdiction of the commissioner shall appear before the commissioner or the commissioner's representative when requested to do so and shall bring all documents or materials that the commissioner or the commissioner's representative has requested.

These two subdivisions unambiguously give the department legal authorization to search and seize documents from NWTA, a regulated, licensed title insurance entity. In addition, there is nothing in the record to suggest that Holstad or any NWTA employee objected when the department investigators arrived at the NWTA office. The search of NWTA's office and the seizure of documents were permissible under Minnesota Statutes section 45.027. No constitutional violations occurred.

II. Admissibility of Evidence

[2] Relators assert that the administrative law judge erred by admitting inadmissible evidence at the hearing. We conclude that rules of evidence do not strictly apply in administrative proceedings.

The Administrative Procedure Act states, "In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence." Minn.Stat. § 14.60, subd. 1 (2012). The Minnesota rules on administrative hearings also explain:

> The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. The judge shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded.

***4** Minn. R. 1400.7300, subp. 1 (2011). These provisions make it clear that the normal civil rules of evidence do not apply in administrative proceedings.

Relators generally assert that the "exhibits submitted into evidence to prove violations of the insurance statute were irrelevant" and later specifically state that the title-commitment exhibits, commitment-protection letters, and gap letters were "irrelevant" to whether NWTA or Holstad violated the law. The state correctly points out in its brief that "[t]hese documents are part of the selling, solicitation or negotiation of insurance, and thus are regulated as the business of insurance." The documents listed by relators as irrelevant or inadmissible have probative value on whether

NWTA or Holstad illegally engaged in the business of title insurance. The administrative law judge properly admitted the documents into evidence under Minnesota Statutes section 14.60, subdivision 1, and Minnesota Rule 1400.7300, subpart 1.

III. Commissioner's Conclusions

Relators generally argue that the evidence does not support the conclusions made by the commissioner on whether relators did not properly report violations in other states, whether NWTA acted as a closing agent without a valid license, and whether NWTA engaged in the business of title insurance without a valid license. Substantial evidence supports the commissioner's conclusions. We affirm the conclusions.

"An agency's quasi-judicial determinations will be upheld unless they are unconstitutional, outside the agency's jurisdiction, procedurally defective, based on an erroneous legal theory, unsupported by substantial evidence, or arbitrary and capricious." *Cole v. Metro. Council HRA,* 686 N.W.2d 334, 336 (Minn.App.2004) (quotation omitted). An agency's conclusions are not arbitrary and capricious so long as there is a rational connection between the facts found and the choice made. *In re Review of 2005 Annual Automatic Adjustment of Charges,* 768 N.W.2d 112, 120 (Minn.2009). "Substantial evidence is defined as: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Cannon v. Minneapolis Police Dep't,* 783 N.W.2d 182, 189 (Minn.App.2010) (quotation omitted).

A. Holstad and NWTA's Failure to Report Disciplinary Actions in Other States

[3] Insurance producers "shall report to the commissioner any administrative action taken against the producer in another jurisdiction or by another governmental agency in this state within 30 days of the final disposition of the matter. This report must include a copy of the order, consent to order, or other relevant legal documents." Minn.Stat. § 60K.54, subd. 1 (2012). In addition,

> The commissioner may, by order, restrict, censure, suspend, revoke, or refuse to issue or renew an insurance producer's license or may levy a civil penalty ... [for] having an insurance producer license, or its equivalent, denied, suspended, or revoked, or having been the subject of a fine or any other discipline in any other state, province, district, or territory[.]

***5** Minn.Stat. § 60K.43, subd. 1(9) (2012).

Relators were required to report their violations in Nebraska and Kansas. Here, the commissioner found that (1) "[t]he [d]epartment demonstrated by a preponderance of the evidence that Wayne B. Holstad was the subject of an administrative order of discipline in another jurisdiction (Nebraska) and did not report the discipline to the [d]epartment within 30 days" and (2) "[t]he [d]epartment demonstrated by a preponderance of the evidence that NWTA was the subject of an administrative order of discipline in another jurisdiction (Kansas) and did not report the discipline to the [d]epartment within 30 days." These findings are supported by the record.

Relators assert that they were not required to report their violations in Nebraska and Kansas based on "procedural, statutory, and constitutional grounds." They contend that they did not violate Minnesota Statutes section 60K.54 because their attorney instructed them not to report the out-of-state proceedings, but the state correctly explains that there is not an exception to the reporting requirements for reliance on the advice of an attorney. It is undisputed that the State of Nebraska fined Holstad for improperly handling escrow accounts; that the State of Kansas revoked NWTA's license; and that Holstad and NWTA did not report the Nebraska or Kansas proceedings to Minnesota. We hold that substantial evidence supports the commissioner's conclusion that relators violated Minnesota Statutes section 60K.54.

B. NWTA Acted As Closing Agent Without a License

[4] The department of commerce is empowered by statute to regulate real-estateclosing activities. *See* Minn.Stat. § 82.641, .89 (2012). Subject to certain exemptions, a person

may not engage in real-estate-closing activities without a license issued by the commissioner. Minn.Stat. § 82.641. In chapter 82, a "person" means "a natural person, firm, partnership, corporation or association, and the officers, directors, employees and agents thereof." Minn.Stat. § 82.55, subd. 14 (2012). Non-natural persons, such as corporations, partnerships, limited liability companies, limited liability partnerships, and other business structures that hold real-estate broker licenses, are sometimes referred to as "brokerages." *See id.,* subd. 2 (2012). There is no dispute that NWTA is a corporation.

There are seven exemptions to the closing-agent licensing requirement under chapter 82, two of which are relevant to this case. The first is an exemption for "a title company that has a contractual agency relationship with a title insurance company authorized to do business in this state, where the title insurance company assumes responsibility for the actions of the title company and its employees or agents as if they were employees or agents of the title insurance company." Minn.Stat. § 82.641, subd. 6(7). The second is an exemption for licensed attorneys or direct employees of licensed attorneys. *Id.,* subd. 6(2).

***6** Prior to December 12, 2011, NWTA had a contractual relationship with Stewart Title and, as such, was exempt from the closing-agent-licensing requirement under subdivision 6(7) of section 82.641. On December 12, 2011, Stewart Title terminated its agency contract with NWTA, at which point the subdivision 6(7) exemption no longer applied to NWTA. The department discovered that NWTA had, on two occasions, engaged in unlicensed real estate closing activities after December 12, 2011.

Relators maintain that the real-estate-closing licensing statute applies only to individuals, not corporations. Relators likely mean "natural persons" when they use the term "individuals." But the plain language of Minnesota Statutes section 82.55, subdivision 14, states that "person" includes "a natural person, firm, partnership, corporation or association." This statute shows that corporations are subject to the licensing requirement in Minnesota Statutes section 82.641.

Relators also contend that the attorney exemption in Minnesota Statutes section 82.641, subdivision 6(2), should apply to attorney-owned corporations. The attorney exemption states, "The following persons, when acting as closing agents, are exempt from the requirements of this section and sections 82.75 and 82.81 unless otherwise required in this chapter: ... (2) a licensed attorney or a direct employee of a licensed attorney." Minn.Stat. § 82.641, subd. 6(2). NWTA is not a "licensed attorney" or a "direct employee of a licensed attorney." Looking to the plain and ordinary meaning of the statutory language, NWTA is not entitled to the exemption in Minnesota Statutes section 82.641, subdivision 6(2). *See Fannie Mae v. Heather Apartments Ltd. P'ship,* 811 N.W.2d 596, 599 (Minn.2012) (stating that, when engaged in statutory interpretation, courts should "give words and phrases their plain and ordinary meaning.").

Relators relatedly argue that it is impossible to separate a corporation from the individual for closing-licensing purposes. But, again, because a corporation is included within the definition of "person," a corporation such as NWTA can be a separate "closing agent" and is, therefore, subject to the real-estate-closing license requirement. *See* Minn.Stat. § 82.55, subd. 14. It should be noted that section 82.63, subdivision 2 (2012), makes it easy for a licensed closing agent to obtain an additional license for or on behalf of a business entity. Relators do not argue that this subdivision should be expanded to allow attorneys to also obtain additional licenses for business entities. Rather, they argue that the attorney-owned corporations need no license at all. Relators' argument contradicts the plain language of the statute. We affirm the conclusion of the commissioner that NWTA acted as a closing agent without a valid license.

C. NWTA Engaged in Business of Title Insurance Without Appointment By Insurer

[5] "A person shall not sell, solicit, or negotiate insurance in this state for any class or classes of insurance unless the person is licensed for that line of authority[.]" Minn.Stat. § 60K.32 (2012). Under Minnesota Statutes section 60K.49, subdivision 2 (2012),

> ***7** [A] licensed insurance producer shall not engage in the business of insurance with an insurer unless the producer either: (1) has been appointed by that insurer; or (2) has the permission of the insurer to transact business on its behalf and obtains an appointment from the insurer within 15 days after the first application is submitted to the insurer.

This statute does not include an element of intent and holds insurance producers strictly liable.

The commissioner concluded, "The [d]epartment demonstrated by a preponderance of the evidence that NWTA engaged in the business of title insurance without permission or appointment by an insurer." The commissioner based his decision on two commitment-protection letters created by NWTA's employee, Kantrud, on December 16 and 19, 2011. These letters were created even though NWTA did not have authority to issue them on behalf of an insurer.

Relators assert that they are not in violation of Minnesota Statutes section 60K.49, subdivision 2, because the commitment-protection letters containing ORTIC's and NWTA's names are not covered by the statute because they are not insurance policies. But the state clarifies that "[t]hese documents are part of the selling, solicitation or negotiation of insurance, and thus are regulated as the business of insurance." The statute states "business of insurance," which includes issuing commitment-protection letters along with issuing insurance policies.

Relators also contend that Kantrud had authority from ORTIC to create commitment-protection letters on ORTIC's behalf through December 21, 2011. Relators believe that Kantrud's agency relationship with ORTIC satisfies the requirements of Minnesota Statutes section 60K.49, subdivision 2, but appellants do not address that NWTA did not have permission to issue insurance through ORTIC and that Kantrud was hired to issue the documents for NWTA. Substantial evidence exists in the record to show that NWTA engaged in the "business of insurance" without the appointment of an insurer. We affirm the commissioner's ruling that NWTA violated Minnesota Statutes section 60K.49, subdivision 2.

IV. Penalties

[6] The imposition of sanctions lies within the discretion of an administrative agency and will only be reversed if the agency abuses that discretion. *See In re Haugen,* 278 N.W.2d 75, 80 n. 10 (Minn.1979). Relators state that the commissioner's retroactive revocation of appellants' insurance-producer licenses is "entirely inappropriate" and that their fines are "excessive and should be vacated or, at a minimum, reduced to a nominal amount." Relators contend that these sanctions should be reversed because they did not commit "intentional fraud or dishonesty." The state reasons that the sanctions should be upheld because they are authorized by statute and are "well within the commissioner's discretion." We hold that the state's argument prevails.

All of the sanctions imposed on NWTA and Holstad are authorized under Minnesota Statutes section 45.027 (2012). Subdivision 11 explains,

> ***8** If a license lapses, is surrendered, withdrawn, terminated, or otherwise becomes ineffective, the commissioner may institute a proceeding under this subdivision within two years after the license was last effective and enter a revocation or suspension order as of the last date on which the license was in effect, or impose a civil penalty as provided for in subdivision 6.

Subdivision 6 states, "The commissioner may impose a civil penalty not to exceed $10,000 per violation upon a person who violates any law, rule, or order related to the duties and responsibilities entrusted to the commissioner unless a different penalty is specified." Contrary to relators' interpretation, the statute does not require a finding of intent or fraud for sanctions to be imposed.

As the commissioner stated in his order, Holstad and NWTA faced penalties up to $80,000 total. Yet the commissioner fined NWTA only $20,000 and Holstad only $3,500. The commissioner's retroactive revocation of NWTA and Holstad's licenses is also within the commissioner's statutory authority under Minnesota Statutes section 45.027, subdivision 11.

Relators cite *Matter of Ins. Agents' Licenses of Kane,* 473 N.W.2d 869, 871 (Minn.App.1991), *review denied* (Minn. Sept. 25, 1991) for the proposition that they should not be sanctioned because they did not commit "misconduct that rises to the level of intentional fraud or dishonesty." This court held in *Kane* that the revocation of the appellants' licenses was an abuse of the commissioner's discretion because the victims were reimbursed after the business made misleading solicitations. *Id.* at 877–78. In addition, this court remanded for sanctions "not [to] exceed what is necessary to protect the

public and to deter such conduct in the future." *Id.* at 878. *Kane* does not involve any of the violations found in NWTA and Holstad's case. Most importantly, this court did not hold that there must be a finding of "fraud or dishonesty" for the commissioner to impose sanctions. *See id.* at 876–77. *Kane* is not factually similar to this case. Based on the seriousness of the violations, the commissioner properly imposed sanctions on Holstad and NWTA.

Affirmed.

All Citations

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In the Matter of William N. DUDLEY, D.V.M., License No. C0858.

No. A07-1795.
|
July 29, 2008.
|
Review Denied Oct. 1, 2008.

Synopsis

Background: Veterinarian appealed decision of the Board of Veterinary Medicine to revoke license to practice veterinary medicine.

Holdings: The Court of Appeals, Schellhas, J., held that:

[1] finding that veterinarian "departed from or failed to conform to the minimum standards of acceptable and prevailing medical practice" on several occasions qualified as a finding of "incompetence";

[2] Board could enforce a minimum standard of care in connection with pain management in animals;

[3] evidence did not support veterinarian's contention that his failure to comply with record-keeping standards was an inadequate basis for revocation of his license;

[4] evidence of veterinarian's past disciplinary orders was admissible to demonstrate veterinarian's familiarity with Board and its policies and the concerns about veterinarian's practice; and

[5] such evidence was not used impermissibly to support further discipline.

Affirmed.

West Headnotes (5)

[1] Health
Negligence, Malpractice, or Incompetence

Finding that veterinarian "departed from or failed to conform to the minimum standards of acceptable and prevailing medical practice" on several occasions qualified as a finding of "incompetence" that supported revocation of license to practice veterinary medicine. M.S.A. § 156.081.

[2] Health
Negligence, Malpractice, or Incompetence

Rules which defined the general minimum standards of practice as the "prevailing standards of practice" for the species of animal and the veterinarian's area of expertise allowed Board of Veterinary Medicine to enforce a minimum standard of care in connection with pain management in animals, despite veterinarian's argument that Board had not promulgated rules on pain management. M.S.A. § 156.081.; Minnesota Rules, part 9100.0800, subp. 1.

[3] Health
Patient Records; Confidentiality

Evidence on appeal did not support veterinarian's contention that his failure to comply with record-keeping standards was an inadequate basis for revocation of his license; ALJ concluded that veterinarian's "failure to document accurately and completely in a standard format has complicated the review of the records and left a very confusing picture of what happened to the patients in his care," and concluded that veterinarian's "errors were compounded by poor charting of diagnosis and test results, treatment plan and treatment implementation," and Board of Veterinary Medicine additionally made findings related directly to veterinarian's care of animals. M.S.A. § 156.081.

[4] Health

Evidence

Evidence of veterinarian's past disciplinary orders was admissible in license revocation proceeding for the limited purpose of demonstrating veterinarian's familiarity with Board of Veterinary Medicine and its policies and the concerns about veterinarian's practice. Minnesota Rules, part 1400.7300.

[5] Health

Evidence

Evidence of past disciplinary action against veterinarian, which was admitted for the limited purpose of demonstrating veterinarian's familiarity with Board of Veterinary Medicine and its policies and the concerns about veterinarian's practice, was not used impermissibly in license revocation proceeding to support further discipline; in the order revoking relator's license, Board made only limited mention of the prior disciplinary actions, Board's findings of fact consisted primarily of the allegations made in the current proceedings and litigated before the ALJ, and record demonstrated that, at most, the prior disciplinary orders were used to provide ancillary support for the ALJ's proposed findings of fact and conclusions of law and Board's adopted findings and conclusions and order.

Minnesota Board of Veterinary Medicine, License No. C0858.

Attorneys and Law Firms

Robert E. Kuderer, Stacey A. Molde, Johnson & Condon, P.A., Minneapolis, MN, for relator William N. Dudley.

Lori Swanson, Attorney General, Tiernee Murphy, Assistant Attorney General, St. Paul, MN, for respondent Minnesota Board of Veterinary Medicine.

Considered and decided by HUDSON, Presiding Judge; SHUMAKER, Judge; and SCHELLHAS, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge.

***1** Relator asserts that respondent's decision to revoke his license to practice veterinary medicine was arbitrary and capricious and not supported by substantial evidence. Because we find that respondent's decision was supported by substantial evidence, we affirm.

FACTS

Relator William N. Dudley has been licensed to practice veterinary medicine since 1958. On September 16, 2005, respondent Minnesota Board of Veterinary Medicine initiated a disciplinary proceeding against relator alleging rules violations pertaining to relator's care of four animals. Respondent later amended its allegations to include complaints it had received concerning relator's care of three additional animals.

Respondent alleged that relator: (1) operated on a cat named Francie and used inadequate pain medication; (2) operated on a dog named Gage and mistakenly removed the dog's prostate, severed its urethra, failed to recognize that the monitoring equipment was malfunctioning, and the dog died; (3) spayed a cat named Sasha and did not keep records of the amount of medication administered; (4) declawed a cat named Guido, failed to provide adequate pain medication, and failed to remove a tourniquet from the cat's leg in a timely fashion, necessitating the amputation of the cat's leg; (5) performed a dental cleaning and tail amputation on a dog named Dewey and failed to provide post-surgical pain medication or antibiotics; (6) improperly treated a dog named Rocky for a broken leg; and (7) declawed a cat named Lucy and failed to provide adequate pain medication, antibiotics, or home-care instructions. In all cases, respondent alleged that relator's record-keeping practices were inadequate.

Upon respondent's motion, the administrative law judge (ALJ) granted partial summary disposition on several of respondent's allegations and found that relator failed to comply with three parts of a 2001 disciplinary order that had been imposed by respondent that required relator to: (1) comply with record-keeping requirements established in Minn. R. 9100.0800, subp. 4 (2001); (2) comply with any

written request for information from respondent within 30 days of the date of the request; and (3) obtain informed consent from clients before hospitalizing critically ill or injured animals overnight. The ALJ scheduled a hearing to consider respondent's remaining allegations against relator.

At the hearing, respondent introduced information that prior to 2005, relator had been the subject of four disciplinary orders pertaining to his record-keeping practices and care of animals. Relator objected to the admission of this evidence, arguing that because it pertained to incidents not at issue in the hearing, the evidence was unfairly prejudicial and lacking in probative value. Over relator's objection, the ALJ admitted the evidence for the limited purpose of demonstrating relator's familiarity with respondent and its policies and the concerns about relator's practice raised by respondent in the past. The ALJ allowed respondent to ask relator to verify his signature on the past disciplinary orders and the dates on which they were signed, but stated that it would be inappropriate to relitigate the underlying allegations because they had already been addressed by those orders.

***2** Respondent called Stephen H. Levine, D.V.M., as an expert witness. Levine testified that relator's treatment of the animals at issue failed to comport with standards of practice in the veterinary field. The ALJ concluded that relator's failure to provide appropriate care to the animals violated Minn.Stat. 156.081, subd. 2(11) and (12) (2004), Minn. R. 9100.0700, subp. 1 (2003), and Minn. R. 9100.0800, subp. 1 (2003), each of which requires veterinarians to meet minimum standards of professional conduct. The ALJ issued proposed findings of fact and conclusions of law and recommended that respondent take "appropriate disciplinary action" against relator. Respondent adopted several of the ALJ's proposed findings of fact and conclusions of law but rejected some findings of fact. For example, respondent determined that certain allegations were not proved by a preponderance of the evidence. Based on the adopted findings of fact and conclusions of law, respondent revoked relator's license.

DECISION

Respondent is a licensing agency that falls within the definition of "agency" under the Minnesota Administrative Procedure Act. Minn.Stat. § 14.02, subd. 2 (2006).

Respondent's Decision

In reviewing an agency decision in a contested case, this court may reverse the agency's decision if it is unsupported by substantial evidence, arbitrary and capricious, or affected by other errors of law. Minn.Stat. § 14.69 (2006). The party seeking reversal of the agency's decision has the burden of proving that the decision violated this standard. *Markwardt v. State, Water Res. Bd.,* 254 N.W.2d 371, 374 (Minn.1977). The decision of an administrative agency is presumed correct. *St. Otto's Home v. Minn. Dep't of Human Servs.,* 437 N.W.2d 35, 39 (Minn.1989).

[1] Relator argues that respondent's decision to revoke his license was arbitrary, capricious, and not supported by substantial evidence. Substantial evidence is defined as: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety. *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship,* 356 N.W.2d 658, 668 (Minn.1984). An agency ruling is arbitrary and capricious if "the agency relied on factors which the legislature had not intended it to consider," if it failed to consider an important aspect of the problem, if it explained the decision in a manner that is contrary to the evidence, or if the decision is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *In re Space Ctr. Transp.,* 444 N.W.2d 575, 581 (Minn.App.1989), *review dismissed* (Minn. Oct. 9, 1989).

The guidelines under which respondent may revoke a veterinarian's license are established by the legislature and are generally set forth in the Minnesota Board of Veterinary Medicine Practice Act, Minn.Stat. §§ 156.001-156.15 (2004). Specifically, Minn.Stat. § 156.081 provides that respondent may revoke a license to practice veterinary medicine for "fraud, deception, or incompetence in the practice of veterinary medicine, including any departure from or failure to conform to the minimum standards of acceptable and prevailing practice without actual injury having to be established." Minn.Stat. § 156.081, subd. 2(11) (2004). Section 156.081 also provides that respondent may revoke a license for "engaging in unprofessional conduct as defined in rules adopted by the board or engaging in conduct which violates any statute or rule promulgated by the board or any board order." Minn.Stat. § 156.081, subd. 2(12) (2004). The Minnesota Rules provide that veterinarians may not "[fail] to meet the minimum standards of practice" or "[engage] in veterinary practice that is professionally incompetent," Minn. R. 9100.0700, subp. 1 A, C (2003), and that "[t]he

delivery of veterinary care must be provided in a competent and humane manner consistent with prevailing standards of practice," Minn. R. 9100.0800, subp. 1 (2003).

***3** Relator argues that "incompetent" is not defined in the Practice Act and should be afforded its dictionary meaning. But section 156.081 includes, as an example of incompetence, "any departure from or failure to conform to the minimum standards of acceptable and prevailing practice without actual injury having to be established." Minn.Stat. § 156.081, subd. 2(11). Both the ALJ and respondent found that relator "departed from or failed to conform to the minimum standards of acceptable and prevailing medical practice" on several occasions. Such conduct qualifies as "incompetence" under section 156.081, therefore, relator's argument fails.

[2] Relator also argues that because respondent has not promulgated rules on pain management in animals, it cannot enforce a minimum standard of care. But section 156.081 describes the applicable standards as those set by "acceptable and prevailing medical practice." *Id.; see also* Minn. R. 9100.0800, subp. 1 (defining the general minimum standards of practice as the "prevailing standards of practice" for the species of animal and the veterinarian's area of expertise). This standard is similar to the standard to which a veterinarian must conform in a malpractice action, i.e., that which is "recognized by the veterinary community ." *Berres v. Anderson,* 561 N.W.2d 919, 924 (Minn.App.1997), *review denied* (Minn. June 11, 1997); *see also Bekkemo v. Erickson,* 186 Minn. 108, 110, 112, 242 N.W. 617, 618, 619 (1932) (recognizing a veterinarian's "duty to exercise the ordinary care as established by the standards of veterinary medicine in his community"). Expert testimony is sufficient to establish this standard of care. *See Plutshack v. Univ. of Minn. Hosps.,* 316 N.W.2d 1, 5 (Minn.1982) (requiring plaintiffs in a medical malpractice case "to introduce expert testimony demonstrating" the applicable standard of care); *Berres,* 561 N.W.2d at 924-25 (applying *Plutshack* to veterinary malpractice claims and holding that expert testimony created at least a question of fact as to whether a veterinarian had a duty to explain proper hygiene). Therefore, relator's argument fails here as well.

[3] Relator further argues that respondent's decision to revoke his license was based in large part on his violation of record-keeping rules, implicitly arguing that failure to comply with record-keeping standards is not an adequate basis for revocation of a veterinarian's license. But aside from ignoring respondent's findings related directly to relator's care of animals, relator's argument ignores the ALJ's conclusion that relator's "failure to document accurately and completely in a standard format has complicated the review of the records and left a very confusing picture of what happened to the patients in his care." Moreover, while the ALJ conceded relator's point that all veterinarians make errors, the ALJ concluded that relator's "errors were compounded by poor charting of diagnosis and test results, treatment plan and treatment implementation." While relator appears to characterize his record-keeping problems as mere administrative issues, the ALJ's proposed findings reflect that relator's poor record-keeping constituted a serious deviation from the standards of his profession.

***4** Respondent's order revoking relator's license is supported by substantial evidence set forth in respondent's findings of fact. Furthermore, respondent's conclusions of law and order are based on this substantial evidence and are grounded in the legislative requirement of section 156.081, that veterinarians' conduct comply with minimum standards of acceptable practice. Minn.Stat. § 156.081, subd. 2(11). Therefore, respondent's revocation of relator's license is not arbitrary or capricious.

Admissibility of Prior Disciplinary Orders

[4] Relator argues in his reply brief that respondent's argument on appeal is improper because respondent's brief contains references to incidents underlying respondent's past disciplinary actions against relator. Relator notes that evidence of these incidents was admitted over his objection by the ALJ at his hearing. But the ALJ is permitted to "admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons" may rely. Minn. R. 1400.7300, subp. 1 (2003). "All evidence to be considered in the case, including all records and documents in the possession of the agency or a true and accurate photocopy, shall be offered and made a part of the record in the case." *Id.,* subp. 2 (2003). In this case, the ALJ admitted evidence of the past disciplinary orders for the previously noted limited purpose for which the ALJ determined the evidence had probative value. Given the less restrictive rules of evidence applicable to administrative hearings, the ALJ did not abuse his discretion in admitting the evidence. *See Lee v. Lee,* 459 N.W.2d 365, 370 n. 2 (Minn.App.1990) (noting "the relaxed evidentiary rules of administrative proceedings"), *review denied* (Minn. Oct. 18, 1990).

[5] Relator argues that respondent used its prior disciplinary actions to support further discipline, and that because respondent based its revocation of relator's license in part on these actions, its decision to revoke relator's license should be reversed. But in the order revoking relator's license, respondent made only limited mention of these prior disciplinary actions. Respondent's findings of fact consist primarily of the allegations made in the current proceedings and litigated before the ALJ. The record shows that at most, the prior disciplinary orders were used to provide ancillary support for the ALJ's proposed findings of fact and conclusions of law and respondent's adopted findings and conclusions and order. We conclude that evidence of relator's prior disciplinary orders was not impermissibly used in these proceedings.

Affirmed.

All Citations

Not Reported in N.W.2d, 2008 WL 2888951

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2013 WL 1743058 (Minn.Off.Admin.Hrgs.)

Office of Administrative Hearings

State of Minnesota

KEN B. PETERSON, COMMISSIONER, DEPARTMENT OF LABOR
AND INDUSTRY, STATE OF MINNESOTA, COMPLAINANT
v.
GATEWAY BUILDING SYSTEMS, INC., RESPONDENT

OAH 65-1901-23109
April 11, 2013

***1 Department of Labor and Industry**

ORDER ON RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

This matter came before Administrative Law Judge Ann O'Reilly pursuant to a Notice and Order for Hearing and Prehearing Conference dated September 27, 2012.

Jackson Evans, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry (Department). Aaron Dean, Best and Flanagan, appeared on behalf of Respondent Gateway Building Systems, Inc. (Respondent or Gateway).

On February 14, 2013, Respondent served a Motion for Summary Disposition, Memorandum of Law, and supporting documentation. On March 11, 2013, the Department filed its Memorandum in Opposition and supporting documents. Respondent served a Reply Brief and supporting affidavits on March 29, 2013. On March 1, 2013, the Department filed an executed copy of a Statement from Nick Buell. Oral argument occurred on April 2, 2013. The hearing record on Respondent's Motion closed on April 2, 2013.

This proceeding arises out of one Citation issued to Respondent on April 30, 2012, by the Minnesota Occupational Safety and Health Administration (MNOSHA). The Citation consisted of two separate violations: Item 001(violation of 29 C.F.R. § 1910.178) and Item 002 (violation of Minn. R. 5207.110). Prior to the hearing, the Department stipulated to the dismissal of Item 001. Accordingly, the only remaining issue subject to Respondent's Motion for Summary Disposition is Item 002 of the Citation.

Based upon the proceedings, memoranda and files herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent's Motion for Summary Disposition with respect to Citation 1, Item 001 (violation of 29 C.F.R. § 1910.178) is **GRANTED**.

2. Citation 1, Item 001(violation of 29 C.F.R. § 1910.178) is **DISMISSED** with prejudice and the fine associated with Citation 1, Item 001 is **VACATED**.

3. Respondent's Motion for Summary Disposition with respect to Citation 1, Item 002 is **DENIED**.

4. This matter shall proceed to hearing on **May 13 and 14, 2013**, commencing at 9:30 a.m., at the Office of Administrative Hearings in St. Paul, Minnesota.

Dated: April 11, 2013

Ann O'Reilly
Administrative Law Judge

MEMORANDUM

FACTUAL BACKGROUND

For purposes of the parties' cross Motions for Summary Disposition, the following facts are considered undisputed:

Respondent Gateway is a building contractor. [1] Gateway was hired to install a roof on a grain bin at the Mattson Dairy Farm in Farwell, Minnesota, in 2012. [2]

On January 4, 2012, two Gateway employees, Nick Buell (Buell) and Anthony Lambutis (Lambutis), were working in an elevated "man basket" or platform attached to a forklift. [3] The employees were hoisted approximately 30 feet in the air, working on a roof of a large grain bin, when the hydraulic brakes of the forklift malfunctioned. [4] As a result, the forklift rolled backwards, toppled over, and seriously injured the two employees. [5]

***2** Following the accident, the Minnesota Occupational Safety and Health Administration (MNOSHA) conducted an investigation. The parties stipulate to the accuracy of MNOSHA's description of the accident, as follows:
On January 04, 2012, at approximately 12:22 p.m., two employees were working from a Haugen elevated work platform that was attached to an Ingersoll Rand VR-90B all-terrain forklift. At the time of the accident, the forklift was parked [6] immediately adjacent to the grain bin on an inclined surface. Contacts #3 & 4 [Buell and Lambutis] were in the elevated platform approximately 30 feet above the ground level, attaching the bolts to the new corrugated metal roof that had been put into place on the grain bin. Contact #5 [Dale Beneke] was at the controls of the forklift in the cab. According to Contact #1, Contact #5 [Beneke] cut the power to the forklift while the employees were in the elevated platform, because the employees were having troubles hearing each other over the noise of the engine. Shortly after Contact #5 [Beneke] cut the power to the forklift, the hydraulic brakes failed and the forklift began to roll backwards down the hill it had been parked on. After rolling backwards approximately 15-25 feet, the forklift fell over with the boom still extended approximately 30 feet in the air. Contact #1 stated that he believed the parking brake was engaged at the time of the accident. The employees were not equipped with fall arrest systems or positioning devices the day of the accident. Both employees sustained multiple broken bone injuries as a result of the fall while in the elevated work platform. Both employees were transferred to a hospital to treat their injuries. [7]

Both Buell and Lambutis received extensive and serious injuries. [8] It is undisputed that neither Buell nor Lambutis was wearing fall protection devices at the time of the accident. [9] Respondent contends, but the Department does not stipulate, that the use of fall protection devices would not have prevented the accident or the injuries. [10]

Also present on the job site at the time of the accident was Dale Beneke (Beneke), the forklift operator, and Timothy Lewis (Lewis), the project foreman. [11] At the time of the accident, Lewis was operating a crane on the opposite side of grain bins and did not witness the accident occur. [12]

The Department does not dispute that Respondent had established a work rule requiring the use of fall protection devices when working above six (6) feet and when working in a "man basket" attached to a forklift. [13] The Department also does not dispute that such rules were adequately communicated to Respondent's employees prior to the accident. [14]

All four employees present at the time of the accident, including Buell and Lambutis, were disciplined for violation of the fall protection rules in April 2012. [15] As part of the discipline, the four employees did not receive a pay raise for 2012. [16] Lambutis eventually returned to work at Gateway. [17] Buell did not. [18]

***3** On or about May 2, 2012, MNOSHA issued Respondent one Citation asserting two serious-level violations (Items 001 and 002). [19] Citation 01, Item 001 asserts a violation of 29 C.F.R. 1910.178(1)(3) and alleges that the forklift operator did not receive initial training in applicable topics of the standard. [20] After reviewing Respondent's documents, the Department agreed to rescind Item 001 of the Citation. [21] Accordingly, by stipulation of the parties, Citation 01, Item 001 shall be dismissed by this Order.

Citation 01, Item 002 asserts a violation of Minn. R. 5207.1100 and alleges that the two employees, who were working from the forklift platform, were not protected from falling by the use of a personal fall arrest system or positioning devise. [22] Minn. R. 5207.1100, subp. 2 provides:
An employee, while occupying a boom-supported elevated work platform or a personnel elevating platform supported by a rough-terrain forklift truck, shall be protected from falling by the use of personal fall arrest systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(d), or positioning device systems that meet the requirements of Code of Federal Regulations, title 29, section 1926.502(e).

On or about May 9, 2012, Respondent served a Notice of Contest and Service to Affected Employees (Notice) upon MNOSHA. [23] The Notice disputed the Citation, type of violation, abatement date, and penalty. [24] In a letter accompanying the Notice, Respondent asserts "an employee misconduct defense." [25]

The MNOSHA Field Compliance Manual (Manual), dated May 28, 2012, [26] recognizes an employer's affirmative defense of unpreventable employee misconduct. [27] The Manual provides that "Before issuing Citations to an employer with employees exposed to a hazard, it must first be determined whether the exposing employer has a legitimate defense to the Citation." [28]
The Manual further provides:
Burden of Proof

Although affirmative defenses must be proved by the employer at the time of the hearing, MNOSHA must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense, especially in fatalities, serious injury, or catastrophe cases. The case file shall contain documentation which refutes the more common defenses. [29]

"Unpreventable employee misconduct" is listed in the Manual as a common affirmative defense. [30]

UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

Minn. Stat. § 182.651, subd. 12, defines a "Serious Violation" of state work safety standards as:
[A] violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been

adopted or are in use, in such a place of employment, *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.* [31]

***4** Consistent with this definition, courts and MNOSHA have recognized the affirmative defense of unpreventable or unforeseeable employee misconduct in OSHA cases. Under this defense, an employer is shielded from liability for workplace safety violations if the employer: (1) established a work rule to prevent the reckless behavior or unsafe condition from occurring; (2) adequately communicated the rule to its employees; (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rules whenever employees transgressed it. [32]

In applying these factors, courts have held that "[T]he proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program." [33] Because employee misconduct is an affirmative defense, the employer bears the burden of establishing all four factors.

RESPONDENT'S ARGUMENTS IN SUPPORT OF MOTIONS FOR SUMMARY DISPOSITION

Respondent asserts that MNOSHA should not have cited Gateway [for Item 002] ""because Gateway has an employee misconduct affirmative defense." [34] Respondent first argues that MNOSHA failed to investigate Respondent's affirmative defense prior to issuing the Citations, and, therefore, the Citation should be dismissed. Next, Respondent argues that the undisputed facts support the imposition of the affirmative defense of employee misconduct, and, thus, summary dismissal of the Citation is warranted.

In response, the Department disputes that the MNOSHA Field Manual establishes a substantive right to the investigation of an affirmative defense or that failure to fully investigate such defense should result in dismissal of a Citation. Further, the Department asserts that there is a dispute as to the material facts establishing factors #3 and #4 of the unpreventable employee misconduct affirmative defense, and, therefore, summary disposition is precluded.

STANDARD FOR SUMMARY DISPOSITION

Summary disposition is the administrative law equivalent to summary judgment. Summary disposition is appropriate where there is no genuine issue of material fact and where a determination of the applicable law will resolve the controversy. [35] The Office of Administrative Hearings has generally followed the summary judgment standards developed in the district courts in considering motions for summary disposition of contested case matters. [36]

The Administrative Law Judge's function on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but solely to determine whether genuine factual issues exist. [37] The judge does not weigh the evidence on a motion for summary judgment. [38]

In deciding a motion for summary disposition, the judge must view the evidence in the light most favorable to the non-moving party. [39] All doubts and factual inferences must be resolved against the moving party. [40] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. [41]

***5** The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. [42] If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts that are in dispute that can affect the outcome of the case. [43]

To successfully defeat a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case. [44] It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial. [45] A genuine issue is one that is not sham or frivolous. [46] A material fact is a fact whose resolution will affect the result or outcome of the case. [47]

While the purpose and useful function of summary judgment is to secure a just, speedy, and inexpensive determination of an action, summary disposition cannot be used as a substitute for a hearing where any genuine issue of material fact exists. [48] Accordingly, summary disposition is only proper where there is no fact issue to be decided. [49]

LEGAL ANALYSIS

A. Applicability of the MNOSHA Field Compliance Manual

Respondent asserts that MNOSHA did not follow the dictates of its Field Compliance Manual and failed to fully investigate Respondent's affirmative defense of preventable employee misconduct. As a result, Respondent argues that the Citation should be dismissed. Respondent's argument, however, fails on its merits.

It is true that the Manual instructs MNOSHA investigators to determine whether an employer has a legitimate defense to a Citation before issuing a Citation, and to include in the case file documentation that refutes the common affirmative defenses. [50] However, this Manual and its mandates are meant for the instruction of MNOSHA investigators in the preparation of MSOSHA case files, and not for the protection of the employers cited. The Manual's purpose is to assist MNOSHA investigators in preparing MNOSHA's case for hearing and to ensure that MNOSHA is prepared to defend against affirmative defenses raised by the parties cited.

For this reason, Federal Occupational Safety and Health Commission case law has repeatedly rejected Respondent's argument on this issue. *See e.g., Secretary of Labor v. Mautz & Oren, Inc.*, 1992 O.S.H.D. (CCH) P 29591, 1991 WL 30784 (O.S.H.R.C.A.L.J., Dec. 19, 1991) (failure to strictly adhere to the guidelines of an OSHA field manual was a procedural error and was not grounds for vacating a Citation); *Secretary of Labor v. Aquatek Systems, Inc.*, 21 O.S.H. Cas. (BNA) 1755, 2006 WL 2548486 (O.S.H.R.C., June 26, 2006) (employer is not entitled to an investigation into a possible affirmative defenses prior to Citation). [51]

The Manual is an internal document, instructive in nature, and is not law or rule. The provisions are procedural directions for MNOSHA investigators, and do not create substantive rights for those investigated. As articulated in *Secretary of Labor v. and FMC Corporation*:

***6** The manual contains only guidelines for the execution of enforcement operations for which the [investigator] has general responsibility. Moreover, the guidelines provided by the manual are plainly for internal application to promote efficiency and not to create an administrative straightjacket. They do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals. [52]

Thus, while a failure to comply with the Manual's protocols may well hinder MNOSHA's ability to adequately defend against an employer's later-asserted affirmative defenses, such failures do not result in the automatic dismissal of Citations.

In addition, as an affirmative defense, it is the employer's burden to establish the elements of the employee misconduct defense. Imposing a legal obligation on MNOSHA to investigate and develop an employer's affirmative defenses would unfairly shift the burden onto MNOSHA and, as the Department asserts, “throw the concept of an affirmative defense on its head.” [53] The information and documentation to support such defense is in the hands of the employer. Thus, it would be inequitable to impose

a duty on MNOSHA to develop the employer's defense and then dismiss a case if MNOSHA failed to investigate or develop it sufficiently for the employer.

Thus, because the Manual does not have the force or effect of law or rule, and because it is Respondent's burden to establish the elements of its affirmative defense in this action, Respondent's Motion for Summary Disposition on this issue is denied.

B. Respondent's Unpreventable Employee Misconduct Affirmative Defense

To obtain summary disposition on the affirmative defense of unpreventable employee misconduct, Respondent must show that there is no issue of material fact as to whether it: (1) established a work rule to prevent the reckless behavior or unsafe condition from occurring; (2) adequately communicated the rule to its employees; (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rules whenever employees transgressed it. [54]

The Department concedes that Respondent has established elements #1 and #2 (that work rules related to the use of fall protection were established and were adequately communicated to its employees prior to the accident). However, the Department asserts that there is a dispute of material fact as to factors #3 and #4 (i.e., whether Respondent took steps to discover incidents of noncompliance with fall protection rules and whether Respondent effectively enforced its fall protection rules).

An Administrative Law Judge's function on a motion for summary disposition, like that of a trial court, is not to decide issues of fact, but solely to determine whether genuine factual issues exist. [55] The ALJ does not make findings of fact or determine the credibility of witnesses. [56] A genuine issue of material fact exists, precluding summary judgment, "when reasonable persons might draw different conclusions from the evidence presented." [57]

***7** With its Motion, Respondent presented voluminous documentation of its rules and policies related to fall protection, as well as employee training records related to those rules and policies. [58] Respondent asserts that it strictly enforced its fall protection rules by conducting surprise audits/inspections and imposing discipline upon those employees found in violation. To that end, Respondent submitted documentation of various site audits from 2008 to 2011, and Employee Warning Notices and other disciplinary notices from 2008 to 2012. [59] Respondent argues that there is no dispute of material fact that such enforcement and disciplinary action establishes factors #3 and #4 of the affirmative defense of unpreventable employee misconduct, and that summary disposition should be granted dismissing Item 002 of the Citation.

Respondent has submitted evidence that it took steps to discover incidents of noncompliance and that it strictly enforced fall protection rules. According to Jason Albertson, Gateway's Safety Director, "Gateway has an extensive program of surprise job site audits/inspections." [60] Albertson contends that fall protection is one of the "key items" assessed during the audits. [61] Albertson asserts that Gateway conducted at least 20 documented surprise inspections in the year before the accident, and estimates that Gateway management conducts approximately 200 undocumented inspections per year. [62] Albertson, Lambutis, and Lewis all submitted affidavits acknowledging the occurrence of surprise safety audits at Gateway by Albertson, Gateway's owner, Kevin Johnson, and the 19 project managers. [63] Albertson, Lambutis and Lewis all assert that Gateway enforces its safety regulations and disciplines employees for safety violations, including failure to wear required fall protection. [64] However, a Gateway site audit, dated July 22, 2009, evidences that an entire crew was caught not using fall protection with the knowledge of its site foreman and that no discipline was imposed in that instance. [65] This site audit, and the lack of any other discovery of, or disciplinary actions for, fall protection violations over the years, establishes a dispute of fact as to whether Gateway was, indeed, actively seeking to discover violations and whether it was actively enforcing its fall protection policies.

In addition, to oppose Respondent's Motion, the Department submitted a signed, but un-notarized, statement from Buell (Statement). [66] In the Statement, Buell asserts that he worked at Gateway at approximately "50-75 job sites" and ""[t]here were never really any surprise audits." [67]

Buell further states that he worked on the elevated lift all morning on January 4, 2012, and for approximately 30 minutes after lunch before the accident occurred. [68] Buell estimates that he worked for four (4) hours in the elevated lift without fall protection. [69] Buell notes that Beneke (the forklift driver) observed Buell and Lambutis working without fall protection but did not object. [70] Buell's Statement does not mention whether or not Timothy Lewis, the job foreman, observed Buell or Lambutis working without fall protection. [71] However, according to Buell's Statement:

***8** At Gateway, a foreman is not really going to discipline you for not wearing fall protection. If a foreman finds you without fall protection, he will just tell you to put it on. It's only if the foreman catches you a second time that you will be formally disciplined. [72]

Buell's Statement, [73] while minimal, does establish a genuine issue of material fact as to whether Respondent took steps to discover incidents of noncompliance and/or whether Respondent effectively enforced the rules whenever employees violated them. It is undisputed that the project foreman, Lewis, was present at the jobsite the day of the accident. [74] Lewis states that he was unable to see Buell and Lambutis because he was working on the other side of the 30 x 60 foot grain bins and was, therefore, unaware that the two employees were working without fall protection. [75]

Buell asserts that he was on the elevated lift for approximately four hours prior to the accident. [76] Lambutis and Lewis acknowledge that Buell and Lambutis were working in the "man basket" for "less than two hours" at the time of the accident. [77] Accordingly, the evidence suggests that the two employees were working between two and four hours before the accident occurred in an elevated "man basket" of a forklift, while their foreman was present on the jobsite and working with them.

As the foreman, Lewis was charged with the duty of supervising the employees and enforcing safety rules on behalf of Gateway. The fact that the employees were working with him for a significant length of time (2-4 hours) without fall protection, in violation of the rules, and Lewis did not object or even notice the violations, presents a question of material fact as to whether there was a lack of enforcement of the fall protection rules and/or whether there was a failure to take steps to discover non-compliance. These facts, in combination with: (1) Buell's Statement that the fall protection rules are not strictly enforced by foremen at Gateway; and (2) the lack of any prior discipline imposed for violation of fall protection rules, especially in an instance when a violation clearly existed, is sufficient to establish a thin, but, nonetheless, existent, issue of material fact as to the applicability of the unpreventable employee misconduct defense.

Accordingly, Respondent's Motion for Summary Disposition is denied. The issues of whether Respondent established factors #3 and #4 of the affirmative defense of unpreventable employee misconduct shall proceed to an evidentiary hearing with respect to Item 002 of the Citation. Item 001 of the Citation is dismissed by stipulation of the parties.

A. C. O.

Footnotes

1 Respondent's Memorandum of Law in Support of Motion for Summary Disposition at pp. 3-4

2 *Id.*

3 Affidavit of Jason Albertson, dated February 14, 2013 (hereafter referred to as "Albertson Aff. #1") at Para. 4

4 *Id.*

5 *Id.* at Para. 4 and Ex. 2.

6 Respondent denies that the forklift was "parked," as defined by the forklift's operating manual, but admits that the forklift was stopped, its power was turned off, and its brakes "failed" at the time of the accident. (See Respondent's Memorandum in Support of Summary Disposition at pp. 4-5.) Whether the vehicle was "parked" is not material to the fall protection citation at issue in Respondent's Motion.

7 *Id* at Ex. 2.

8 *See*, recording of Oral Argument, April 2, 2013.

9 *Id.; See also*, Affidavit of Anthony Lambutis and Statement of Nick Buell, dated March 27, 2013.

10 Respondent's Memorandum of Law in Support of Summary Disposition at p. 5; *See also*, recording of Oral Argument on April 2, 2013.

11 Albertson Aff. #1; Affidavit of Timothy Lewis.

12 Lewis Aff.

13 Lambutis Aff.; Lewis Aff.; Albertson Aff. #1; Department's Memorandum in Opposition to Motion for Summary Disposition at p. 4.

14 *Id.*

15 Lambutis Aff.; Lewis Aff.; Albertson Aff. #1 at Ex. 29.

16 Albertson Aff. #1 at Ex. 29.

17 Lambutis Aff.; *See also*, recording of Oral Argument, April 2, 2013.

18 *See*, Recording of Oral Argument, April 2, 2013.

19 *Id* at Exs. 1 and 2; *See also*, Respondent's Memorandum in Support of Motion for Summary Disposition at p. 12.

20 Albertson Aff. #1 at Ex. 1.

21 *See* email correspondence from Jackson Evans to Judge O'Reilly and Aaron Dean, dated February 26, 2013. *See also*, recording of Oral Argument, April 2, 2013.

22 Albertson Aff. #1 at Ex. 1.

23 Albertson Aff. #1 at Ex. 4.

24 *Id.*

25 *Id.*

26 Notably, the Manual cited by Respondent is dated May 28, 2012. This post-dates the date of the accident and investigation in this case.

27 Affidavit of Aaron Dean, dated February 14, 2013 (Dean Aff. #1), at Ex. A, p. 59 (Unpreventable Employee Misconduct or "Isolated Event" — The violative conduct was unknown to the employer and in violation of an adequate work rule which was effectively communicated and uniformly enforced through a disciplinary program.)

28 Dean Aff. #1 at Ex. A, p. 57.

29 *Id* at p. 59.

30 *Id.*

31 Emphasis added.

32 *Modern Continental Construction Company, Inc. v. Occupational Safety and Heath Review Commission, et al.*, 305 F.3d 43, 51 (1st Cir. 2002), *citing P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Committee, et al.*, 115 F.3d 100, 109 (1st Cir. 1997); *See also, Valdek Corporation v. Occupational Safety and Health Review Commission*, 73 F.3d 1466, 1769 (8th Cir. 1996) ("To establish the defense of unforeseeable employee misconduct, [[the employer] must prove that it had a work rule in place which implemented the standard, and that it communicated and enforced the rule.").

33 *Valdek*, 73 F.3d at 1469*, citing Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied*, 484 U.S. 989, 108 S. Ct. 479, 98 L.Ed.2d 509 (1987).

34 *See*, Respondent's Memorandum of Law in Support of Summary Disposition.

35 *See, Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); *Gaspord v. Washington County Planning Commission*, 252 N.W.2d 590, 590-591 (Minn. 1977); Minn. R. 1400.5500(K) (2009); Minn. R. Civ. P. 56.03.

36 *See*, Minn. R. 1400.6600 (2011).

37 *See e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

38 *Id.*

39 *Ostendorf v. Kenyon*, 247 N.W.2d 834, 836 (Minn. Ct. App. 1984).

40 *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

41 *DLH*, 566 N.W.2d at 69.

42 *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

43 *Highland Chateau, Inc. v. Minnesota Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 6, 1985).
44 Thiele, 425 N.W.2d at 583; *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).
45 Minn. R. Civ. P. 56.05.
46 *Highland Chateau*, 356 N.W.2d at 808.
47 *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976); *See also*, O'Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996).
48 *Sauter*, 70 N.W.2d at 353.
49 *Id.*
50 Dean Aff. #1 at Ex. A.
51 Federal OSHA decisions are instructive in so much as Minnesota has adopted and MNOSHA applies federal OSHA regulations.
52 5 O.S.H. Cas. (BNA) 1707, 1977-1978 O.S.H.D (CCH) P 22060, 1997 WL 7715 at *4 (O.S.H.R.C. Aug.4, 1977) (citations omitted).
53 Memorandum of Law in Opposition to Motion for Summary Disposition at p. 3.
54 *See e.g., Modern Continental*, 305 F.3d at 51.
55 *DLH, Inc.*, 566 N.W.2d at 70.
56 *Id.*
57 *Id.* at 69.
58 *See*, Albertson Aff. #1.
59 Albertson Aff. #1 at Exs. 27 and 28; Affidavit of Jason Albertson, dated March 28, 2013 (Albertson Aff. #2), at Exs. C, D, and E.
60 Albertson Aff. #2 at Para. 14.
61 Albertson Aff. #1 at Para. 59.
62 Albertson Aff. #2 at Para. 14-22 and Exs. C and D. *See also*, Albertson Aff. #1 at Para. 59 and Ex. 27.
63 Albertson Aff. #2, Lambutis Aff., Lewis Aff.
64 *Id.*
65 Albertson Aff. #1 at Ex. 27; Albertson Aff. #2 at Ex. C, pp. GBS-000105-000107.
66 According to Assistant Attorney General Jackson Evans, legal counsel for the Department, Buell lives in out-state Minnesota and was unable to locate a notary. As a result, counsel could only obtain a signed statement from Buell prior to the motion hearing. (See recording of Oral Argument on April 2, 2013.)
67 Statement of Nick Buell, dated March 27, 2013.
68 Buell Statement at Para. 2.
69 *Id.*
70 *Id.* at Para. 3.
71 Buell Statement.
72 *Id.* at Para. 4.
73 Respondent objects to the consideration of Buell's Statement because it is not a notarized or sworn affidavit, and was not executed by Buell until March 27, 2013 — weeks after the Department served its responsive Memoranda. In a district court, Respondent's objections would likely be sustained under Minn. R. Civ. P. 56.05. However, the rules applicable to contested administrative hearings, such as this, allow for broader inclusion of evidence than the Minnesota Rules of Civil Procedure and Rules of Evidence. According to Minn. R. 1400.7300:

The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs....

Although Buell's Statement is not notarized, it is signed by Buell (albeit late). By his signature, Buell is acknowledging the veracity of the statements contained therein, and is identifying the substance of his anticipated hearing testimony. There is no allegation or other indication that the document was forged, that it is inauthentic, or that it is untrue. If the Statement was not executed, it would, indeed, be disregarded as not possessing probative value. However, given his signature, the evidence of authenticity, and the lower threshold for the admission of evidence in administrative hearings, the fact that the Statement was not notarized is not fatal to its admission for purposes of responding to this Motion.
74 Lewis Aff. at Para. 2-3.
75 *Id.*
76 Buell Statement.
77 Lambutis Aff. at Para. 1.

2013 WL 1743058 (Minn.Off.Admin.Hrgs.)

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1998 WL 879166 (Minn.Off.Admin.Hrgs.)

Office of Administrative Hearings

State of Minnesota

IN THE MATTER OF THE RISK LEVEL DETERMINATION OF HARLEY B. MORRIS

***1 Department of Corrections**
1-1100-11701-2
September 1998

ORDER ALLOWING RECEIPT OF ADDITIONAL EXHIBITS

By a written motion filed with the Office of Administrative Hearings on August 10, 1998, the ECRC seeks an order reopening the record and receiving additional exhibits into evidence. Harley B. Morris filed a response to the motion on August 24, 1998.

Alan Held, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, represents the End of Confinement Review Committee (ECRC). Peter Gray-Whiteley, Assistant State Public Defender, Legal Advocacy Project, 2829 University Avenue S.E., Suite 600, Minneapolis, Minnesota 55414, represents Harley B. Morris.

Based upon the memoranda filed by the parties, and for the reasons set out in the attached Memorandum:

IT IS HEREBY ORDERED: that the documents submitted with the August 10, 1998 motion to reopen the record are received into evidence in this proceeding.

Dated this _____ day of September 1998.

George A. Beck
Administrative Law Judge

MEMORANDUM

The documents which the ECRC seeks to have included in this administrative record are the following:
1. Two reports from the Hennepin County Workhouse concerning an alleged assault by Harley Morris upon another inmate in 1970.

2. A plea and sentencing transcript relating to two alleged domestic assaults by Mr. Morris upon his wife in 1989.

3. A transcript of a probation violation hearing on May 22, 1991.

4. Two documents concerning an alleged domestic assault committed by Mr. Morris in 1989.

The Committee states that it had attempted to obtain these documents prior to the hearing, but was unable to do so. It argues that they relate to offenses or times of incarceration that were already addressed in previously received exhibits and therefore do not unfairly prejudice Mr. Morris. The Committee suggests that the documents provide further details to assaultive behavior by Mr. Morris and of his interest, or lack thereof, in pursuing treatment.

In his response, Mr. Morris objects to receipt of these exhibits into evidence on a number of grounds. He first objects to incorporation of the offered exhibits into the Committee's argument before they have been received into the record. He suggests that these materials are not newly discovered, but were simply not gathered in time for the hearing. He argues that the appropriate procedure was for the Committee to seek to reschedule the hearing so that Mr. Morris would have an opportunity to examine these documents prior to the hearing and an opportunity to cross-examine concerning the documents at the hearing. Mr. Morris also contends that the motion was not stated with particularity, that the documents are improperly certified, and that various portions of the proposed exhibits are repetitive, irrelevant, pejorative, and hearsay.

***2** A review of the proposed exhibits indicates that they are relevant to the issues in this case and that they do refer to or expand on evidence already in the record. Because of this fact, Mr. Morris is not unduly prejudiced by receipt of the exhibits since he had the opportunity, at the hearing and will have the opportunity in his final brief, to address the incidents described in the newly submitted documents. Although Mr. Morris objects to the motion as not being stated with particularity, the motion is sufficient in stating the reasons that the ECRC believes justify including this material in the record.

Mr. Morris points to an apparently inaccurate date on the record certification and suggests that it is unlawful. He also suggests that the documents meet neither the business records' or public records' exceptions to the hearsay rule contained in the Minnesota Rules of Evidence, 901 and 902. The standard for admission of evidence in an administrative proceeding for hearsay documents is whether or not they are reliable. Minn. Rule 1400.7300, subp. 1. Although compliance with the Minnesota Rules of Evidence may demonstrate admissibility in an administrative proceeding, it is not necessarily a requirement of admissibility. In this case, the inaccurate date does not render these documents unreliable. They clearly relate to matters already discussed in the existing record and the form and content of the documents support their reliability and authenticity.

Mr. Morris' objection to the repetitious nature of the documents is not well taken since they do provide further detail as to matters in the record. A review of the materials do not show that they are unduly prejudicial or clearly irrelevant. Although they contain hearsay material, Mr. Morris is, of course, free to argue that less weight should be given to hearsay observations such as those of an investigating police officer in a police report.

Mr. Morris has also argued that allowing the receipt of this evidence into the record should not be allowed in these proceedings since it circumvents Mr. Morris' opportunity to review documents before the hearing and to address matters contained in the documents at the hearing. This is a valid argument. Receipt of documents into evidence after the hearing cannot be tolerated as normal procedure. Had these documents related to new matters not already contained in the record and exhibits submitted at the hearing, they would likely have been excluded. It is the Committee's responsibility to gather all of the evidence prior to the hearing in order to support its determination. As Mr. Morris points out, any procedural strategy which would deliberately prejudice his right to address material in the record would be improper.

A review of the proposed exhibits and the briefs convinces the Administrative Law Judge that in this case there is no prejudice to Mr. Morris in receiving these documents into the record since they relate to previously examined matters and can be addressed by Mr. Morris in his final brief.

***3** G.A.B.

1998 WL 879166 (Minn.Off.Admin.Hrgs.)

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