2014 WL 2013436
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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN.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 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

349 Searches and Seizures
349I In General
349k79 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

217 Insurance
217XI Agents and Agency
217XI(B) Licenses and Permits; Regulation in General
217k1617 Discipline
217k1620 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

217 Insurance
217XI Agents and Agency
217XI(B) Licenses and Permits; Regulation in General
217k1617 Discipline
217k1618 In General

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
122A Deposits and Escrows
122AII Conditional Deposits or Escrows
122Ak13 Depositaries
217 Insurance
217XI Agents and Agency
217XI(B) Licenses and Permits; Regulation in General
217k1617 Discipline
217k1618 In General

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
217 Insurance
217XI Agents and Agency
217XI(B) Licenses and Permits; Regulation in General
217k1617 Discipline
217k1618 In General

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
122A Deposits and Escrows
122AII Conditional Deposits or Escrows
122Ak13 Depositaries
217 Insurance
217XI Agents and Agency
217XI(B) Licenses and Permits; Regulation in General
217k1617 Discipline
217k1618 In General

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.

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This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).
Court of Appeals of Minnesota.

In the MATTER OF Julitta ADU–GYAMFI, R.N., L.P.N., R.N. License No. 184096–8, L.P.N. License No. 58788–2.

A17–1425
|
Filed June 4, 2018
|
Review Denied August 7, 2018

Minnesota Board of Nursing, File No. OAH 68–0904–33654

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Considered and decided by Ross, Presiding Judge; Reilly, Judge; and Klaphake, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge [*]

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

***1** Relator Julitta Adu–Gyamfi challenges a decision by respondent Minnesota Board of Nursing placing limitations and conditions on her nursing licenses based on the board's findings that relator violated requirements of the Minnesota Nurse Practice Act, Minn. Stat. §§ 148.171–.285 (2016). Relator asserts that (1) the board improperly initiated a disciplinary hearing against her without a verified written complaint; (2) the board's decision was unsupported by substantial evidence, arbitrary and capricious, and a violation of due process because it was based primarily on hearsay evidence and speculation; and (3) the board violated due process by considering the Administrative Law Judge's (ALJ) order and costs at the same hearing. Because the hearing process satisfied due-process requirements and the board's decision is supported by substantial evidence and not arbitrary or capricious, we affirm.

DECISION

"[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field[s] of their technical training, education, and experience." *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). But an appellate court reviewing an agency decision may reverse or modify "the decision if the substantial rights of the petitioners may have been prejudiced" because the administrative decision was (1) based on unlawful procedure, (2) affected by an error of law, (3) unsupported by substantial evidence in view of the entire record, or (4) arbitrary or capricious. Minn. Stat. § 14.69 (2016). "The relator has the burden of proof when challenging an agency decision ...." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427, 433 (Minn. 2003).

"In reviewing an agency's decision on a legal issue, this court is not bound by the agency's ruling." *In re Revocation of the Family Child Care License of Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003). "A reviewing court must defer to the agency's fact-finding process and be careful not to substitute its findings for those of the agency." *Id.* A reviewing court does not retry facts or make credibility determinations, but must defer to an agency's credibility determinations. *In re Appeal of Rocheleau*, 686 N.W.2d 882, 891 (Minn. App. 2004), *review denied* (Minn. Dec. 22, 2004).

I.

Relator argues that the board's order should be reversed because the panel failed to provide a verified complaint before initiating the contested case against relator. "Before scheduling a contested case hearing, the executive director or executive secretary [of a health-related licensing board]

must have received a verified written complaint from the complaining party." Minn. Stat. § 214.10, subd. 2 (2016).

In October 2015, the board received a written complaint against relator, who was employed by a home-care agency; the complaint was signed and submitted to the board by H.M., who was initially relator's supervisor and became her clinical manager in 2015. In July 2016, the board began a contested case proceeding against relator. The notice of hearing that the board provided to relator spelled out the violations of the nursing practice act alleged against relator and the conduct underlying those allegations. It was also supplemented by documents in her employment file relating to her substandard nursing practice and unprofessional conduct. Because relator was provided adequate notice of the allegations against her, the lack of a verified complaint is not a ground for reversal. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (Minn. 1975) (stating that "error without prejudice is not ground for reversal").

II.

2** ***Substantial evidence

> A decision is supported by substantial evidence when it is supported by (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.

Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency, 644 N.W.2d 457, 464 (Minn. 2002).

Relator argues that the evidence was hearsay and, therefore, does not meet the substantial-evidence standard. In an administrative hearing, the ALJ "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." Minn. R. 1400.7300, subp. 1 (2017). Hearsay evidence was admitted through relator's supervisor, A.S., regarding complaints by coworkers about relator not keeping schedules up to date, improperly administering medication through an intravenous (IV) port, and failing to timely document patient statuses. Emails and testimony about emails by coworkers who did not testify at the hearing were also admitted. The emails included complaints about relator's late documentation, charting deficiencies, failure to schedule a patient for a blood draw, failure to correct a "start of care" plan for a patient despite repeated requests to do so, and complaints received by coworkers from patients.

The hearsay evidence was corroborated by nonhearsay evidence. On January 15, 2013, A.S., relator's clinical manager through 2014, wrote a supervisor/manager documentation note stating that she had called relator repeatedly to chart lab test results for a patient's potassium level. A.S. explained that potassium levels are important because abnormal levels can indicate cardiac problems. On January 16, A.S. called relator about missing documentation in patient charts for January.

In March 2013, A.S. drafted a corrective-action plan for relator due to her failure to complete documentation on time. A.S. gave relator a verbal warning, removed relator from her case manager position, and demoted her to a visiting nurse position. A.S. directed relator to complete patient charting within 24 hours and to timely complete patient admission documentation. A.S. explained that untimely and incorrect documentation impacts patient care because other staff cannot complete their documentation, see doctors' orders, or know when to see a patient.

T.V., relator's supervisor who testified at the hearing, emailed A.S. in August 2014 about relator's failure to timely complete and close a patient's chart, which resulted in another nurse being unable to determine whether another blood draw had been ordered for the patient, who was on a blood thinner.

On August 18, 2015, A.S. drafted a second corrective-action plan for relator. The plan stated that relator failed to communicate with case managers and patients in a timely manner, that case managers had complained that relator's patient reports were untimely, her documentation was incomplete, and she was not following up after patient visits. A.S. gave relator a written warning, stating that failure to meet the performance-improvement goals could result in further corrective action, including termination.

***3** On October 2, 2014, A.S. drafted a third corrective-action plan for relator. The plan stated that patients had reported that they did not want relator for their nurse because relator was

rude and unpleasant, was late for home visits, and did not call when she was going to be late.

On November 17, 2014, A.S. drafted a fourth corrective-action plan due to discrepancies on relator's timecard. Relator's timecard had discrepancies when compared to completed documentation in medical records, and she over-reported the number of patient visits she had completed.

On May 21, 2015, H.M., relator's clinical manager, met with relator to discuss her continuing documentation deficiencies. H.M. testified that relator's failure to complete documentation in a timely manner prevented the home-care agency from knowing when later visits should be scheduled and which providers to send to a patient's home for follow-up visits. H.M. explained that the lack of documentation prevented other nurses from preparing for their visits because there was no guidance on physician's follow-up orders. On May 29, 2015, H.M. again met with relator about her documentation deficiencies.

There was testimony about the transfer of relator's case manager load to M.M. M.M. testified that relator's charting for some patients was incomplete, including discharge summaries for three patients. H.M. testified that relator's transition of patient care was dangerous and that in one case, relator's failure to enter wound-care orders or information about a blood draw could have led to a patient's death.

After relator resigned, H.M. went through relator's supplies and found contaminated bloody syringes and needles in a plastic bag. The home-care agency's disposal policy required that leftover blood in a syringe be deposited into a contained waste tube and that the waste tube, syringes, and needles be disposed of properly.

Relator cites *Pietsch v. Minn. Bd. of Chiropractic Exam'rs,* 683 N.W.2d 303, 309 (Minn. 2004) (reversing summary disposition that appellant engaged in unprofessional conduct when there was no evidence beyond mere assertions to support a conclusion that his solicitation methods were "unethical, deceptive and harmful to the public"); *In re Wang*, 441 N.W.2d 488, 494–95 (Minn. 1989) (reversing a violation finding when the only evidence linking the appellant to prescription refills was an unsubstantiated notation on a pharmacy record and the investigator's testimony that appellant admitted authorizing the refills); and *In re Expulsion of E.J.W.*, 632 N.W.2d 775, 782 (Minn. App. 2001) (reversing expulsion when the only evidence connecting the appellant to the bomb threat was the officers' testimony about what they were told by students).

In the cases relied on by relator, there was minimal or no evidence corroborating the hearsay evidence. Here, although the evidence about relator's violations was to some extent hearsay, the hearsay evidence was corroborated by A.S.'s testimony about the corrective-action plans; the testimony of H.M., M.M., and T.V.; documents produced by relator's supervisors that were discussed with and signed by relator; patient medical records; and the evidence about the contaminated items found in relator's supplies.

The board determined that:

> [B]y failing to timely and adequately document her nursing care, including lab test results and doctors' orders, and by improperly disposing of used syringes, [relator] failed to perform nursing with reasonable skill and safety in violation of Minn. Stat.§ 148.261, subd. 1(5); by failing to timely and adequately document her nursing care and by improperly disposing of used syringes, [relator] engaged in unprofessional conduct that failed to conform to minimal standards of acceptable and prevailing nursing practice and created a danger to patients' health and safety in violation of Minn. Stat.§ 148.261, subd. 1(6); by failing to timely and adequately document her nursing care, [relator] improperly managed patient records in violation of Minn. Stat.§ 148.261, subd. 1(16); by engaging in unprofessional conduct, [relator] violated a state law relating to the practice of nursing in relator's licenses violation of Minn. Stat.§ 148.261, subd. 1(18).

***4** Viewing the record in its entirety, substantial evidence supports the board's findings, and those findings support its conclusions on relator's violations of the nursing practice act.

Arbitrary and capricious

> [A]n agency ruling is arbitrary and capricious if the agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs, 713 N.W.2d 817, 832 (Minn. 2006). An agency decision is arbitrary or capricious if the decision is based on whim or is devoid of articulated reasons. *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001).

Relator argues that less stringent conditions should have been imposed on her licenses. When a licensed professional breaches professional standards, "the nature and duration of the discipline is best determined by his or her fellow professionals, who are in a superior position to evaluate the breaches of trust and unprofessional conduct." *Padilla v. Minn. State Bd. Of Med. Exam'rs*, 382 N.W.2d 876, 886–87, *review denied* (Minn. Apr. 24, 1986). The legislature has conferred on the board, not the ALJ, the discretion to determine the type of discipline to impose. *Id.*

The board placed the following conditions on relator's licenses (1) prohibiting her from working in home care, group homes, assisted-living facilities, schools, or through temporary placement agencies; (2) requiring that she attend seven hours of continuing education with a nurse consultant to address time management, documentation standards, infection control, and therapeutic communications; (3) requiring that she follow the consultant's recommendations; (4) requiring relator to provide the board with a report on what she learned through the instruction; and (5) requiring quarterly reports from relator's nursing supervisor. Because all of these conditions are either related to the deficiencies in her performance of nursing or means of monitoring her performance to guard against future deficiencies, the conditions are not arbitrary or capricious.

Due process

> Due-process protections include reasonable notice, a timely opportunity for a hearing, the right to be represented by counsel, an opportunity to present evidence and argument, the right to an impartial decision-maker, and the right to a reasonable decision based solely on the record. Full due-process requirements, however, do not attach to a general fact-finding investigation conducted by an agency.

Humenansky v. Minn. Bd. of Med. Exam'rs, 525 N.W.2d 559, 565 (Minn. App. 1994).

We have already addressed relator's argument that the board's order was based on unreliable hearsay. A three-day hearing was conducted at the Office of Administrative Hearings (OAH), and relator had the opportunity to present evidence and confront and cross-examine witnesses. After the ALJ issued the recommended order, the relator was afforded the opportunity to submit exceptions and present written and oral arguments to the board. The board's hearing process satisfied due-process requirements.

III.

***5** Minn. Stat. § 148.262, subdivision 4, states:

> Any person whose license or registration has been revoked, suspended, or limited may have the license reinstated and a new registration issued when, in the discretion of the board, the action is warranted, provided that the person shall be required by the board to pay the costs of the proceedings resulting in the revocation, suspension, or limitation of the license or registration certificate and reinstatement of the license or registration certificate, and

> to pay the fee for the current registration period.

Relator contends that she was denied due process because the board considered the ALJ's order and costs at the same hearing. [1] Relator was provided with a copy of the panel's statement of costs which included itemized invoices, and relator had the opportunity to object to, and did object to, the statement of costs. *See Proetz v. Minn. Bd. of Chiropractic Exam'rs*, 382 N.W.2d 527, 533 (Minn. App. 1986) (affirming imposition of costs for ALJ's services and court reporter without a hearing when relator had the opportunity to object to imposition of costs but failed to do so). Here, the board had a proper basis for assessing the costs, and the relator had the opportunity to be heard on the issue. The board's consideration of the ALJ's order and costs at the same hearing satisfied due-process requirements.

1 Relator mischaracterizes the order for costs as a "civil penalty" under Minn. Stat. § 148.262, subd. 1(6), which states that the board may:

> [I]mpose a civil penalty not exceeding $10,000 for each separate violation, the amount of the civil penalty to be fixed as to deprive the nurse of any economic advantage gained by reason of the violation charged, to reimburse the board for the cost of counsel, investigation, and proceeding, and to discourage repeated violations.

Affirmed.

All Citations

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United States District Court,
S.D. Indiana,
Indianapolis Division.

Monica SCHMUTTE, Plaintiff,
v.
RESORT CONDOMINIUMS INTERNATIONAL, LLC., Defendant.

No. 1:05-cv-0311-LJM-WTL.
|
Nov. 29, 2006.

Attorneys and Law Firms

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ORDER ON DEFENDANT'S MOTIONS TO STRIKE

LARRY J. McKINNEY, District Judge.

***1** This cause is now before the Court on defendant's, Resort Condominiums International, LLC. ("RCI"), motions to strike that were incorporated into its reply brief on its pending Motion for Summary Judgment. Because the number of motions to strike was so large and disposition of them critical to the Court's analysis on summary judgment, the Court chose to address the motions to strike in a separate order.

For the reasons stated herein, all of RCI's motions to strike are **DENIED.**

1. *RCI's Objections to Paragraphs in Schmutte's Declaration*

RCI has moved to strike numerous paragraphs in plaintiff's, Monica Schmutte's ("Schmutte") Declaration, contending that the statements contradict her prior deposition testimony, are inadmissible hearsay, and/or are not based on personal knowledge. When ruling on a motion for summary judgment, the Court has the authority to strike any affidavit that does not conform to the requirements of the Federal Rules of Civil Procedure. *See Adusumilli v. City of Chi.,* 164 F.3d 353, 359 (7th Cir.1998). "A party cannot create an issue of fact merely by manufacturing a conflict in his own testimony by submitting an affidavit that contradicts an earlier deposition...." *Piscione v. Ernst & Young,* 171 F.3d 527, 532 (7th Cir.1999). Moreover, "when a deposition and affidavit are in conflict, the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken, perhaps because the question was phrased in a confusing manner or because a lapse of memory is in the circumstances a plausible explanation for the discrepancy." *Id.* (quoting *Russell v. Acme-Evans Co.,* 51 F.3d 64, 67-68 (7th Cir.1999)). A party may attempt to clarify (but not contradict) prior deposition testimony through affidavits. *Simmons v. Chi. Bd. of Educ.,* 289 F.3d 488, 492 (7th Cir.2002). Ambiguities in a deposition must be resolved in favor of the non-moving party on summary judgment. *Aviles v. Cornell Forge Co.,* 183 F.3d 598, 602-03 (7th Cir.1999). Each objection is now addressed in turn.

a. Paragraph 15 of Schmutte's Declaration-In paragraph 15 of her declaration, Schmutte testified:

> I believe that my manager, Jennifer Dickinson, reacted negatively to me taking intermittent leave. When I had to inform Ms. Dickinson that I needed intermittent time off she sighed at me, or said "what is it this time?" She also responded to me in an unfriendly voice, which was not like her because she was usually friendly towards me.

RCI maintains that Schmutte's statements should be stricken because they are speculation and conjecture, contradict prior deposition testimony, and are remote in time. RCI cites no authority for its proposition that Schmutte's statements are too remote in time to be considered. In addition, Schmutte's statements are not speculation or conjecture. Schmutte can testify about what she believed based on her interactions with Dickinson. Federal Rule of Evidence 701 ("Rule 701"), the rule which permits certain opinion testimony by lay witnesses, permits a witness to testify concerning opinions that are "rationally based on the perception of the witness." Here, Schmutte testified as to what she observed Dickinson

say and do that led her to believe that Dickinson was reacting negatively to her taking intermittent FMLA leave. This evidence meets the requirements of Rule 701.

***2** Moreover, Schmutte's affidavit testimony does not conflict with her prior deposition testimony. During Schmutte's deposition, counsel for RCI introduced Schmutte's Initial Disclosure Statement. Dep. Schmutte, p. 172-173, Dep. Ex. 54. The following exchange then occurred:

> Q. Ms. Schmutte, I'm showing you what's been marked as Exhibit 54. This is a pleading that your attorneys have filed on your behalf in your lawsuit, or at least have served on us in your lawsuit. Have you seen this before?
>
> A. No.
>
> Q. They've provided us with some information that relates to the matters at issue in this case. I just want to ask you a couple of questions about their responses and see if you can provide me with your best information on those. First of all, they've identified people who have information that might be relevant to this case. I just want to walk through a couple of those names with you. Who's Jennifer [Dickinson]?
>
> A. Jennifer [Dickinson] is the supervisor over Shell Vacations Club. She was the supervisor over Shell Vacations Club.
>
> Q. What information would she have that would be relevant to your claims in this case, do you know?
>
> A. She would basically have information on any type of reviews, anything like that on me. As in this specific situation, the incident, I don't know.
>
> Q. Okay. She wasn't there on December 22nd?
>
> A. I don't remember.

Dep. Schmutte, p. 172-173, Dep. Ex. 54.

Schmutte's testimony from her deposition is not in conflict with Paragraph 15 of her declaration. In Schmutte's deposition she responded to a question asking for information Ms. Dickinson may have that would be relevant to Schmutte's claims. Questioning Schmutte about "information" Dickinson may have would not prompt Schmutte to testify about conversations she had with Dickinson about her prior intermittent FMLA leave requests. Moreover, RCI narrowed the line of questioning to the incident that occurred on December 22, 2003. Schmutte would not know that she should testify about interactions she had with Dickinson in 2002, when RCI specifically referred to the events that occurred on December 22, 2003.

b. Paragraphs 24-26 of Schmutte's Declaration-In Paragraphs 24-26 of her declaration Schmutte testified as follows:

> 24. I went to work on Thursday, September 18, 2003, and I told my co-worker Luanne Moore that I attempted suicide. Ms. Moore informed our Team Leader, Lisa Ogborn about my suicide attempt. Shortly thereafter, Gayla Jackson, the General Sales Manager, approached me at my desk and escorted me to the Human Resources Office. Ms. Ogborn was also present.
>
> 25. When we arrived at the Human Resources Office, Ms. Jackson, Ms. Ogborn, and I met with Brad Binder, the Manager of Human Resources, in his office.
>
> 26. Mr. Binder told me that he was aware that I attempted suicide. Mr. Binder suggested that I look into the counseling program offered to RCI employees. I told Mr. Binder that I had suffered from depression for most of my life and that I was already in therapy and taking medication for my depression.

***3** RCI maintains that because Schmutte testified in her deposition that she went to the St. Vincent's Stress Center the day after she attempted suicide, any events alleged to occur between her suicide attempt and Schmutte's admission to the Stress Center should be stricken. With respect to her admission to the St. Vincent's Stress Center, Schmutte testified:

> Q. Now, after this FMLA leave, do I understand that you subsequently, in the fall of 2003, had an FMLA leave again related to stress-
>
> A. Yes.
>
> Q.-concerns? When did that FMLA leave start?
>
> A. Would have started, I believe, September-around September 17th. I don't-I'm sorry, I don't remember the exact day. I know it was mid September [sic].
>
> Q. Of 2003?
>
> A. Yes, it was.

Q. And how long did it last?

A. Till November 22nd, around that date....

Q. How did you end up going to the Stress Center and being placed in inpatient care there?

A. I tried to commit suicide.

Q. Do you know when that happened?

A. The night before I was admitted into St. Vincent's.

Dep. Schmutte, p. 82-83, 86.

Schmutte's deposition testimony and her affidavit testimony are not in conflict. It is clear that Schmutte was unsure in her deposition of the exact date that her September 2003, FMLA leave began and was mistaken when she stated that she was admitted to the St. Vincent Stress Center the day after she attempted to commit suicide. Testimony from other witnesses indicates that Schmutte did indeed have a conversation with Brad Binder, Gayla Jackson, and Lisa Ogborn regarding her suicide attempt. Both Ogborn and Jackson testified that a meeting occurred with Schmutte as a result of her attempted suicide. Dep. Ogborn, p. 44-46; Dep. Jackson, p. 24-26. Ogborn testified that Binder told Schmutte that everything was going to be okay and that she needed to go back upstairs to work and get on the phone. Dep. Ogborn, p. 45. Schmutte's affidavit testimony serves to clarify her prior deposition testimony.

c. Paragraph 36, Last Sentence of Schmutte's Declaration-The last sentence in paragraph 36 of Schmutte's declaration states, "CORE was responsible for communicating with RCI about my medical leave." RCI maintains that this sentence must be stricken because "Schmutte does not have personal knowledge of CORE's responsibilities with respect to communications with RCI." However, Schmutte can testify about her understanding of RCI's FMLA policy requiring employees to make FMLA requests through CORE because she was an employee and was required to follow the policy. Moreover, documents produced by CORE and RCI during discovery in this matter show that Schmutte communicated with CORE and CORE communicated with RCI. Dep. D'Addario, Ex. 1.

d. Paragraphs 38, 83-84, 94 of Schmutte's Declaration-In Paragraph 38 of her declaration, Schmutte testified as follows: "38. To give me time to find a psychiatrist and not run out of medication, Dr. Mishra and Dr. Osman gave me refills on my prescriptions for Klonopin and Effexor EX. Dr. Beard continued to prescribe Zoloft."

***4** RCI maintains that this paragraph must be stricken because Schmutte cannot diagnose herself or conjecture about her physician's motives. However, Schmutte does not diagnose herself in Paragraph 38, she merely lists the medications she was taking. Moreover, it is not conjecture for Schmutte to testify about what she believes her physician's motives were. Also, Schmutte can testify, based on her personal knowledge, that she continued to take the medications prescribed by Drs. Mischra, Osman, and Beard and that she continued to refill those medications while she looked for a psychiatrist.

RCI claims that Paragraphs 83 and 84 must be stricken because Schmutte allegedly was attempting to provide medical information on her certification forms and appeal letters which had not been provided by her doctors. In Paragraphs 83-84 and in Paragraph 94, Schmutte specifically quotes from the cover letter and appeal letter she submitted to CORE, which are Exhibits 17 and 20 attached to her declaration. RCI introduced these Exhibits during Schmutte's deposition. Schmutte is not "self diagnosing" with these Exhibits. Schmutte provided Declaration Exhibits 17 and 20 to CORE to evidence her attempts to appeal the denial of her FMLA request. Schmutte can attest to what her cover sheet and appeal letter stated, including the fact that she has been diagnosed with depression and anxiety, what she has been told by her physicians, and the symptoms she had experienced. Moreover, these statements are not hearsay because they are not made to prove the truth of the matter asserted; they show the communication that occurred between Schmutte and CORE.

Furthermore, RCI's objections to these Exhibits are contradictory given that RCI introduced Exhibits 40 and 45 at Schmutte's deposition, which according to RCI's analysis, would also contain the self-diagnosis and conjecture testimony that RCI now seeks to strike. Exhibit 40 is the paperwork that Schmutte faxed to CORE on January 8, 2004. Schmutte's paperwork included a fax coversheet, a cover letter, and the FMLA certification form. Schmutte's cover letter states, in part:

> This is in regards to the FMLA paperwork I have faxed along with

> this. I wanted to give you a brief explanation as to what happened. I had an adverse reaction to some anxiety medication I am on and basically collapsed at work.... I have contacted my doctor to inquire on changing my medicine.... I was a patient in the emergency room for 5-6 hours that day, making sure I didn't have any other medical problems and was given some other medicine to counter-act my reaction.

See RCI's Summ. J.App., Ex. B, Dep. Ex. 40. Exhibit 45 to Schmutte's deposition is the paperwork that she faxed to CORE on January 22, 2004. RCI is hard pressed to argue that the Exhibits cited in Schmutte's declaration should be stricken where it relies on substantially similar Exhibits in its own motion for summary judgment.

e. Paragraph 39 of Schmutte's Declaration-In Paragraph 39 to her declaration, Schmutte testifies about a print-out she requested from her drug store. The print-out shows the dates on which Schmutte refilled her medications prescribed by Drs. Mishra, Osman, and Beard. RCI maintains that this paragraph and Exhibit must be stricken because Schmutte cannot authenticate the Exhibit and because "they are inadmissible hearsay." Schmutte can attest to the medication she was prescribed by her physicians and that she was given refills on the medication. Schmutte can also attest to the fact that she had to refill her medications from time to time during 2003, and January 2004, at the CVS pharmacy.

***5** Schmutte can authenticate the print-out that she received from the drug store. With respect to authentication, the proponent of the proffered evidence need only make a prima facie showing that the exhibit is what the proponent claims it is. *See United States v. Kelly,* 14 F.3d 1169, 1175 (7th Cir.1994). Here, Schmutte testified that she requested a print-out from the drug store where she had her prescriptions filled during 2003, and January 2004. Schmutte attached a true and correct copy of her prescription print-out from the CVS pharmacy. There is no reason to doubt that what is attached to Schmutte's declaration is not the print-out that she received from the CVS pharmacy. Thus, Schmutte has made a prima facie showing of authenticity.

f. Paragraph 42 of Schmutte's Declaration-In Paragraph 42 of her declaration, Schmutte stated:

> I did not apply for intermittent FMLA leave when I returned to work in November 2003 because I had been off work for seven (7) weeks and felt obligated to return full time. Additionally, I did not apply for intermittent leave because I did not believe that RCI would approve such a request based on Ms. Dickinson and Ms. Burtzlaff's reaction to my prior intermittent leave request.

RCI maintains that this affidavit testimony must be stricken because it contradicts Schmutte's deposition testimony. During her deposition, Schmutte testified as follows:

> Q. Okay. And did you understand that following November 12, 2003, that you had been released to return to work without restrictions?
>
> A. Yes. I asked for-to return without restrictions. Because I, again, felt that I needed to get back to work. I felt guilty for being off.
>
> Q. And you knew that intermittent leave was potentially available, but you opted not to seek it; is that a fair statement?
>
> A. At that-at that point in time, yes. I-a few reasons. I wasn't sure what-how many hours I had left on FMLA. Again, I looked at it as being off for two months. I felt that I would be competent enough to go back and handle the work life. I guess you would say.
>
> Q. Had you tracked the amount of FMLA time you had taken in 2003?
>
> A. No.
>
> Q. Did you ever ask anybody how much time you had left?
>
> A. No. I knew that the only time I took was from my surgery in May, and then, from this. So, I knew that I had the time, I just didn't know-once you add it up, of how much time I had left, or whatever.

Q. Okay. Why don't we take a break.

Dep. Schmutte, p. 88-89.

Schmutte testified in her deposition that she did not request intermittent leave when she returned in November 2003 for "a few reasons." RCI did not follow-up in order to explore all of Schmutte's reasons not to apply for intermittent leave when she returned. RCI stopped this line of questioning and went on to question Schmutte about a different matter. Thus, Schmutte's declaration is not inconsistent with her deposition testimony.

g. Paragraphs 44-47, 51 (Sentences 6-7) of Schmutte's Declaration-With respect to paragraphs 44-47, 51 (Sentences 6-7), RCI maintains that Schmutte's affidavit testimony regarding her conversations with Lisa Ogborn contradict her prior deposition testimony. In response to questions regarding Deposition Exhibit 54, Schmutte's deposition testimony reflects the following exchange:

***6** Q. And I'll ask-to try to move this along, I'll ask sort of a broader question, and maybe we can just jump through it. But have we-we've listed-or, in this pleading is listed Brad Binder, Lee Watts and Lisa Ogborn and Everett Lanham. Have we talked about everything that those individuals have that are relevant to your claims in this case?

A. Yes.

Q. And have we covered all the conversations that you've had with those individuals that would related to your incident on December 22nd and your claims for-

A. Yes.

Q.-FMLA leave?

A. Yes.

Dep. Schmutte, p. 172-174. A broad question relating to Schmutte's Initial Disclosure Statement is not sufficient to prompt Schmutte to describe every conversation she had with Lisa Ogborn. Asking a witness what information another person may have is not the same as asking the witness what conversations she has had with the other person. Moreover, with respect to conversations with supervisors, Schmutte's full testimony reveals:

Q. Had you talked with any of your supervisors at RCI after you came back from the Stress Center about your medical status, the status of your treatment for stress?

A. I would talk to Lisa periodically. I don't remember exactly what all was said. Again, Lisa was my team lead, but she was also like a friend that I could talk to, so she knew-

Q. Sort of confidential conversation?

A. Yeah. Yeah.

Q. Anybody else that you talked to on a more formal basis about your condition-

A. Not

Q.-at RCI?

A.-besides my friend, Luanne, no actual supervisors, or anything, no.

Dep. Schmutte, p. 116-117. RCI never followed-up with Schmutte about what conversations she had with Lisa Ogborn. Moreover, RCI never asked Schmutte to explain what Ogborn "knew." Instead, RCI proceeded with a different line of questioning. Schmutte's affidavit testimony that expounds on her conversations with Ogborn does not contradict her deposition testimony.

Furthermore, during her deposition, Schmutte did attempt to testify about the issues she was having with her panic attacks. RCI chose not to question Schmutte. Schmutte testified:

Q. Ms. Schmutte, I'm showing you Exhibit 25. It is a one-page exhibit. Is that your signature at the bottom?

A. Yes, it is.

Q. Dated December 2, 2003?

A. Yes, it is.

Q. There's some typed questions, and then, there's some written responses on this form. Was that-are those written responses your handwriting?

A. Yes, they are ...

Q. And then, it says: What will you do differently to improve your attendance. Do you see that?

A. Yes.

Q. And you say: Stay at work as much as possible. And then you say: Not leave early. Was leaving early a problem?

A. I did have some issues with that at work, yes. I would have panic attacks at work, and just the work environment was at that time very stressful for me.

Dep. Schmutte, p. 51-54, Dep. Ex. 25.

RCI did not question Schmutte about the panic attacks she had at work. Additionally, RCI knew that the panic attack causing Schmutte to go to the hospital occurred on December 22, 2003, so RCI should have known that Schmutte was not referring to the same panic attack when she was testifying about a document dated December 3, 2003. In her deposition, Schmutte referenced more than one panic attack. She specifically testified about having "panic attacks at work." RCI never questioned Schmutte about her panic attacks. Moreover, this deposition testimony is consistent with Schmutte's affidavit testimony where Schmutte testified that she left work early on November 23, 2003, and December 1, 2003, because she had panic attacks at work.

***7** Finally, Schmutte can attest to the fact that Lisa Ogborn expressed concerned about how job stress might affect Schmutte's performance. This statement is made based on Schmutte's personal knowledge.

h. Paragraph 63 of Schmutte's Declaration-RCI contends that Paragraph 63 of Schmutte's declaration contradicts her deposition testimony. RCI's alleged contradiction is nothing more than Schmutte's misuse of pronouns. Schmutte testified in paragraph 63 of her declaration:

> Later in the day Dr. Beard's nurse called me and said that they were having difficulty filling out the certification form. The nurse said that by looking at the form they did not know which box to check. I told the nurse that I was going to call CORE and ask them what to do.

In Schmutte's deposition, RCI introduced Deposition Exhibit 52, records from Dr. Beard's office. The following line of questioning followed:

Q. Ms. Schmutte, I'm showing you a document that was produced by Dr. Beard's office to us. And in particular, I want to direct your attention to the third page. I wonder whether you-have you seen any of these documents?

A. No, I haven't.

Q. Okay. I just want to ask, and you may not have knowledge of this, but there's a handwritten note on the third page that says: Why was she in meth, question mark. And it says: If psych, episode of anxiety, had shot of Xanax. And then, it says: Psych needs to fill out FMLA. And then, it looks like the initials of Dr. Beard. Did you have any discussion with anyone in Dr. Beard's office about someone else needing to fill out your FMLA paperwork?

A. No.

Q. Does that ring a bell with you at all in terms of any contact you had with Dr. Beard's office?

A. I spoke with her nurse, and she called to find out exactly what happened. And she was looking over it, and she goes, well, I'll have to just call CORE, then, to find out what box I need to select on the form that she had. But they never informed me that I would need to speak with anyone else.

Dep. Schmutte, p. 165-167.

Schmutte's deposition testimony indicates that during her conversation with Dr. Beard's nurse, the nurse was looking over the FMLA form and told Schmutte that she (Schmutte) would have to call CORE to find out what box Schmutte needed to select on the form. This testimony does not contradict Schmutte's affidavit testimony.

i. Paragraph 64 of Schmutte's Declaration-RCI maintains that Paragraph 64 of Schmutte's declaration, which describes conversations Schmutte had with Dr. Beard's nurse and CORE representatives, should be stricken because Schmutte omitted this information from her deposition testimony and because it is contradictory to Schmutte's statement in her deposition. RCI is responsible for asking the deposition questions. Schmutte is not responsible for providing RCI with

information where RCI made no effort to question Schmutte about the conversation. Thus, Schmutte should not be faulted for omitting this conversation from her deposition testimony.

***8** Moreover, Schmutte's testimony in response to RCI's questions about Schmutte's Initial Disclosure Statement does not contradict Paragraph 64. RCI asked Schmutte whether Dr. Beard was her family physician and then asked, "We've covered everything that she has that would be relevant to your claims?" Schmutte's testimony in paragraph 64 of her declaration relates to a conversation she had with CORE and a conversation she had with Dr. Beard's nurse. Testimony about information that Dr. Beard may have does not contradict testimony concerning conversations with individuals other than Dr. Beard.

RCI also maintains that the statements made in Paragraph 64 are inadmissible hearsay. Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Not all out-of-court declarations amount to inadmissible hearsay. An out-of-court statement offered to establish a statement was made and it had an effect on the listener is not contrary to the general hearsay rule. *See Foo v. Trustees of Ind. Univ.,* 88 F.Supp.2d 937, 942 (S.D.Ind.1999) ("If the statement were being offered for the truth of the matter asserted, it would be inadmissible hearsay. But the court finds that this statement is nonhearsay, offered to show its effect on the listener."); *see also CooperSchut v. Visteon Auto. Sys.,* 361 F.3d 421, 430 (7th Cir.2004). Rule 803(3) sets forth the "state of mind" hearsay exception. *See, e.g., United States v. Linwood,* 142 F.3d 418, 424-425 (7th Cir.1998); *Foo v. Trustees,* 88 F.Supp.2d at 942. "Offering testimony to establish background facts leading up to a sequence of events is likewise an ostensibly non-hearsay use of evidence." *United States v. Akinrinade,* 61 F.3d 1279, 1282 (7th Cir.1995).

Schmutte's statements in Paragraph 64 are not offered for the truth of the matter asserted. The statements are asserted to show the effect on the listener. Schmutte contacted CORE because she was instructed to do so by Dr. Beard's nurse. Thereafter, as a result of Schmutte's conversation with the CORE representative, Schmutte contacted the nurse at Dr. Beard's office regarding the FMLA form. Schmutte's testimony is admissible.

j. Paragraph 70, Third through Last Sentence of Schmutte's Declaration-In Paragraph 70 of her Declaration, Schmutte testified:

> On Monday, January 12 or Tuesday, January 13, 2004, I contacted CORE to inquire about the status of my leave request. The person I spoke with told me that my FMLA request was denied because I did not have a serious health condition. The person did not tell me that my certification form was insufficient, inadequate or incomplete. The person did not ask me to have my doctor provide more information. The person also never told me that I could appeal the denial of my leave request and that there was an appeal deadline. I never received anything in writing from CORE informing me that my FMLA request had been denied or advising me of my appeal rights.

***9** RCI maintains that the third through the last sentences should be stricken because Schmutte does not remember enough of the conversation. RCI bases this contention on the following exchange during Schmutte's deposition:

> Q. And Kelly told you your request had been denied?
>
> A. Right.
>
> Q. Did she tell you why it had been denied?
>
> A. It was not considered a serious medical condition.
>
> Q. What did you say?
>
> A. I don't believe I said anything. I just said, okay.
>
> Q. What was that-
>
> A. I don't remember asking any questions, or anything.

Dep. Schmutte, p. 119.

Schmutte testified during her deposition that she believes that she spoke with Kelly at CORE on January 12, 2004, and that Kelly told her that her request was denied because it was

not considered a serious health condition. Dep. Schmutte, p. 118-119. Schmutte also testified that she did not remember asking any questions. *Id.* RCI did not ask Schmutte whether Kelly did or did not tell her that the FMLA form was insufficient, incomplete, or inadequate. RCI did not ask Schmutte whether Kelly did or did not ask her to have her doctor provide more information. Schmutte's affidavit testimony does not contradict her deposition testimony. Schmutte cannot respond to questions that RCI failed to ask.

Furthermore, Schmutte also testified during her deposition:

> Q. When you talked to the CORE representative on January 12th-
>
> A. Uh-huh.
>
> Q.-did you ask about filing an appeal, or did the representative say anything about a mechanism for filing an appeal?
>
> A. She never mentioned an appeal. I never knew anything about an appeal for the fact that the other times I've been approved with no problem, so I didn't know of an appeal process.

Dep. Schmutte, p. 122. Schmutte also testified that she did not receive the letter sent by CORE stating that she could appeal the FMLA denial:

> Q. Ms. Schmutte, I'm showing you what's been marked as Exhibit No. 41. Would you take a moment to look at that and tell me if you recognize that document.
>
> A. (Complying.) I do not.
>
> Q. And did you receive this document from CORE?
>
> A. No.
>
> Q. At any point in time?
>
> A. No.

Dep. Schmutte, p. 133-134. Schmutte's Declaration testimony does not contradict this deposition testimony.

k. Paragraph 78, Last Sentence of Schmutte's Declaration-In Paragraph 78 of her declaration, Schmutte testified:

> I was terminated on January 20, 2004. At that time the only correspondence I had received from CORE was the January 5, 2004 correspondence that I received on January 12 or 13, 2004. This was the first time that termination was ever mentioned as a possibility.

RCI contends that the last sentence in Schmutte's declaration contradicts her deposition testimony. RCI points to the following deposition testimony for this contention:

> Q. Ms. Schmutte, I'm showing you now Exhibit 26. Is that your signature on the third page?
>
> A. Yes, it is.
>
> ***10** Q. And this one is signed by Lisa Ogborn, correct?
>
> A. Yes.
>
> Q. Dated December 15, 2003?
>
> A. Yes.
>
> Q. And this, as I understand it, is it a final written warning you received on that date?
>
> A. Yes, it was.
>
> Q. And you had 2 points remaining?
>
> A. Yes.
>
> Q. And you understood that the next disciplinary action that could occur would be termination?
>
> A. Yes.

Dep. Schmutte, p. 54-55. While RCI relies on this testimony to support its argument, it fails to include the fact the Schmutte testified that on December 22, 2003, Watts told Schmutte that her job was safe. Schmutte testified as follows:

> A....I remember someone saying that-that I should go to the hospital so I could get checked out. And I remember telling them that I can't

> go to the hospital, I-I can't lose my job. And at that point in time, I remember Lea Watts saying that-not to worry, that my job is safe, that I need to just worry about going to the hospital and getting better ...

Dep. Schmutte, p. 92-93. Schmutte also testified:

> Q. So, after you returned to work the next day, when did you first discuss with anyone at RCI how you might protect the absence occurrence that had taken place on December 22nd?
>
> A. That day.
>
> Q. Who did you talk to?
>
> A. I-
>
> Q. So, this is December the 23rd?
>
> A. Yes.
>
> Q. Who did you talk to?
>
> A. I originally went to Lisa Ogborn, and she referred me to Everett Lanham. Q. And who is Everett Lanham?
>
> A. Everett Lanham was the attendance coordinator. He was filling in for a Kathleen Kestner while she was on maternity leave.
>
> Q. Did you talk to Mr. Lanham?
>
> A. Yes.
>
> Q. What day did you talk to Mr. Lanham? A. The next day.
>
> Q. The 23rd of December?
>
> A. Yes ...
>
> Q. Okay. What was said in that conversation?
>
> A. He said-I basically informed him of what happened, and I said that-I informed him of what I was told by [Watts] and what I needed to do with my time card on filling this out. And he said that he would look into it and he'd get back with me.

(Dep. Schmutte 101-103). Schmutte further testified about the day that she was terminated:

> Q. Okay. And then, what happened on the day that you were terminated? Can you describe what happened that day?
>
> A. Well, I came to work. On my first break, I went downstairs to the cafeteria to get a pretzel and a Coke and came back upstairs. And as soon as I sat down and was about to eat my pretzel, they called me downstairs. And at that point in time was when Brad Binder terminated me.
>
> Q. And what did he say to you when he terminated you?
>
> A. Went over the attendance policy and showed me the warning that I had. And basically, just explaining that-with you going down to zero points, with RCI's policy, you are terminated. I brought up the conversation-not conversation. I brought up what happened when I passed out and mentioned what Lea Watts has said, and I gave him Luanne's name as a witness to what she said. And he basically said he would get-he'll talk to [Watt's] to find out exactly what was said. And I left. They had everything packed up and [sic] went home.

***11** Dep. Schmutte, p. 138-139.

Schmutte's deposition testimony shows that Schmutte knew where she stood as far as attendance points. However, her deposition testimony also shows that Schmutte did not believe that she would be terminated as a result of being taken to the hospital on December 22, because Lea Watts told her that her job was safe. Thus, Schmutte's declaration that the date of her termination was the first time termination had been mentioned in relation to her December 22 absence does not contradict her deposition testimony.

l. Paragraph 89, Fourth through Last Sentence-In Paragraph 89 of her declaration, Schmutte testified:

> On January 26, 2004, I called CORE to check on the status of my appeal. I was informed by a person named Sharon that my appeal was denied. I then asked to speak with a supervisor. Sharon transferred me to Cheryl. Cheryl told me that my appeal was denied because the appeal deadline had expired and because my absence was not considered a serious health

> condition. I told Cheryl that I never received anything in writing stating that I could appeal the denial. Cheryl told me that a letter sent on January 12, 2004, which I did not receive, gave me five (5) days to appeal the denial. Cheryl also said that if my family doctor had mentioned anything about me having an anxiety attack CORE would have approved the FMLA request no matter what. I told Cheryl that the first certification form I submitted provided that I was taking medication for anxiety so I assumed they understood that I had anxiety. Cheryl said that description was not sufficient. I believe that Cheryl also told me that my therapist was not a qualified health care provider.

RCI argues that the fourth through last sentences contradict Schmutte's deposition testimony. RCI also argues that the testimony is inadmissible hearsay.

During her deposition Schmutte testified:

> Q.... Had anyone informed you that your appeal letter was due on January 18, 2004?
>
> A. No, they did not give me a specific date. They just said it was past the appeal date....
>
> Q. Okay. Now, between the time that you talked to Jamie on January 22, 2004, and confirmed that she had received your new certification-
>
> A. Uh-huh.
>
> Q.-submission and your receipt of this Exhibit 46, had you had any contact with anyone at CORE about your FMLA?
>
> A. Yes.
>
> Q. What contact had you had?
>
> A. I don't remember the names. I don't have it on me here. Kim does have all the information. I know that I probably have spoke with someone possibly every other day. I'm just-right now I know that I called them again on the 23rd to find out what-what their decision was on the 22nd information. I know at that point in time they said, well, the therapist that filled it out is not considered a provider to-I don't remember exactly the words on that. So, I went back and had the licensed social worker in that same office sign it, as well, since she was-she's aware of my condition, and sent that back in to them. And I think I called on the next day to check on that ...

***12** Dep. Schmutte, p. 152-155.

In reference to Deposition Exhibit 47, a fax verification form with Schmutte's handwriting, Schmutte testified:

> Q. So, 1/26/04, called CORE, Sharon trans to Cheryl-
>
> A. Right.
>
> Q.-that's your handwriting?
>
> A. Yeah, Sharon transferred me to Cheryl.
>
> Q. So, who is Sharon?
>
> A. Sharon was the representative I spoke to on the phone.
>
> Q. On January 26th?
>
> A. Right. Cheryl is the manager-she's the manager. I don't remember if she's the manager over the Appeal Department or just a manager in her office.
>
> Q. She's a more senior person-
>
> A. Yes.
>
> Q.-at CORE as you understood it?
>
> A. Yes.
>
> Q. Do you know what either of their last names are?
>
> A. No.
>
> Q. Did you talk to Cheryl then?
>
> A. Yes.
>
> Q. What was your-first of all, what was your conversation with Sharon on January 26th, if you can recall?
>
> A. I-honestly, I don't recall. I mean, basically, it's just inquiring on the appeal of what has been determined, but,

I mean, I can't remember exactly what would have been said.

Q. And what did Cheryl say to you when you talked to her?

A. For this particular conversation on the 26th, I'm sorry, I don't remember.

Q. Is it possible that these were the conversations in which you were told that your therapist was not a medical provider eligible to fill out the certification form?

A. It may have been at that time.

Dep. Schmutte, p. 152-155.

During Schmutte's deposition, RCI introduced Deposition Exhibit 64, a copy of the CORE note pad with the notes of conversations between Schmutte and CORE. With respect to this Exhibit Schmutte testified:

Q. Ms. Schmutte, I'm showing you what's been marked as Exhibit 64, a four-page exhibit. Could you take a moment to look at that?

A. (Complying) Okay.

Q. Have you seen this document before?

A. No, I have not.

Q. Okay. So, this is not something you have gone over with your attorney?

A. No.

Dep. Schmutte, p. 200-201. RCI then asked Schmutte a few questions about the Exhibit, but did not go through each entry with Schmutte. Dep. Schmutte, p. 200-203.

After her deposition, Schmutte reviewed the CORE notepad, which refreshed her memory about the conversations she had with the CORE representatives. Schmutte's Summary Judgment Appendix includes a copy of the CORE notepad. *See* Exhibit 11 (Excerpts from Deposition of Jeanette D'Addario), Exhibit 1, pages CORE000012-17. According to CORE's notepad, the discussion Schmutte had with CORE on January 26, 2004, was as follows:

1/26/2004 01:15 P.M. created by SHARYN CASSELL

TCF EE checking on claim. Advised EE that her appeal for FMLA has been denied. EE requests to s/w and FMLA supervisor. Transferred EE to Cheryl @ 3059.

1/26/2004 01:24 P.M. created by CHERYL SIKORA

p/c with Ee regarding her denial. Informed the Ee with the information on the cert form it was not considered a serious health condition and the person who completed the Family Cert form was not a qualifying provider. I did indicate to the EE if the doctor (PCP who completed the first cert form) indicated the absence was due to a anxiety episode and it was a serious health condition, we would have indeed approved the absence. I also indicated her appeal process was 1/18/2003 (sic) and we did not receive her appeal and medical information until 1/21/2004. She asked if there was anything that she could do I stated “no” it would now be up to Cendant and I do believe they would refer her back to CORE. I informed her I just reviewed her Family Certification form with the Adjudicator and all decisions CORE made were correct. Ee stated okay and call ended.

***13** Dep. D'Addario, Ex. 1, p. CORE000015-16.

Schmutte's lack of recollection of her conversation with Cheryl during her deposition is not inconsistent with her declaration. After her deposition, Schmutte reviewed the notepad, which had been introduced at Schmutte's deposition by RCI, and Schmutte's memory was refreshed. RCI could have questioned Schmutte about all of the conversations recorded in the notepad, but chose not to. Schmutte's affidavit testimony also places her deposition testimony into context and clarifies her prior deposition testimony. *See Simmons v. Chi. Bd. of Educ.,* 289 F.3d 488, 492 (7th Cir.2002) (A party may attempt to clarify (but not contradict) prior deposition testimony through affidavits).

Finally, Schmutte's testimony in Paragraph 89 regarding what Cheryl told her is not inadmissible hearsay. Schmutte's statements are not offered to prove the truth of the matter asserted. The testimony is put forth to show the effect on the listener. As a result of her conversation with Cheryl, Schmutte went back to her therapist's office and had her certification form signed by a licensed social worker. She then faxed the certification form back to CORE.

m. Paragraph 102, Third through Last Sentence, and Paragraph 103 of Schmutte's Declaration-In Paragraphs 102 and 103 of her declaration, Schmutte testified:

102. In late February 2004 or early March 2004, I contacted the Department of Labor to file a complaint regarding my termination. The investigator looking into my complaint was Steve Garrett. Mr. Garrett investigated my complaint from late February 2004 or early March 2004 until August 2004. Mr. Garrett told me that RCI had violated the FMLA. Mr. Garrett said that he was going to try to settle my complaint against RCI.

103. Mr. Garrett tried to resolve my complaint with RCI but he told me that RCI was not interest in reinstatement and offered to resolve my complaint for only $100.00.

RCI maintains that the third through last sentence of Paragraph 102 and all of Paragraph 103 must be stricken because the testimony is inadmissible hearsay. Schmutte's testimony is not offered to prove the truth of the matter asserted, rather it is offered to show its effect on the listener. As a result of Mr. Garrett's statements to Schmutte, Schmutte decided to drop her FMLA complaint filed with the Department of Labor ("DOL") and pursue a lawsuit against RCI.

2. *RCI's Objections to Dr. Mishra's Deposition Excerpts*

RCI objects to the excerpts from the deposition of Dr. Sanjay Mishra as not relevant to the issues in this case because Schmutte "has presented no evidence that any decisionmaker with respect to [Schmutte's] request for FMLA leave to cover her December 22, 2003, absence, or any decisionmaker with respect to her termination, possessed the information contained in these excerpts." RCI maintains in this lawsuit that Schmutte does not suffer from a serious health condition. Schmutte is entitled to put forth evidence establishing that she does, indeed, suffer from a serious health condition. Dr. Mishra's cited testimony is relevant to establish that Schmutte suffers from a serious health condition.

***14** In addition, Dr. Mishra's testimony relates to his treatment of Schmutte at the St. Vincent's Stress Center in September 2003, when Schmutte was on FMLA leave. RCI recognized this leave as covered by the FMLA. Accordingly, this evidence related to Schmutte's condition, which RCI has recognized as FMLA-qualifying.

3. *RCI's Objections to the Declaration of Kim Papanikandros*

RCI's objects to the Declaration of Papankikandros as not relevant to the issues in this case because Schmutte "has presented no evidence that any decisionmaker with respect to [Schmutte's] request for FMLA leave to cover her December 22, 2003, absence, or any decisionmaker with respect to her termination, possessed the information contained in these excerpts." Again, RCI contends in this lawsuit that Schmutte does not suffer from a serious health condition. Papanikandros' declaration and attached exhibits support Schmutte's argument that she does suffer from a serious health condition. Moreover, the documents attached to Panpanikandros' declaration are documents that were sent by Schmutte's health care provider to CORE, RCI's agent, for the purpose of handling FMLA leave requests from RCI's employees. RCI contracted with CORE to be the administrator of its FMLA leave policy. RCI cannot claim that the documents submitted to CORE between September and November 2003, in connection with Schmutte's FMLA leave have no relevance when its agent requested the documents from Schmutte's medical providers and received the documents to support Schmutte's request for FMLA leave.

4. *RCI's Objections to the Declaration of Kimberly Jeselskis*

Exhibit 8 in support of Schmutte's Response to RCI's Motion for Summary Judgment is a declaration signed by Kimberly Jeselskis. The purpose of the declaration is to identify Exhibits 1-7 attached to the declaration.

a. Exhibit 1: File from the DOL-RCI objects to the submission of the file from the DOL as "unauthenticated" and "inadmissible hearsay." "The requirement of authentication ... as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED.R.EVID. 901(a). Generally speaking, the proponent of the proffered evidence need only make a prima facie showing that the exhibit is what the proponent claims it is. *See United States v. Kelly,* 14 F.3d 1169, 1175 (7th Cir.1994). Circumstantial evidence is sufficient to establish the authenticity of a document. *United States v. Clark,* 649 F.2d 534, 542 (7th Cir.1981). The proponent may establish authenticity by showing that the "[a]ppearance, contents, substance, internal patterns, or

other distinctive characteristics, taken in conjunction with circumstances" indicate that the evidence is what he purports it is. FED.R.EVID. 901(b)(4). The proponent may also establish authenticity through testimony of a witness with knowledge "that a matter is what it is claimed to be." FED.R.EVID. 901(b)(1). A public record or report can be authenticated if it is authorized by law to be recorded or filed and it is in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation can be authenticated if it "is from the public office where items of this nature are kept." FED.R.EVID. 901(b)(7). When a party has produced the document in question in response to a subpoena or discovery request, he has implicitly authenticated the document. *United States v. Lawrence,* 934 F.2d 868, 871-72 (7th Cir.1991); *In re Greenwood Air Crash,* 924 F.Supp. 1511, 1514 (S.D.Ind.1995). Additionally, authentication is not required for official publications "purporting to be issued by public authority." FED.R.EVID. 902(5).

***15** Exhibit 1 is the file from the DOL regarding the FMLA complaint that Schmutte filed against RCI with the DOL. Jeselskis testified that she has personal knowledge that Exhibit 1 is a true and correct copy of the DOL file. This is a prima facie showing of authenticity. *See* FED.R.EVID. 901(b)(1) (stating that testimony of a witness with knowledge meets the authentication requirement set forth in Rule 901(a)); *Sprinkle v. Lowe's Home Ctrs., Inc.,* 2006 U.S. Dist. LEXIS 49203 at *3-6 (S.D.Ill.2006).

Additionally, the first page of Exhibit 1 shows that the DOL file is the official file that was produced pursuant to the Freedom of Information Act. This satisfies the authentication requirement pursuant to Rules 901(b)(7) and 902(5).

Moreover, the file is authenticated because a copy of the DOL file was produced during discovery in this matter. *See United States v. Lawrence,* 934 F.2d 868, 871-72 (7th Cir.1991); *In re Greenwood Air Crash,* 924 F.Supp. 1511, 1514 (S.D.Ind.1995).

Finally, Exhibit 1 is not inadmissible hearsay. Rule 803, which provides exceptions to the general hearsay rule, states that "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... the activities of the office or agency" "are not excluded by the hearsay rule, even though the declarant is available as a witness." FED.R.EVID. 803(8). The DOL file is a public record or report of a public office or agency which sets forth the activities of the office or agency and is, thus, admissible pursuant to Rule 803(8).

b. Exhibits 2-3: Documents Produced Pursuant to Subpoena and Non-Party Request for Production of Documents-RCI objects to the submission of documents produced by CORE pursuant to a subpoena and non-party request for production of documents. Like the DOL file, Jeselskis testified that she has personal knowledge that Exhibit 2 is a true and correct copy of the Subpoena and Non-Party Request for Production served on CORE, and Exhibit 3 is the documentation produced by CORE in response to Exhibit 2. This is a prima facie showing of authenticity. *See* FED.R.EVID. 901(b)(1); *Sprinkle v. Lowe's Home Ctrs., Inc.,* 2006 U.S. Dist. LEXIS 49203 at *3-6 (S.D.Ill.2006).

In addition, the documents making up Exhibit 3 were produced to Schmutte and RCI during the course of discovery in this lawsuit. *See United States v. Lawrence,* 934 F.2d 868, 871-72 (7th Cir.1991); *In re Greenwood Air Crash,* 924 F.Supp. 1511, 1514 (S.D.Ind.1995). In fact, RCI insisted on reviewing the documents before CORE made a production to Schmutte.

Exhibit 3 is not inadmissible hearsay. The Exhibit falls within Rule 803(6), the hearsay exception for records of regularly conducted activity.

c. Exhibits 4-5: Medical Documents from St. Vincent's Stress Center Produced Pursuant to a Medical Release-During the course of this lawsuit, RCI specifically requested copies of Schmutte's medical records. The parties narrowed the scope of RCI's request to include the medical records from Schmutte's treatment at the St. Vincent's Stress Center. Jeselskis testified that she has personal knowledge that Exhibit 4 is a true and correct copy of the Medical Release sent to St. Vincent's Stress Center, and Exhibit 5 is the documentation produced by St. Vincent's Stress Center in response to Exhibit 4. This is a prima facie showing of authenticity. *See* FED.R.EVID. 901(b)(1); *Sprinkle v. Lowe's Home Ctrs., Inc.,* 2006 U.S. Dist. LEXIS 49203 at *3-6 (S.D.Ill.2006). In addition, the documents making up Exhibit 5 were produced to RCI during the course of discovery in this lawsuit in response to RCI's discovery requests. *See United States v. Lawrence,* 934 F.2d 868, 871-72 (7thCir.1991); *In re Greenwood Air Crash,* 924 F.Supp. 1511, 1514 (S.D.Ind.1995).

***16** Exhibit 5 is not inadmissible hearsay. The Exhibit falls within Rule 803(6), the hearsay exception for records of regularly conducted activity. Additionally, Schmutte can submit this evidence in support of her argument that she suffers from a serious health condition.

d. Exhibits 6-7: Medical Documents from Methodist Hospital-During the course of this lawsuit, RCI specifically requested copies of Schmutte's medical records. The parties narrowed the scope of RCI's request to include the medical records from Schmutte's treatment at the Methodist Hospital emergency room. Jeselskis testified that she has personal knowledge that Exhibit 6 is a true and correct copy of the Medical Release sent to Methodist Hospital, and Exhibit 7 is the documentation produced by Methodist Hospital in response to Exhibit 6. This is a prima facie showing of authenticity. *See* FED.R.EVID. 901(b)(1) In addition, the documents comprising Exhibit 7 were produced to RCI during the course of discovery in this lawsuit in response to RCI's discovery requests. *See United States v. Lawrence,* 934 F.2d 868, 871-72 (7th Cir.1991); *In re Greenwood Air Crash,* 924 F.Supp. 1511, 1514 (S.D.Ind.1995).

Exhibit 7 is not inadmissible hearsay. The Exhibit falls within FRE 803(6), the hearsay exception for records of regularly conducted activity. This evidence also supports Schmutte's argument that she suffers from a serious health condition and is relevant for that purpose.

5. *RCI's Objections to Carla Sander's Deposition Excerpts*

RCI objects to Ms. Sander's deposition testimony as inadmissible hearsay. However, the testimony is not offered in evidence to prove the truth of the matter asserted. Ms. Sander's testimony is offered to show its effect on the listener. Ms. Sander's testimony reflects how she reacted to the information provided to her by the DOL investigator. She testified that she questioned him about what CORE could have done better. She also testified that after speaking with the DOL investigator about his findings, CORE did not reverse the decision to deny Schmutte's FMLA request. Thus, Ms. Sander's testimony is not inadmissible hearsay.

CONCLUSION

For the foregoing reasons, the Court holds that the Defendant's Motions to Strike are **DENIED.**

IT IS SO ORDERED.

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End of Document

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Court of Appeals of Minnesota.

PORTFOLIO RECOVERY ASSOCIATES, LLC, Respondent,
v.
Diane M. STAEHELI, Appellant (A13–1793),
Ronald Staeheli, Appellant (A13–1795).

Nos. A13–1793, A13–1795.
|
April 14, 2014.

Dakota County District Court, File No. 19HA–CV–12–5136.

Attorneys and Law Firms

Joel Boon, Rodenburg Law Firm, Bismarck, ND, for respondent.

Diane M. Staeheli, Eagan, MN, attorney pro se.

Ronald Staeheli, Eagan, MN, attorney pro se.

Considered and decided by CHUTICH, Presiding Judge; CONNOLLY, Judge; and SMITH, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge.

***1** In this consolidated appeal, pro se appellants challenge the district court's grant of summary judgment to respondent. Appellants argue that the district court erred in considering the evidence that respondent submitted in support of its motion and by determining that there is no genuine issue of material fact. We affirm.

FACTS

A. Ronald Staeheli

On June 14, 2007, appellant Ronald Staeheli (R.S.) opened a credit card with GE Money Bank. The account was opened under R.S.'s name and a copy of the account statement from 2008 was addressed to him at his Eagan, Minnesota address. The majority of the charges on the account were made in the immediate vicinity of Eagan, but at some point between 2008 and 2009, the address on R.S.'s account changed to an address in Davenport, Florida.

The last payment on the account was made on July 8, 2008. This payment did not constitute payment or settlement of the account in full. On February 6, 2009, the account was "charged off," or shutdown, with a balance of $2,642.62.

On February 26, 2009, respondent Portfolio Recovery Associates LLC, purchased R.S.'s account from GE Money Bank. On June 5, 2012, R .S. was served with respondent's summons and complaint by substituted service on his spouse, Diane Staeheli. The complaint alleges that R .S. owes respondent $2,642.62 plus interest. R.S. denied all of the allegations in the complaint and asserted the following affirmative defenses: (1) accord and satisfaction, (2) arbitration and award, (3) assumption of risk, (4) contributory negligence, (5) discharge in bankruptcy, (6) duress, (7) estoppel, (8) failure of consideration, (9) fraud, (10) illegality, (11) injury by fellow servant, (12) laches, (13) license, (14) payment, (15) release, (16) res judicata, (17) statute of frauds, (18) statute of limitations, and (19) waiver.

On June 20, respondent served R.S. with interrogatories and requests for production. On September 12, respondent received R.S.'s first set of discovery requests. Respondent responded 15 days later and included a letter requesting that R.S. respond to its June 20 discovery request. On December 17, R.S. served his second set of discovery requests on respondent. He also included a letter stating he could not attend a hearing scheduled for this matter because he needed to care for his father in Davenport, Florida. Respondent responded four days later and made another request that R .S. respond to its June 20 request. On January 25, 2013, R.S. served respondent with his third set of discovery requests. Respondent responded 12 days later and again requested that R.S. respond to its original discovery request. R.S. never responded to respondent's discovery requests.

B. Diane Staeheli

On January 18, 1995, appellant Diane Staeheli (D.S.) opened a credit card account with HSBC Card Services Inc. The card was opened in her name and a copy of an account statement

was addressed to her at an address in Davenport, Florida. The last payment on the account was made on June 25, 2008, but it did not constitute payment or settlement of the account in full. On January 31, 2009, the account was "charged off" with a balance of $3,774.49.

***2** On July 28, respondent purchased D.S.'s account from HSBC Card Services Inc. On June 5, 2012, D.S. was personally served with respondent's summons and complaint at her address in Eagan, Minnesota. The complaint alleges that D.S. owes respondent $3,774.49 plus interest. In her answer, she denied all allegations in the complaint and asserted the following affirmative defenses: (1) accord and satisfaction, (2) arbitration and award, (3) assumption of risk, (4) contributory negligence, (5) discharge in bankruptcy, (6) duress, (7) estoppel, (8) failure of consideration, (9) fraud, (10) illegality, (11) injury by fellow servant, (12) laches, (13) license, (14) payment, (15) release, (16) res judicata, (17) statute of frauds, (18) statute of limitations, and (19) waiver.

On August 29, respondent served interrogatories and requests for production on D.S. On September 12, respondent received D.S.'s answers to the interrogatories in which she generally denied all claims against her. D.S. did not respond to respondent's requests for production.

C. Summary Judgment

On February 11, 2013, respondent moved for summary judgment against R.S. On February 25, respondent moved for summary judgment against D.S. Respondent filed affidavits and exhibits in support of its motions for summary judgment. Appellants both responded by submitting their own affidavits in which they claimed for the first time that they are the victims of identity theft. Appellants also claimed that they did not make charges on their respective credit accounts and that they have both received notices from creditors informing them that their personal information may be compromised. Appellants did not submit any other evidence to support their claims.

On May 6, 2013, the district court held hearings on respondent's motions for summary judgment. On July 26, the district court issued its findings of fact, conclusions of law, and order granting summary judgment to respondent in both cases. This appeal follows.

DECISION

Appellants challenge the district court's grant of summary judgment in favor of respondent and argue that they offered sufficient proof to create genuine issues of material fact. We disagree.

Summary judgment is appropriate when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ,* 566 N.W.2d 60, 69 (Minn.1997) (quotation omitted). On appeal from summary judgment, this court examines the record to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French,* 460 N.W.2d 2, 4 (Minn.1990). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DHL, Inc.,* 566 N.W.2d at 71. We view the evidence in the light most favorable to the party against whom summary judgment was granted, but the party resisting summary judgment must do more than rest on mere averments. Minn. R. Civ. P. 56.05; *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn.1993).

A. Foundational Reliability

***3** First, appellants argue that the district court erred by admitting the bill of sale and account statements for appellants' respective accounts because the supporting affidavits do not provide a sufficient foundation for their admissibility. We disagree. Although we conduct a de novo review of the district court's decision to grant or deny summary judgment, "[w]e review a district court's evidentiary rulings, including rulings on foundational reliability for an abuse of discretion." *Doe 76C v. Archdiocese of St. Paul,* 817 N.W.2d 150, 164 (Minn.2012).

In support of its motions for summary judgment, respondent submitted identical affidavits of one of its agents, the bills of sale for appellants' accounts, and appellants' account statements. These documents show that appellants had accounts with GE Money Bank and HSBC Card Services Inc., respectively. Respondent's agent's affidavits state,

> I ... am an authorized agent of [respondent] and am competent to testify to the matters stated herein, which are

made on my personal knowledge and are true and correct based upon my review of [respondent's] business records maintained relative to the account.

I have personal knowledge of the manner in which [respondent] creates and maintains its normal business records, including computer records of its accounts receivables.

[Respondent's] business records are regularly and contemporaneously maintained during the course of [respondent's] business.

[Respondent's] records include information provided by [respondent's] predecessor such as the [appellant's] name, address, Social Security number, account balance, last payment date, the identity of the original creditor, and the account number.

I know from my experience in reviewing such records, and from common knowledge, that it was the regular practice of [respondent's] predecessor for its business records to be created at or near the time of the transactions reflected therein by a person having personal knowledge of the information contained in the records and that it was also the regular practice of [respondent's] predecessor to maintain those records as part of its regularly conducted business activity. Exhibits attached to my affidavit are true and correct copies of the originals.

The district court determined that the agent's affidavits provide a sufficient foundation for the admissibility of the attached account statements and bills of sale under the business-records exception to the hearsay rule. It stated, "The [a]ffidavit of [respondent's agent] establishes that the attached account statements and [b]ill of [s]ale are records that are kept by [respondent], and were kept by [respondent's] predecessor, in the course of regularly conducted business activities and were made as a part of [respondent's] and its predecessor's regular business practice."

Appellants argue that, while respondent's agent may be qualified to offer documents as to respondent's business, she is not qualified to offer the documents or business records of respondent's predecessors in interest because she lacks sufficient firsthand knowledge of their business practices. They cite to Minnesota Rule of Evidence 602, which states, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." But the committee comment to rule 602 clarifies, "[t]he requirement of firsthand knowledge does not preclude a witness from testifying as to a hearsay statement which qualifies as an exception to the hearsay rule." *Id.*

***4** One such exception to the hearsay rule is the business-records exception.

> Business records are admissible under the business-records exception if the custodian or another qualified witness can testify that the records were (1) made by a person with personal knowledge of the matters recorded and a business duty to report accurately or from information transmitted by a person with such knowledge, (2) made at or near the time of the recorded event, (3) kept in the course of a regularly conducted business activity, and (4) made as part of the regular practice of the business activity.

In re Child of Simon, 662 N.W.2d 155, 160 (Minn.App.2003) (citing Minn. R. Evid. 803(6)). "[O]ne business entity may submit the records of another business entity to establish a proposition at trial." *Nat'l Tea Co. v. Tyler Refrigeration Co.,* 339 N.W.2d 59, 61–62 (Minn.1983). The actual custodian need not testify, but the person laying foundation must be familiar with how the business compiles its documents. *Id.* at 62.

The agent's affidavits state that the account statements and the bills of sale were kept in the regular course of respondent's and respondent's predecessors' business and were kept as a part of their regular business practices. She further stated that the information in the affidavits is based on her personal knowledge, industry experiences, and her review of the records kept in the ordinary course of respondent's business. The agent is familiar with respondent's predecessors' business practices and how their records are created and maintained. We therefore conclude that the district court did not abuse its discretion by determining that the affidavits provide sufficient foundation for the attached bills of sale and account statements.

B. Summary Judgment

Next, appellants argue that they have presented a genuine issue of material fact because they claim that they never entered into any contracts with respondent or respondent's predecessors in interest. We disagree.

The affidavits, bills of sale, and account statements establish that appellants had credit card accounts with HSBC and GE Money Bank, that R.S. and D.S. owed $2,642.62 and $3,774.49, respectively, and that respondent purchased appellants' accounts from its predecessors in interest. Conversely, appellants have not submitted any evidence, other than their own affidavits, to support their argument that they are the victims of identity theft.

In their affidavits, appellants state that they did not own the accounts at issue. These affidavits contradict appellants' respective answers, in which they both asserted several affirmative defenses, including accord and satisfaction and discharge in bankruptcy. They did not raise the identity theft defense until after respondent moved for summary judgment and have not produced any documents to support their claims. "In order to successfully oppose a motion for summary judgment, appellant must extract *specific,* admissible facts from the voluminous record and particularize them for the trial judge." *Kletschka v. Abbott–Northwestern Hosp., Inc.,* 417 N.W.2d 752, 754 (Minn.App.1988), *review denied* (Minn. Mar. 30, 1988). "General assertions" are not enough to create a genuine issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul,* 533 N.W.2d 845, 848 (Minn.1995).

***5** Appellants cite to the fact that the account statements were sent to addresses in both St. Paul, Minnesota and Davenport, Florida to support their argument that their identities were stolen. But, the record shows that R.S. was at some point in Davenport to care for his father, and appellants' affidavits submitted in opposition to summary judgment were notarized in Florida before being filed in Minnesota, indicating that appellants have some connection to both states. Moreover, although appellants claim that they have received notices from creditors regarding security breaches on their accounts, appellants have not produced any evidence to support this claim. Because they have not produced even a scintilla of evidence to support their arguments, we conclude that the district court did not err in determining that there is no genuine issue of material fact in this case. *See DLH, Inc.,* 566 N.W.2d at 71.

But appellants also argue that the district court made impermissible credibility determinations by reasoning that appellants' affidavits did not create a genuine issue of material fact for trial. We disagree. *See* Minn. R. Civ. P. 56.03 (stating that summary judgment is appropriate when "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.").

Appellants are correct that "[w]eighing the evidence and assessing credibility on summary judgment is error." *Hoyt Properties, Inc. v. Prod. Res. Grp., L.L.C.,* 736 N.W.2d 313, 320 (Minn.2007). But the purpose of summary judgment is to "prevent the assertion of unfounded claims or the interposition of specious denials or sham defenses." *Camfield Tires, Inc. v. Michelin Tire Corp.,* 719 F.2d 1361, 1365 (8th Cir.1983) (quotation omitted).

The district court found that appellants "failed to raise any credible or genuine issues of material fact." The district court did not assess the credibility of appellants as witnesses, but rather, determined whether their claims had sufficient merit to withstand summary judgment. The district court went through the proper summary judgment considerations by determining whether "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc.,* 566 N.W.2d at 69 (quotation omitted). We conclude that the district court did not err in granting summary judgment to respondent.

Affirmed.

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Court of Appeals of Minnesota.

The JANICE KAUNAS SAMSING REVOCABLE TRUST, et al., Respondents,
v.
Arthur D. WALSH, Appellant.

No. A14–1529.
|
June 29, 2015.
|
Review Denied Sept. 29, 2015.

Washington County District Court, File No. 82–CV–13–1444.

Attorneys and Law Firms

Barton C. Gernander, Burns & Hansen, P.A., Minneapolis, MN, for respondents.

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Considered and decided by STAUBER, Presiding Judge; BJORKMAN, Judge; and RODENBERG, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge.

***1** We affirm the district court in this foreclosure-by-action dispute because, of the issues properly preserved for review, the district court made no errors of law and acted within its discretion. We decline to address the issues on appeal that were not timely raised to the district court.

FACTS

This dispute arises out of a loan to appellant Arthur D. Walsh, a licensed attorney, made by respondents Mildred Kaunas and Janice Samsing as co-trustees of the Janice Kaunas Samsing Revocable Trust. [1] The appeal follows multiple motions and a court trial.

1 Mildred Kaunas, Janice Samsing, and the Janice Kaunas Samsing Revocable Trust are referred to collectively as "respondents."

Appellant borrowed $150,000 from respondents to finance the construction of a new home located at 4936 210th Street North, Forest Lake, Minnesota. Appellant acknowledged both his receipt of the funds and the terms for repayment in several letters addressed to respondents. In these letters, appellant agreed to repay the loan in monthly installments over a thirty-year period at six percent annual interest. Appellant also stated in the letters that he would repay the loan according to the terms of a promissory note secured by a first mortgage, both to be drafted by appellant, and the letters were to be enforceable until appellant finalized the promissory note and mortgage.

No promissory note was drafted, but appellant did draft and execute a mortgage in favor of the trust on January 5, 2004. Appellant made 29 sporadic payments after signing the mortgage, with the last payment made on December 24, 2011.

On January 17, 2012, respondents sent a letter to appellant demanding that he bring the payments current or deed the property to respondents in lieu of foreclosure. Appellant failed to do either. Respondents commenced an action to foreclose the mortgage, and requested judgment for the full amount loaned, plus interest and attorney fees.

Respondents moved for partial summary judgment, arguing that as a matter of law, appellant's letters constituted an enforceable contract between the parties, that the mortgage was valid and enforceable, and that appellant was in default under his agreement with respondents. Appellant also moved for summary judgment. Although he failed to properly serve the motion, the district court allowed appellant to make arguments in support of his untimely motion at the summary judgment hearing. The district court granted respondents partial summary judgment, determining that the letters from appellant created a valid contract between the parties, that the mortgage was a valid and enforceable document, and that appellant was in default under the mortgage and in breach of the contract between the parties regarding repayment of the loan. Because the amount owed by appellant was in dispute, the issue of respondents' money damages was reserved for

further decision. Appellant's summary judgment motion was denied.

A court trial was held on the remaining issues: the amount of respondents' damages, the amount of attorney fees incurred by respondents, and the effect of any failure by respondents to provide a foreclosure notice under Minn.Stat. § 580.021, subd. 2 (2014). After trial, the district court ordered a money judgment against appellant for $244,676.83 and concluded that respondents were entitled to a decree of foreclosure. The district court further determined that Minn.Stat. § 580.021, subd. 2 provided no penalty for failure to give the required notice, ruled that appellant suffered no prejudice by any such violation, and excused any failure by respondents to provide the required notice under the statute. Respondents docketed the judgment on May 27, 2014.

***2** On June 9, 2014, appellant moved for amended findings and a new trial, and for judgment as a matter of law on various grounds. The district court denied appellant's motions. This appeal followed.

DECISION

I. Issues Not Properly Before the Court

Appellant raises numerous issues on appeal. Several of these issues were not properly presented to or considered by the district court.

Appellant argues that 1) respondents failed to provide a foreclosure-related notice under Minn.Stat. § 580.041 (2014); 2) respondents failed to provide notice that late payments would no longer be accepted before commencing the foreclosure action against appellant as articulated in *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232 (Minn.1980); 3) the district court erred in applying attorney fees to appellant's personal judgment obligation; 4) respondents elected to pursue their remedies on the personal judgment and to forego the foreclosure remedy by docketing the judgment against appellant; and 5) pursuant to Minn.Stat. § 541.05, subd. 1(1) (2014), respondents are barred by the six-year statute of limitations from recovering any payments from appellant before June 28, 2013. All of these issues were first raised by appellant in a post-trial motion to the district court. [2]

[2] Appellant asserted the statute of limitations as a defense in his answer but no argument was presented on the issue until appellant's post-trial motion.

Appellant also argues that any personal judgment against him must be limited to installments claimed due and owing at the time of trial, because the letter promising repayment terms contained no acceleration clause. This issue was first raised by appellant in a post-summary-judgment-hearing memorandum and was not addressed by the district court in its order regarding summary judgment. [3] Appellant again raised the issue in his post-trial motion.

[3] While the district court did allow parties to submit a "[v]ery brief closing argument" after the summary judgment hearing, it did not allow the parties to submit post-hearing memoranda raising issues that were not previously raised at the hearing.

Because none of these issues were properly and timely raised in the district court, we decline to consider appellant's arguments concerning these issues on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn.1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." (quotations omitted)); *see also Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn.App.2002) (stating that "an issue first raised in a post-trial motion is not raised in a timely fashion"); *State v. Brunes*, 373 N.W.2d 381, 386 (Minn.App.1985) (providing that when issues are first raised in a post-hearing memorandum, they are considered waived). Appellant had ample opportunity to raise these issues at or before trial and, whether by inadvertence or some design, failed to do so. No good reason appears for us to depart from our general practice of declining to address issues not timely presented to the district court.

II. Real Party In Interest

Appellant argues that the district court's foreclosure judgment must be vacated because respondents failed to include the real party in interest. Appellant asserts that if the mortgage was part of the trust res, then respondents Kaunas and Samsing should have brought suit in their capacity as trustees, rather than as individuals. Minnesota Rule of Civil Procedure 17.01 requires that every action be brought by the real party in interest, which is determined by "whether the party has the legal right to bring the claim under the applicable substantive law." *Austin v. Austin*, 481 N.W.2d 884, 886 (Minn.App.1992). The rule's purpose is to "prevent other claimants from making further demands against a defendant

for the same relief." *Id.* "Determining the real party in interest is ordinarily a question of fact for the [district] court, whose factual findings must be upheld unless clearly erroneous." *Minn. Educ. Ass'n v. Indep. Sch. Dist. No. 404,* 287 N.W.2d 666, 668 (Minn.1980) (citation omitted).

***3** Here, the named plaintiffs include Mildred Kaunas, Janice Samsing, and the Janice Kaunas Samsing Revocable Trust. Kaunas and Samsing are co-trustees of the trust. Appellant received the loan from Kaunas and Samsing, and a mortgage was executed in favor of the trust. The payments that appellant made were paid to the order of either 1) Mildred Kaunas and Janice Samsing, collectively; 2) the Janice Kaunas Samsing Revocable Trust; or 3) Janice Samsing, individually.

Together, the named plaintiffs comprise all of the potential plaintiffs that could pursue the claims against appellant. Under rule 17.01, Samsing and Kaunas, as trustees of the trust, could have sued in their own names without joining the trust itself. Minn. R. Civ. P. 17.01 (A "trustee of an express trust, ... may sue in that person's own name without joining the party for whose benefit the action is brought"). The district court did not err in allowing suit to proceed in these circumstances.

III. "Notice" Issues Properly Raised on Appeal

Appellant argues that respondents failed to comply with various notice prerequisites for the foreclosure by action, and that such failures require that the foreclosure be vacated. *See* Minn.Stat. §§ 580.021, subd. 2; 582.041 (2014). Appellant timely raised and preserved statutory-notice issues. Minn.Stat. § 580.021, subd. 2 and Minn.Stat. § 582.041 (2014). We address each in turn.

A. Minn.Stat. § 580.021, subd. 2

At trial, respondents stipulated that they did not provide appellant with notice under Minn.Stat. § 580.021, subd. 2. The parties dispute the effect of the absence of the notice on this proceeding. Appellant argues that respondents' failure to provide the statutory notice requires vacation of the foreclosure judgment because the statute mandates that notice of foreclosure prevention counseling services be given. Appellant's claim involves a determination of the effect the statute has if the statutory notice is not given in the foreclosure-by-action context. Whether respondents' failure to comply with the statutory notice requirements of section 580.021, subd. 2, requires vacation of the foreclosure judgment presents a question of statutory interpretation. We therefore review de novo. *See S.M. Hentges & Sons, Inc. v. Mensing,* 777 N.W.2d 228, 231 (Minn.2010).

Minn.Stat. § 580.021, subd. 2 provides:

> Before the notice of pendency under section 580.032, subdivision 3, or the lis pendens for a foreclosure under chapter 581 is recorded, a party foreclosing a mortgage must provide to the mortgagor information contained in a form prescribed in section 580.022, subdivision 1, that:
>
> (1) foreclosure prevention counseling services provided by an authorized foreclosure prevention counseling agency are available.

The statute does not specify a remedy for failure to comply with the required foreclosure-prevention-counseling-services notice in the foreclosure-by-action context. Appellant suggests that vacation of the foreclosure judgment, and requiring respondents to begin the foreclosure action anew, is the only way to give effect to the statute's notice requirements. To support his argument, appellant cites to a footnote in *Jackson v. Mortg. Elec. Registration Sys., Inc.,* 770 N.W.2d 487, 492 n. 3 (Minn.2009). The footnote provides:

> ***4** In 2008, the legislature added an additional prerequisite to foreclosure by advertisement, requiring that "before the notice of pendency as required under section 580.032 is recorded, the party has complied with section 580.021." Act of May 18, 2008, ch. 341, art. 5, § 7, 2008 Minn. Laws 1390, 1422 (codified at Minn.Stat. 580 .02 (2008)). Section 580.021 requires the foreclosing party to give notice of the availability of counseling, and to provide the homeowner various contact information for counseling services. Minn.Stat. §§ [*sic*] 580.021 (2008).

Id. The supreme court in *Jackson* then went on to note:

> [T]he Minnesota Legislature has amended chapter 580 to help mortgagors facing foreclosure by advertisement.... Under the new sections, it is a prerequisite to foreclosure by advertisement that the mortgagees provide mortgagors with information on the availability of counseling. Minn.Stat. §§ 580.02–.22 (2008). The Minnesota

> Legislature has attempted to provide homeowners facing possible foreclosure by advertisement with greater information and access to help.

Id. at 502. "If the foreclosing party fails to strictly comply with the statutory requirements, the foreclosure proceeding is void." *Id.* at 494.

Appellant's reliance on *Jackson* is misplaced. *Jackson* discusses application of the statute in the foreclosure-by-advertisement context. This case involves a foreclosure by action. "An alternative to foreclosure by action, foreclosure by advertisement was devised to avoid the delay and expense of judicial proceedings." *Ruiz v. 1st Fidelity Loan Servicing, LLC,* 829 N.W.2d 53, 59 (Minn.2013) (voiding a foreclosure by advertisement for failure to strictly comply with Minn.Stat. § 580.02(3)). Unlike a foreclosure by advertisement, a foreclosure by action involves judicial review and subsequent approval of the foreclosure process.

Appellant is correct that a strict-compliance standard is applied in foreclosure by advertisement. But no authority requires strict compliance in instances of foreclosure by action. Accordingly, violation of the Minn.Stat. § 580.021 notice requirement does not mandate automatic vacation of the foreclosure judgment.

Because we conclude that strict compliance with the section 580.021, subd. 2, notice is not required in the case of a foreclosure by action, we next consider whether appellant was prejudiced by respondents' failure to provide the foreclosure-prevention-counseling-services notice. *See* Minn. R. Civ. P. 61 (stating that "no error or defect in any ruling or order ... is ground for granting a new trial ... unless refusal to take such action appears to the court inconsistent with substantial justice"); *see also Waters v. Fiebelkorn,* 216 Minn. 489, 495, 13 N.W.2d 461, 465 (Minn.1944) ("[E]rror without prejudice is not ground for reversal."). The district court determined that appellant was not prejudiced by respondents' failure to provide notice under section 580.021, subd. 2, taking judicial notice that appellant is a licensed attorney and determining that his status as an attorney was relevant to the question of whether appellant was aware of options to avoid foreclosure.

***5** Appellant's status as an attorney supports the district court's determination that he was not prejudiced by respondents' failure to provide notice of foreclosure prevention counseling services. He should have been aware of options to avoid foreclosure without being advised under section 580.021, subd. 2. And neither at the district court nor on appeal does appellant identify any prejudice suffered by him as a result of the lack of notice. The record does not reveal any prejudice. The district court did not err in ruling that failure to provide notice to appellant under Minn.Stat. § 580.021, subd. 2 did not require dismissal of this foreclosure by action.

B. Minn.Stat. § 582.041

Appellant also argues that respondents failed to provide notice under Minn.Stat. § 582.041. He asserts that this failure requires vacation of the foreclosure judgment. Again, this is a question of statutory interpretation, and we review de novo. *S.M. Hentges,* 777 N.W.2d at 231.

Minn.Stat. § 582.041, subd. 1 provides:

> If a mortgage on real property is foreclosed and the property contains a portion of a homestead, the person in possession of the real property must be notified by the foreclosing mortgagee that the homestead may be sold and redeemed separately from the remaining property.

Section 582.041 notice provides a procedure for a debtor to allocate a portion of a foreclosed property to be designated as a homestead if it contains a home, and sold separately. *Id.,* subd. 2. The allocated parcels must conform to local zoning ordinances and be compact so as to not unreasonably reduce the value of the remaining property. *Id.,* subd. 3. The homestead portion is to be sold separately. *Id.,* subd.

We have already determined that no authority requires strict statutory compliance in foreclosure-by-action cases. The failure to give the section 582.041 notice requirement does not mandate vacating the foreclosure judgment, as appellant contends.

Appellant has suffered no prejudice by not receiving the homestead-exemption notice because appellant could not possibly "allocate[ ] a portion of homestead property to be sold first" under the statute. Appellant's house is located

on a residential lot that is platted as a single-family residence. Further division of the property is not possible without violating local zoning ordinances. Moreover, the entire assessed value of appellant's land is significantly lower than the total amount of respondents' claims. Even if appellant were able to have a separate portion of his property homesteaded, he would only benefit under the statute if that separate parcel could be sold to satisfy the judgment against appellant. That is impossible on these facts. Because it would be impossible for appellant to designate a portion of his property to be sold separately from the house itself, he has suffered no prejudice by the failure to provide the homestead-exemption notice. The district court did not err in excusing respondents' failure to provide such notice.

IV. Attorney Fees

***6** Appellant challenges the district court's award of attorney fees. We review a district court's grant of attorney fees for an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.,* 401 N.W.2d 655, 661 (Minn.1987). "The reasonable value of attorney fees is a question of fact, and we must uphold the district court's findings on that issue unless they are clearly erroneous." *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.,* 625 N.W.2d 178, 188 (Minn.App.2001).

A. Sufficiency of Findings

In challenging the district court's award, appellant first argues that the district court erred by failing to make sufficient findings of fact to support its award of attorney fees to respondents. A judgment based on insufficient findings will not be sustained on appeal. *See Becker,* 401 N.W.2d at 661 (providing that, on remand, the district court should provide its rationale for denying request for attorney fees so the award could be reviewed by appellate court).

Here, the district court awarded respondents attorney fees in the amount of $28,785.89. The district court made several findings of fact regarding its award of the fees, indicating the analysis it applied and providing its reasoning for the amount awarded to respondents. The district court's findings are more than adequate, and the record before us supports those findings. Accordingly, the district court made sufficient findings to support its award of attorney fees to respondents.

Appellant also argues that the district court shifted to him the burden of proof on the attorney-fees issue. Appellant misapprehends the district court's observation in its finding of fact that appellant presented no argument rebutting the amount of claimed attorney fees. The district court found that respondents met their burden of proof through Samsing's testimony. The court's observation that respondents' request for fees was unopposed by appellant did not amount to a reallocation of the burden of proof.

B. Exhibit 14

Appellant argues that the district court abused its discretion in allowing Exhibit 14, a copy of the billing statements of respondents' attorneys through the day before trial, to be used to refresh Samsing's recollection when she testified at trial. Appellant asserts that the document could not be used to refresh Samsing's memory because Samsing was not the author of the document.

"The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.,* 567 N.W.2d 42, 45–46 (Minn.1997) (quotation omitted). Under Minn. R. Evid. 612, if a witness has first-hand knowledge about that which he or she is testifying, that witness may legitimately rely on a writing to refresh his or her memory. *See also* Minn. R. Evid. 602. The district court "has wide discretion in permitting use of memoranda [to refresh a witness's memory] and in the references that may be made thereto." *Ostrowski v. Mockridge,* 242 Minn. 265, 274, 65 N.W.2d 185, 191 (1954).

***7** Rule 612 does not require that the individual whose memory is being refreshed be the same individual who authored the document. The rule only requires that the witness have "first-hand knowledge" about the topic to which he or she is testifying. *See* Minn. R. Evid. 602. Here, Samsing testified that she had personal knowledge of the attorney fees that she had incurred, but also indicated that she could not remember the specific amount of the fees. Exhibit 14 was used to refresh her recollection of the exact amount. The district court did not abuse its discretion in allowing Exhibit 14 to be used to refresh Samsing's recollection.

V. Amount of Judgment

Appellant argues that the district court erred in entering judgment against him in the full amount owed on the loan through the date of trial. Appellant asserts that the district court's error stems, in part, from admitting inadmissible evidence.

Appellant argues that the district court abused its discretion when it received into evidence Exhibit 13, an amortization schedule reflecting the payments made by appellant, the principal amount that remained owing, and the accrual of interest through the date of trial. Appellant asserts that Exhibit 13 prejudiced him because it was the only evidence offered by respondents regarding the amount due and owing by appellant.

As previously discussed, the district court has broad discretion in making evidence-admissibility determinations, and these rulings will only be overturned if they are based on "an erroneous view of the law or constitute [ ] an abuse of discretion." *Kroning,* 567 N.W.2d at 45–46. Over appellant's objection, the district court allowed Exhibit 13 into evidence under Minn. R. Evid. 803(6). Rule 803(6) allows for the admission of hearsay statements under the business-records exception, provided that a qualified witness testifies that it was the regular practice of the business to create and maintain that record. *See also Nat'l Tea Co. v. Tyler Refrigeration Co.,* 339 N.W.2d 59, 62 (Minn.1983) (providing that the business-records exception requires foundation for the document's admissibility to be laid by a qualified witness). A "qualified witness" need not be an employee of the business. *See Nat'l Tea,* 339 N.W.2d at 61–62. "The phrase 'other qualified witness' should be given the broadest interpretation; *he need not be an employee of the entity so long as he understands the system.*" *Id.* at 61.

Appellant argues that Samsing is not a "qualified witness" within the meaning of Rule 803(6) because she did not know exactly how Exhibit 13 was produced or the basis for the calculations contained in the document. Despite this, the record supports the district court's admission of the exhibit. At trial, Exhibit 13 was identified by Samsing as a record regularly kept concerning this loan to appellant and reflecting the amounts owed through the date of trial. She testified that the document was prepared, at her direction, by her accountant of fifteen years. Samsing further testified that the accountant first prepared the document at the time the loan was made, that the document was prepared with information Samsing provided to the accountant, that the document accurately reflected the payments appellant made, and she had no reason to believe that there was any error or inaccuracy in the document. Based on this record, we see no abuse of the district court's discretion in finding that proper foundation was provided for Exhibit 13. The district court acted within its discretion in admitting the amortization schedule as a business record.

***8 Affirmed.**

All Citations

Not Reported in N.W.2d, 2015 WL 4523580

End of Document

2013 WL 10154648 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota.
Seventh Judicial District
Mille Lacs County

MILLE LACS POWER SPORTS, INC., Julie Van Steenwyk, and Dale Van Steenwyk, Plaintiffs,
v.
Bradley J. LANGERMAN d/b/a Langerman Roofing and Remodeling LLC, and Minnesota Roofing and Remodeling, Inc., Defendants.

No. 48-CR-11-1657.
November 13, 2013.

Order

Robert J. Raupp, Judge.

***1** The above-entitled matter came before the Honorable Robert J. Raupp, Judge of District Court, on October 10, 2013, for a Motions in Limine hearing, at the Mille Lacs County Courthouse in the City of Milaca, County of Mille Lacs, State of Minnesota.

Joseph Walsh appeared on behalf of the plaintiffs. Margaret Bauer Reyes appeared on behalf of Bradley Langerman d/b/a Langerman Roofing and Remodeling, LLC (hereinafter "Langerman"). Valerie Sims appeared on behalf of Minnesota Roofing and Remodeling, Inc., (hereinafter "MN Roofing").

At the hearing, the Court took several motions under advisement.

BASED ON THE FOREGOING, the Court makes the following:

ORDER

1. Plaintiffs' motion to preclude evidence not disclosed prior to the close of discovery in July is hereby **DENIED.**

2. MN Roofing and Remodeling, Inc.'s motion to preclude appraisals offered by the plaintiff dated in 2007, is hereby **GRANTED**.

3. MN Roofing and Remodeling, Inc.'s motion to admit the plaintiffs' application for property tax reductions for 2005-2009 is hereby **GRANTED**.

4. Langerman Roofing and Remodeling LLC's motion precluding evidence of alleged damages is hereby **DENIED**.

5. Langerman Roofing and Remodeling LLC's motion precluding evidence of diminished market value is hereby **DENIED**.

6. Langerman Roofing and Remodeling LLC's motion precluding evidence of compromise or settlement is hereby **GRANTED** in part, **DENIED** in part.

7. Langerman Roofing and Remodeling LLC's motion precluding evidence of insurance, declination of insurance or insurance coverage is hereby **GRANTED**.

8. Langerman Roofing and Remodeling LLC's motion precluding evidence offered by undisclosed witnesses is hereby **GRANTED**.

9. Langerman Roofing and Remodeling LLC's motion precluding evidence of undisclosed repair bids is hereby **GRANTED**.

10. Langerman Roofing and Remodeling LLC's motion precluding evidence of documents and/or testimony requested but not disclosed in discovery is hereby **GRANTED**.

11. Langerman Roofing and Remodeling LLC's motion precluding evidence of the presence or absence of mold is hereby **DENIED**.

12. Langerman Roofing and Remodeling LLC's motion precluding evidence of consequential damages previously dismissed is hereby **GRANTED**.

13. Langerman Roofing and Remodeling LLC's motion precluding any and all testimony regarding the previously dismissed claims is hereby **GRANTED.**

14. MN Roofing and Remodeling, Inc.'s motion to declare the measure of damages for plaintiffs' claim for damage to property is the lesser of the cost of repair or the difference in value before and after the loss and instructing the jury accordingly is hereby **GRANTED.**

15. MN Roofing and Remodeling, Inc.'s motion to introduce evidence of the cost of repair is hereby **GRANTED.**

16. The offered memorandum is hereby incorporated by reference and made part of the Order.

Dated: November 13, 2013

BY THE COURT:

<<signature>>

Robert J. Raupp

JUDGE OF DISTRICT COURT

MEMORANDUM

At the October 10, 2013 hearing, plaintiffs' attorney did not object to the following motions made by the defendants:
***2** 1. Precluding evidence regarding any insurance that may be applicable to the claims made by plaintiff or any other party against the defendants; any evidence that LRR is being defended by counsel hired by their insurance company; and any evidence of plaintiff's insurance company's subsequent denial of their claim related to LRR's work.

2. Precluding evidence offered by undisclosed witnesses.

3. Precluding evidence of any undisclosed repair bid(s).

4. Precluding evidence of documents and or testimony requested but not disclosed in discovery.

5. Precluding evidence of consequential damages that this Court has previously dismissed.

6. Precluding evidence regarding any claims for damages by plaintiffs which this Court has previously dismissed.

The following motions were contested at the hearing and taken under advisement:

1. *Motion to Preclude Evidence not Disclosed Prior to the Close of Discovery*

Plaintiff filed a motion precluding all evidence not disclosed by the defendants prior to the pretrial hearing on June 04, 2013. Specifically, additional discovery provided by defendants in July of 2013. The original discovery deadline set by the Court was September 7, 2012. The Court allowed plaintiffs to add Minnesota Roofing and Remodeling as a defendant in August of 2012. At a June 4, 2013 pretrial hearing, the parties discussed discovery. Plaintiff alleges that the parties agreed discovery was completed on that date. Defendants responded that the parties could not complete discovery until depositions were completed some weeks later.

The discovery at issue consists of public tax documents purportedly filed by the plaintiffs. These documents were available to the plaintiffs throughout the litigation. Therefore, this Court will allow evidence that has been disclosed prior to the motions in limine hearing held on October 10, 2013, to be included in discovery. Because the trial date has been moved to March 2013, any documents that are relevant to the value of the property that were disclosed in July do not unduly prejudice the plaintiffs. *See* Minn. R. Civ. P. 6.02.

Any objection to foundation can be resolved at the time of trial.

2. *Motion to Preclude Appraisals*

MN Roofing moves the Court to preclude the admission of two appraisals completed on the subject property in 2007, on the reasoning that they are inadmissible hearsay. MN Roofing contends that the plaintiffs have not retained the services of the authors of said appraisal reports and have not proposed any expert testimony to lay foundation for the appraisals. Additionally, MN Roofing argues that the appraisals are not relevant to the time period in question, as the damage occurred in 2009.

At the hearing, plaintiffs stated they do not intend to call the appraisers that completed the appraisals on the subject property in 2007. Plaintiffs contend that the appraisals will not be used for the truth of the matter asserted; instead they will be used to lay the foundation as to how the plaintiff's arrived at the valuation of their property. Additionally, the plaintiffs contend that any alleged prejudicial effect may be ameliorated by an instruction to the jury not to consider the appraisal as direct evidence of the value of the property, but just as information received by the plaintiffs that informed their opinion of the property's value. Since the value of the property is, according to the plaintiffs, the key issue in this case, this Court must consider any appraisal evidence as offered, at least in part, to prove the truth of the matter asserted, and therefore subject to the hearsay rule. Appraisal evidence offered without the testimony of the person who performed the appraisal is inadmissible hearsay.

***3** Relevant evidence is any evidence having a tendency to make any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Minn. R. Evid. 401. Evidence which is not relevant is not admissible. Minn. R. Evid. 402. The damage occurred to the plaintiffs' property in 2009, and the property was subsequently lost to foreclosure in 2010. The real estate market changed drastically from 2007 when the appraisals were completed, to 2009 when the damage occurred, and 2010 when the property was lost to foreclosure. Property values in MN declined 15-25% between 2007 and 2010. MN Association of Realtors, *The Annual Report on the Minnesota Housing Market, available at* http://

www.mnrealtor.com/publications/housing-report (last visited October 18, 2013). The rapid fluctuation of property values during this time period renders the relevance of the 2007 appraisals questionable.

Accordingly, the Court finds that the appraisals are inadmissible hearsay and are not relevant to the time period in question. The motion to preclude the appraisals from 2007 is hereby granted.

3. *Motion to Admit Application for Property Tax Reductions*

MN Roofing argues that in 2010 plaintiffs filed an Application for Reduction in Valuation of Real Estate and/or Refund of Taxes Paid to decrease the taxes levied for 2005, 2006, 2007, 2008, and 2009. These applications set the value of the property at $198,100 for each of those years.

The parties agree that pursuant to *Jackson v. Buesgens*, 186 N. W.2d 184, 186-87 (Minn. 1971), an owner is competent to testify as to the value of their property. However, plaintiffs filed a separate motion in limine to exclude these documents because of their untimely disclosure pursuant to the Minnesota Rules of Civil Procedure. However, as the Court has discussed, because the trial has been moved to March 2014, documents that are relevant to the value of the property and were disclosed in July 2013 do not unduly prejudice the plaintiffs.

This motion to admit these documents is granted.

4. *Motion Precluding Evidence of Alleged Damages*

Langerman makes a motion to exclude all evidence of plaintiffs' alleged damages, stating that throughout two years of litigation, the plaintiffs have never produced a definitive, itemized description of what damages they claim. Defendants have requested that plaintiffs itemize their damages so that the defense may conduct discovery on, and properly prepare a defense against those claims. Langerman cites *Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997), in explaining that it is elemental that a plaintiff bears the burden of proof to establish evidence of damages they have sustained by a preponderance of the evidence.

The plaintiffs claim that this motion is an improperly noticed dispositive motion for summary judgment disguised as a motion in limine and may not be heard as a result. A motion in limine that is “tantamount to a motion for summary judgment” must be treated as a dispositive motion. *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 418-19 (Minn. Ct. App. 2003). The Court agrees with plaintiffs' contention and finds that the effect of granting Langerman's motion in limine would be to dismiss plaintiffs' claims for damages against Langerman and grant Langerman judgment as a matter of law, which is a dispositive motion. *Id.*, (citing *Fabio v. Bellomo*, 504 N.W.26 758, 761 (Minn. 1993)).

In Judge Anderson's Summary Judgment Order issued August 3, 2013, the Court denied defendant's motion for summary judgment as to damages to the building, and also denied a motion to compel discovery, stating “the Court feels that the plaintiffs have provided sufficient information regarding the calculation of damages to the building.” In rejecting the defendant's request for summary judgment, the Court held, “there is ample evidence to suggest that the value of the building was not increased back to the original value and that this was caused by defendant's breach of contract.” Because these motions have already been denied by this Court, and the effect of granting Langerman's motion in limine would be to dismiss plaintiff's claims for damages against Langerman and grant Langerman judgment as a matter of law, Langerman's motion to exclude all evidence of plaintiffs' alleged damages is hereby denied.

5. *Motion Precluding Evidence of Compromise or Settlement*

***4** Langerman moves the Court to preclude evidence of compromise or settlement. Langerman is seeking to preclude the plaintiffs from offering testimony and other evidence of a history of their negotiations with Langerman, and their own insurers over the property damage claims which were resolved prior to this matter.

The Minnesota Rules of Evidence specifically preclude evidence of compromise or offers to compromise. Minn. R. Evid. 408. Settlement evidence is "inherently prejudicial." *In re Bucbnaster*, 755 N.W.3d 570 (Minn. Ct. App. 2008). This is because it "has a strong potential to mislead the jury because the motive behind the offer could be misinterpreted by the jury." *Hayes v. North-wood Panelboard Co.*, 415 N.W.2d 687, 690 (Minn. Ct. App. 1987).

Plaintiffs have proposed Exhibit 3 (Exhibit I attached to affidavit of Bauer Reyes) which is a letter dated February 9, 2010 wherein plaintiffs identified what they perceived was left undone or done poorly by Langerman. (The letter is signed by Dale Van Steenwyk, but the repeated references in the letter to "Dale" in the third person indicates that the letter was actually written by Julie Van Steenwyk). In that letter, the plaintiffs requested a final settlement of $16,575.56 from Langerman and stated that they "looked forward to settling our disagreement timely."

Additionally, Exhibit 2 (Exhibit H attached to the affidavit of Bauer Reyes) is a document entitled "Agreement" on plaintiffs' Mille Lacs Power Sports letterhead. The document states that Langerman Roofing and Remodeling "agreed…that the work is not correct on the following items." It is signed by both plaintiffs and Langerman, and states that Langerman Roofing and Remodeling "has been paid in full and final settlement…" Langerman contends that these documents are evidence of furnishing a valuable consideration in compromising or attempting to compromise a claim which was disputed and is therefore inadmissible pursuant to Minn. R. Evid. 408.

Three criteria must be met before evidence is excluded under Rule 408: 1) The evidence must offer to compromise a claim which was disputed as to either validity or amount; 2) The evidence cannot be offered to prove liability for or invalidity of the claim or its amount; and 3) The evidence is not offered for another legitimate purpose. *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519 (Minn. Ct. App. 1999).

Plaintiffs contend that both documents were drafted by the plaintiffs during the time when the work was ongoing. Further, both documents were drafted before any counsel was retained, and before this matter was filed. It is the plaintiffs' position that the documents were the parties' attempt to reach a contractual agreement regarding the deficiencies in Langerman's work and payment for work performed. Specifically, Exhibit 2, entitled "Agreement" contemplates further work to be completed by Langerman and is not just a settlement for money consideration. Plaintiffs argue that this document is evidence of a novation, or the replacement of an existing contract with a new one. In order for there to be a valid novation, there must be a prior obligation that is discharged and a new obligation substituted. A valid novation requires the mutual agreement of all parties involved. *Epland v. Meade Ins. Agency Associates, Inc.*, 564 N.W.2d 203 (Minn. 1997).

***5** The Court finds that the February 24, 2010 document entitled "Agreement" is evidence related to plaintiffs breach of contract claim and as such, is not being offered to prove liability for or invalidity of the claim or its amount. Moreover, the agreement demonstrated that Langerman's workmanship was not in dispute, as it recites, "it has been agreed by the contractor that the work is not correct on the following items and that he will correct the following faults at his own cost within the next thirty days." It appears that at the time the agreement was signed there was no dispute as to the validity or amount of the claim.

Rule 408 is applicable to exclude evidence only if the parties had a genuine dispute as to either the validity or the amount of the claim. *See Daltex Inc. v. Western Oil & Fuel Co.*, 275 Minn. 509, 148 N.W.2d 377, 382 (1967) (admitting evidence of a settlement which occurred *prior* to any dispute). For there to be a compromise, there needs to first be a dispute. *Id.*

In re Commodore Hotel Fire and Explosion Cases, the Minnesota Supreme Court examined Rule 408 and indicated that before excluding evidence the courts should look to whether there was a dispute as to the validity or amount of the claim. *In re Commodore Hotel Fire and Explosion Cases*, 324 N.W.2d 245 (Minn. 1982). *In re Commodore*, the appellants were owners

of a hotel that was destroyed by a fire, and they were seeking to recover damages for the destruction of the hotel that were not covered by fire insurance. The trial judge admitted evidence of the negotiations and settlement with the appellant's fire insurance company. On appeal, the Minnesota Supreme Court held that Rule 408 was not applicable to bar evidence of these negotiations because there was not a dispute as to the validity or amount of the claim. The projected damages were substantially in excess of the insurance coverage, and both parties agreed to settle for the policy limits. The Court explained that there was no showing the parties actually accepted a high or low figure with a view toward avoiding litigation. *Id.* at 248.

In the instant matter, the Court finds that at the time said document was executed, there was no genuine dispute as to the workmanship or the amount of loss. Further, there was no lawsuit pending at the time said document was executed. In addition, the language of the document which indicates defendant has been "paid in full" is relevant to the dispute between the parties over whether defendant was fully compensated for the work it performed. Therefore, Rule 408 of the Minnesota Rules of Evidence does not apply. Accordingly, Langerman's motion to preclude evidence of the document dated February 24, 2010, is hereby denied.

The document dated February 9, 2010, is, however, an offer of settlement that must be precluded under Rule 408. That letter lists numerous complaints regarding the work and materials provided by defendants, as well as complaints regarding the defendants' response to plaintiffs' concerns. The letter requests cash compensation from the defendants, and ends with a request to "settl[e] our disagreement timely." The plaintiffs have offered no compelling reason for the admission of this document, other than to support their underlying contract claim. Consequently, the Court will preclude admission of the February 9, 2010 letter at trial.

6. *Motion Precluding Evidence of the Presence or Absence of Mold*

Langerman moves to preclude expert testimony in support of plaintiffs' contention that they had sustained personal injuries from exposure to mold. Langerman contends that this Court has previously rejected plaintiffs' personal injury claims, and must not allow plaintiffs to offer evidence regarding of the presence of mold in the subject building.

***6** Plaintiffs agree that the personal injury claim has been dismissed and the evidence of mold in the building is irrelevant for that purpose. However, plaintiffs believe that the proper measure of damages is the value of the building with a fixed roof, subtracted by the value of the building after defendant's breach, and the question of whether the defendant's breach caused significant amounts of mold to grow in the building is relevant to the value of the subject property after the defendant's breach.

Pursuant to Minn. R. Evid. 401, this Court finds that evidence of the presence of mold in the building is relevant to the alleged breach that occurred, and may be essential to prove the measure of damages. Accordingly, Langerman's motion precluding the evidence of the presence or absence of mold is hereby denied.

7. *Measure of Damages*

All of the parties take issue with the language in the Court's August 3, 2012 Order pertaining to the appropriate measure of damages. The plaintiffs' property was subject to a mortgage foreclosure sale after the defendant's alleged breach of contract.

Langerman argues that the Court incorrectly identified the measure of damages as expectation damages; the expected value minus the debt value, or the cost of debt relief gained through the foreclosure sale. Langerman points to the language of CIVJIG 92.10, which indicates that in cases in which property is damaged, but not beyond repair, the proper measure of damages is either the difference in the value of the property before and after the harm, or the reasonable cost of repair. Defendant MN Roofing argues that damages must be limited to the lesser of cost of repair or difference in value.

Plaintiffs note that the Summary Judgment Order issued by Judge Anderson on August 3, 2012, states that "plaintiff alleges damages due to diminution of value of the building caused by defendants alleged bad acts." Plaintiffs' position was that

"expectation damages are the primary remedy for contract losses," and the Court found "they are appropriate here." Plaintiff's position is that after summary judgment, the only remaining claim was plaintiffs' breach of contract action relating to Langerman's failure to repair the roof.

The Court's Order did include language indicating that the plaintiffs are entitled to the expected value, minus the debt value, and that represents actual expectation damages. Plaintiffs have agreed that there appears to be no cases in support of this particular damage calculation and that they are not aware of any prior case law supporting the Court's position. However, right or wrong, the plaintiffs claim they have relied on the summary judgment ruling regarding expectation damages as the law of the case. *See Peterson v. BASF Corp.*, 675 N.W.2d 57, 65 (Minn. 2004) ("Law of the case is a rule of practice that once an issue is considered and adjudicated, that issue should not be reexamined in that court or any lower court throughout the case.") (citing *Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1988)).

Further, plaintiffs argue that the Court's summary judgment order made cost to repair irrelevant as the cost to repair is no longer of consequence to the determination of this action. Instead, based on law of the case, the damages should be calculated based on the market value of the property with a functional roof subtracting the market value of the property as it existed after defendant's attempted repair.

The paragraph at issue is contained within the Court's discussion of standing. As the Court noted at the beginning of its consideration of that issue, standing exists when a potential litigant demonstrates a fairly traceable connection between the alleged injury in fact and the defendant's alleged conduct, and a substantial likelihood that the requested relief will remedy that injury. It is in the context of the analysis of the last element that the Court noted that plaintiffs had presented evidence that the requested relief (money damages) would remedy the alleged injury, but the Court went on to suggest that plaintiffs had not correctly calculated their damages.

***7** The elements of standing which the Court addressed in its Order of August 3, 2012, do not, in this Court's opinion, require such a fine calculation. Simply put, the precise manner of calculating damages is not essential to a determination of standing. Under either the plaintiffs' original assertion of damages or the method of calculation argued by the Court in its Order, the plaintiffs' injury would be substantially remedied by the award of damages.

This Court believes that the language in the Summary Judgment Order pertaining to the calculation of damages was not essential to the summary judgment decision, and therefore would be considered dicta, and not the law of the case, as the plaintiffs argue.

MN Roofing and Remodeling contends that the measure of damages is limited to the cost of repair. Under Minnesota law the proper measure of damages in this situation is the lesser amount of either the cost of repair or diminution in value, and this Court is of the opinion that such an assessment should be made by the trier of fact at the conclusion of the trial in this matter.

The Court agrees that the plaintiffs are not entitled to elect a higher measure of damages. In cases involving real property, Minnesota courts have consistently held that the proper measure of damages is the diminution in value or cost of repair, *whichever is less. See In re Commodore Hotel Fire & Explosion Cases*, 324 N.W.2d 245, 249 (Minn. 1992) (involving negligence claims related to a fire in a hotel and applying principles of contract law); *VanLandschoot v. Walsh*, 660 N.W.2d 152, 156 (Minn.Ct.App.2003) (involving a negligence claim concerning a commercial building). Cases holding to the contrary involved chattel, not real property. See *Hart v. N. Side Firestone Dealer*, 235 Minn. 96, 49 N.W.2d 587 (1951); *Kopischke v. Chicago, St. P., M. & O. Ry. Co.*, 230 Minn. 23, 40 N.W.2d 834 (1950).

Plaintiffs' reliance on Judge Anderson's Summary Judgment Order as the law of this case with respect to expectation damages, is misplaced. The Court finds that the facts of this case do not distinguish it from controlling Minnesota precedent. Therefore, based on the arguments presented, the Court denies plaintiffs' motion insofar as it relates to limiting the measure of damages to that of diminution of value of the building, and grants the defendants' motion to introduce evidence of cost of repairs.

8. Evidence of Diminished Market Value

Langerman makes the motion to preclude extraneous testimony or evidence of diminished market value of the subject property. Defendant anticipates that the plaintiffs may attempt to offer their own personal opinion on the diminution of their property at trial, but because they could not testify as to this under oath in their depositions, the defendants believe the plaintiffs should not give such an opinion to a jury.

Additionally, Langerman argues that the plaintiffs have never disclosed an expert to provide opinions or testimony that the decline of the property's market value was caused by a roof leak, as opposed to numerous economic factors in the real estate market between the years of 2009 and 2011, which caused real estate prices to decline. The defendant argues that allowing the plaintiffs to provide evidence of the diminished market value of the subject property would be speculative, unreliable, and misleading to a jury.

The plaintiffs contend that the law of the case prevents this issue from being relitigated because this Court has already determined plaintiff's calculation of damages: "the correct calculation of damages would be the value of the building as it should have been had there been no breach, subtracted by the value after." Judge Anderson in his Summary Judgment Order noted that plaintiffs had supplied "sufficient evidence to present a genuine issue of fact as to the values to use in the calculation and the defendant's fault in creating any devaluation." MSJ Order at 9-10.

***8** Minnesota case law clearly holds that a property owner is competent to testify as to the value of his or her property. Lack of foundation for that opinion goes to the weight of the testimony, but not its admissibility. *Jackson* v, *Buesgens*, 290 Minn. 78, 186 N.W.2d 184 (1971).

This Court finds that allowing the plaintiffs to offer evidence of a diminished market value is relevant to the alleged breach that occurred and the measure of damages. Accordingly, Langerman's motion precluding the evidence of a diminished market value is hereby denied.

9. *Debt Relief*

Plaintiffs believe the Court's specific statement of damage calculations as illustrated in Judge Anderson's Summary Judgment Order was not fully adjudicated and should be revisited by this Court in the crafting of appropriate jury instructions. Specifically, plaintiffs argue that the Court appeared to treat plaintiffs' debt relief as a collateral source without analyzing it pursuant to MN's collateral source statute and common law. Plaintiffs contend that under MN law, debt relief the plaintiffs received should not be considered by the jury, nor deducted from the plaintiffs' damage award following trial.

The Minnesota Court of Appeals held that the collateral-source rule, which provides that compensation received from a third part will not diminish recovery against a wrongdoer, applies only to a payment that comes from a source other than the tortfeasor or someone acting for the tortfeasor. *See VanLandschoot v. Walsh*, 660 N.W.2d 152 (Minn. Ct. App. 2003); Restatement (Second) of Torts, § 920A(2).

This Court has determined that the language of the Summary Judgment Order pertaining to the debt relief is not essential to the Summary Judgment Order, and is thus dicta, and not the law of the case. Further, this Court finds that the insurance payments the plaintiffs have already received in relation to this matter came from a source other than the tortfeasor, and therefore this Court agrees with plaintiffs' position that the debt relief the plaintiffs have already received should not be considered by the jury, nor deducted from the plaintiffs' damages award following trial, should there be one.

Dated: November 13, 2013

BY THE COURT:

<<signature>>

Robert J. Raupp

JUDGE OF DISTRICT COURT

End of Document

2005 WL 757873
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 Welfare of A.A.M., Child.

No. A04-1296.
|
April 5, 2005.

Ramsey County District Court, File No. J8-02-556495.

Attorneys and Law Firms

John M. Stuart, State Public Defender, Ann McCaughan, Assistant Public Defender, Minneapolis, MN, for appellant A.A.M.

Mike Hatch, Attorney General; and Susan Gaertner, Ramsey County Attorney, Kathryn A. Santelmann, Assistant County Attorney, St. Paul, MN, for respondent state.

Considered and decided by HALBROOKS, Presiding Judge, TOUSSAINT, Chief Judge, and HUDSON, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge.

***1** Appellant A.A.M. was adjudicated delinquent on one count of first-degree controlled-substance crime. Appellant was placed at Boys Totem Town, a residential and correctional facility for adolescent boys. On appeal from the dispositional order, appellant argues that out-of-home placement is not the least drastic step necessary to rehabilitate him and that the district court did not make adequate written findings to support its disposition. Because we conclude that the district court's findings are inadequate to support its order, we remand for additional written findings.

FACTS

Appellant A.A.M. agreed to deliver a package for a friend's father in exchange for $100. A.A.M. admits that he knew that the package contained drugs. He was arrested after delivering the package to a confidential police informant.

A.A.M. was subsequently charged with first-degree sale of a controlled substance in violation of Minn.Stat. §§ 152.01, subds. 3a, 15a, .021, subds. 1(1), 3 (2002 & Supp.2003). The state then moved to certify A.A.M. to stand trial as an adult. A.A.M. agreed to plead guilty to the charged offense and to cooperate with the police in exchange for the state's withdrawal of its certification motion.

A.A.M. was adjudicated delinquent and, based on the probation officer's report, the district court ordered an out-of-home placement at Boys Totem Town for a period of 4-6 months. In its findings of fact in support of this placement, the district court noted:

2. The Court has reviewed and accepted the staffing report and/or the probation officer's report from June 1, 2004, and adopts as its necessary findings for why public safety and the best interests of the child are served by this disposition order, and how this correctional placement meets the needs of the child:

a. *Justification For Placement:* The child's behavior represents a direct threat to the community and self. The child is also at least one full year behind in school.

b. *Reasonable Efforts to Avoid Placement:* CRP; community service.

c. *Alternatives Considered:* Elmore Academy; Chamberlain Academy.

3. The transcript of these proceedings sets forth facts which support this disposition order and is hereby incorporated as to: (a) why the best interests of the child are served by this disposition order and (b) what alternative dispositions were considered by the court and discussed as to why they were not appropriate in said case.

The district court made no additional findings regarding placement. This appeal follows.

DECISION

"[District] courts have broad discretion to order dispositions authorized by statute in delinquency cases." *In re Welfare of M.A .C.,* 455 N.W.2d 494, 498 (Minn.App.1990). A district court's dispositional order will not be disturbed absent an abuse of discretion. *In re Welfare of J.A.J.,* 545 N.W.2d 412, 414 (Minn.App.1996).

An out-of-home placement must be supported by evidence that the placement is the "least drastic step necessary to restore law-abiding conduct in the juvenile." *In re Welfare of M.R.S.,* 400 N.W.2d 147, 151 (Minn.App.1987); *see also* Minn.Stat. § 260B .198, subd. 1 (2004) (stating that in cases of delinquency, the district court shall enter a dispositional order "deemed necessary to the rehabilitation of the child"). "It is reversible error, both arbitrary and unjust, to impose a disposition without evidence that it is 'necessary' for the declared statutory purpose of restoring law-abiding conduct." *In re Welfare of L.K.W.,* 372 N.W.2d 392, 398 (Minn.App.1985) (citing Minn.Stat. § 260.185, subd. 1 (1984)). [1]

1 Minn.Stat. § 260.185 was repealed and recodified in 1999 as Minn.Stat. § 260B.198. *See* 1999 Minn. Laws ch. 139, art. 4, § 3 (repealer); 1999 Minn. Laws ch. 139, art. 2, § 30 (recodification). As the legislature stated in its bill to repeal and recodify Chapter 260, the changes were not intended to alter pre-existing law. *See* 1999 Minn. Laws ch. 139, art. 4, § 1.

***2** Necessity incorporates two elements: public safety and proportionality. Minn. R. Juv. Delinq. P. 15.05, subd. 2(B)(1). Proportionality requires that the disposition be "the least restrictive action consistent with the child's circumstances." Minn. R. Juv. Delinq. P. 15.05, subd. 2(B)(1)(b). When considering an out-of-home placement, "there must be evidence that the aims of the law cannot be satisfied without removal of the child from home." *M.R.S.,* 400 N.W.2d at 151.

Moreover, a district-court disposition for out-of-home placement must be supported by findings that address five subjects: (1) why public safety is served by the disposition; (2) why the best interests of the child are served by the disposition; (3) what alternative dispositions were proposed to the court and why such recommendations were not ordered; (4) why the child's present custody is unacceptable; and (5) how the correctional placement meets the child's needs. *In re Welfare of J.S.S.,* 610 N.W.2d 364, 366-67 (Minn.App.2000) (citing Minn. R. Juv. P. 15.05, subd. 2(A), and Minn.Stat. § 260.185, subd. 1(i)(5)(a) (Supp.1997)). The district court abuses its discretion by ordering a disposition without making the requisite findings in support of its order. *See In re Welfare of N.T.K.,* 619 N.W.2d 209, 211-12 (Minn.App.2000) (noting that "[w]ritten findings are essential to meaningful appellate review"). Inadequate juvenile-disposition findings constitute reversible error. *Id.* (holding that insufficient findings are an independent basis for reversal); *J.S.S.,* 610 N.W.2d at 368 (reversing for failure to make sufficient statutorily required written findings of fact); *In re Welfare of C.A.W.,* 579 N.W.2d 494, 499 (Minn.App.1998) (reversing where district court's findings did not address the factors necessary to justify out-of-home placement); *M.A.C.,* 455 N.W.2d at 499 (explaining that the failure to make statutorily required written findings warrants reversal). Because adequate written findings are necessary for meaningful appellate review, when the district court fails to make such findings, this court may remand for the limited purpose of requiring the district court to make findings of fact that satisfy the statutory requirements. *N.T.K.,* 619 N.W.2d at 211-12.

This court has previously held that incorporation of the transcript of a dispositional proceeding does not, by itself, satisfy the requirement that the district court make written findings of fact in support of the disposition chosen. *In re Welfare of J.L.Y.,* 596 N.W.2d 692, 696 (Minn.App.1999), *review granted* (Minn. Sept. 28, 1999) *and appeal dismissed* (Minn. Feb. 15, 2000). As we explained:

> We acknowledge the administrative efficiency of the form and that in many cases the sound reasons for the disposition ordered are on the record, but *incorporating the entire transcript into the order does not satisfy the written-findings requirement.* Incorporation does not effectuate the purpose of having written findings, which is threefold: (1) to guarantee that the court consider the appropriate factors in reaching its decision; (2) to enable the parties to understand the court's decision; and (3) to facilitate meaningful appellate review.

***3** *Id.* (emphasis added) (citation omitted).

In paragraph 3 of its findings of fact, the district court stated:

> The transcript of these proceedings sets forth facts which support this disposition order and is hereby incorporated as to: (a) why the best interests of the child are served by this disposition order and (b) what alternative dispositions were considered by the court and discussed as to why they were not appropriate in said case.

This court recently considered the sufficiency of identical findings. *In re Welfare of D.T.P.,* 685 N.W.2d 709, 713 (Minn.App.2004). Regarding this language, we held that

> [i]f the requisite particularized findings are made on the record and appear in a transcript, it is appropriate for the district court to incorporate those findings by reference into its order. But the transcript here does not contain the requisite findings, and the boilerplate language in paragraph 3 fails to identify the facts that support the court's disposition.

Id. [2] Here, the court has employed identical "boilerplate language" to incorporate the disposition transcript. But, as in *D.T.P.,* the transcript does not contain the requisite findings. [3] While the discussion in the transcript as to why an out-of-home placement would serve public safety is arguably sufficient, [4] the other factors are insufficiently addressed.

2 At first glance, *J.L.Y.* and *D.T.P.* appear to conflict. *Compare J.L.Y.,* 596 N.W.2d at 696, *with D.T.P.,* 685 N.W.2d at 713. These cases may be reconciled by noting that incorporation of findings contained in the transcript is appropriate, but that the district court must then take the additional step of identifying specifically which of these findings it is using to support its disposition.

3 The state's brief contains substantial discussion of the five factors and rationale supporting the out-of-home placement. But these justifications for the court's disposition go beyond the district court's findings and appear to be post-hoc rationalizations by the state.

4 The transcript reflects that the state discussed the amount of cocaine involved and the danger that such drugs pose to the public.

1. Best Interests

With respect to out-of-home placement, the best-interest standard and the requirement of necessity are intertwined. Parental custody is presumed to be in the best interest of the child. *J.S.S.,* 610 N.W.2d at 367. A conclusory finding with minimal elaboration that the child's best interests are served by some other disposition is inadequate. *Id.* The district court is required to provide written findings explaining why "each of the provisions ordered was *necessary* for restoring [the juvenile] to law-abiding conduct." *J.L.Y.,* 596 N.W.2d at 696 (emphasis added); *see also J.A.J.,* 545 N.W.2d at 415 (noting that the fact that a disposition is desirable in a "holistic" sense is insufficient; the disposition must be necessary to restore the child to law-abiding conduct); *L.K.W.,* 372 N.W.2d at 399 ("The promise of benefits in a disposition, that the choice would be good or even best, does not permit an action which is not necessary.").

Regarding the best interests of A.A.M., the state noted that Boys Totem Town has a drug-awareness program that addresses the effects and consequences of drug dealing and that A.A.M. could receive "credits for hours of school time" that could be transferred to his regular school. Although this may indicate that a placement at Boys Totem Town is desirable, it does not address why such placement is necessary. There is no discussion of why these needs could not be met without an out-of-home placement. Thus, the record is insufficient to support the district court's finding that such placement would be in the best interests of A.A.M. Likewise, the record lacks evidence that removal of A.A.M. from the home is necessary to satisfy the "aims of the law." *M.R.S.,* 400 N.W.2d at 151.

2. Alternative Dispositions

***4** There is no discussion in the transcript of what alternatives were considered and why they were not ordered by the district court. Instead, the state simply declares, "[p]ossession of controlled substance in the 5th degree for first offenders we send to Boys Totem Town." The district court has also adopted the probation officer's report. This report mentions Elmore Academy and Chamberlain Academy as "alternatives considered," but contains no discussion of

why those alternatives are inadequate. Instead, the report simply concludes that "considering all the aggravating factors it is quite apparent that the only consideration for [A.A.M.] should be a long term correctional placement."

3. Present Custody

The rule that the district court must consider why the child's present custody is unacceptable serves as "a reminder of the preference for placing children in their own homes, and it calls for attention to the families of the children.... Correctional placements cannot occur without evidence and findings reflecting consideration of the child's familial relationships." *C.A.W.,* 579 N.W.2d at 499. Here, members of A.A.M.'s family testified regarding his home life and their determination to ensure that he "go the right way." There is no indication in the record that the district court sufficiently considered A.A.M.'s familial relationships and no finding that his current custody was unacceptable.

4. Suitability of Placement

An order for an out-of-home disposition must contain written findings stating the reasons that the placement will be suitable to the child's needs. *J.S.S.,* 610 N.W.2d at 368. These reasons must be specific to the individualized needs of the particular child. *See L.K.W.,* 372 N.W.2d at 400 ("If a placement is not suited to actual needs of the child, it cannot serve the child's best interests."). Here, the transcript contains a very brief statement by the state noting that the specific needs noted by A.A.M.'s counsel "can be covered" by the drug awareness, educational and vocational programs at Boys Totem Town. But the record does not establish how these programs would meet A.A.M.'s particular needs.

Because the findings are inadequate to support the district court's dispositional order, we remand to the district court for additional written findings of fact satisfying the statutory requirements.

Remanded.

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11 E.A.D. 565 (E.P.A.), 2004 WL 3214486

United States Environmental Protection Agency (E.P.A.)

Environmental Appeals Board

IN RE: WASHINGTON AQUEDUCT WATER SUPPLY SYSTEM

***1** National Pollutant Discharge Elimination System

NPDES Appeal No. 03-06
NPDES Permit No. DC0000019
July 29, 2004

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Syllabus

The Washington Aqueduct Water Supply System, a division of the U.S. Army Corps of Engineers, Baltimore District, provides drinking water to the Washington, D.C. metropolitan area. The Aqueduct "manufactures" drinking water by taking in raw Potomac River water, allowing a large percentage of sediments to settle out of the water, and then treating the water using a three-step process: (1) chemically induced sedimentation, in which aluminum sulfate, a widely used flocculant, is added to the water to induce further separation of solids from the water; (2) filtration; and (3) disinfection. The sedimentation step, which is at the heart of this appeal, occurs in six "sedimentation basins" that are adjacent to the Aqueduct's water treatment facilities in northwest Washington, D.C.

Over time, the aluminum sulfate flocculant added to the sedimentation basins and the resultant settled solids build up in the bottom of the basins and can interfere with the daily production of drinking water if they are not periodically removed. Accordingly, from two-to-five times per year per basin (depending on basin size and use), the Corps of Engineers cleans out the basins by discharging the treated sediments and supernatant into the Potomac River. Historically, each discharge episode has occurred over the course of several days in batch releases lasting approximately four-to-twelve hours.

On March 14, 2003, Region III of the U.S. Environmental Protection Agency ("EPA" or "Agency") issued a revised version of a National Pollutant Discharge Elimination System ("NPDES") permit to the Corps of Engineers' Baltimore District authorizing the discharges from the Washington Aqueduct into the waters of the United States, pursuant to section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. On April 11, 2003, the National Wilderness Institute ("NWI"), a non-profit environmental organization based in Alexandria, Virginia, filed a petition for review of Region III's permit decision. NWI requested on several grounds that the permit be remanded to the Region for further consideration. Region III subsequently issued a modified version of the permit on February 27, 2004, which is now before the Environmental Appeals Board ("Board").

Held: NWI's petition for review of the Washington Aqueduct's NPDES permit is denied in part; however, with respect to one issue, the permit is remanded to EPA Region III for further consideration.

Under the federal regulations implementing section 402 of the CWA, 33 U.S.C. § 1342, permit issuers must determine, among many other things, whether a given point source discharge "causes, has the reasonable potential to cause, or contributes to" an exceedance of certain narrative and numeric criteria for various pollutants set forth in state water quality standards. If a discharge is found to cause, have the reasonable potential to cause, or contribute to such an exceedance, the permit writer must calculate water quality-based effluent limits ("WQBELs") for the relevant pollutants. The permit writer must then compare

the resulting WQBELs to any technology-based effluent limits developed for particular pollutants and incorporate the more stringent set of effluent limitations into the NPDES permit.

***2** In this case, Region III conducted the "reasonable potential" analysis for the Washington Aqueduct using grab samples of effluent that had been discharged from one of the sedimentation basins on October 21, 2002. After determining the concentrations of various metals, such as aluminum, arsenic, chromium, copper, iron, lead, mercury, selenium, and zinc, and other pollutants in the Aqueduct's effluent, the Region determined that only aluminum had a reasonable potential to exceed District of Columbia water quality standards. The Region therefore calculated WQBELs for aluminum but found that the technology-based effluent limits it had developed for that metal were slightly more stringent that the WQBELs. Accordingly, Region III did not include any WQBELs in the Aqueduct's NPDES permit.

In comments on the Aqueduct's draft permits, NWI raised questions about the representativeness of the data Region III chose to use to conduct the Aqueduct's reasonable potential analysis. NWI reviewed a decade of Discharge Monitoring Reports from the Aqueduct, which disclosed the concentrations of aluminum, iron, and total suspended solids discharged from the sedimentation basins into the Potomac River. NWI also collected several reports, prepared by the Corps of Engineers or its contractors, that contained measured concentrations of metals and other pollutants in the Aqueduct's effluent. Finally, NWI collected its own samples of Aqueduct discharges and had them evaluated for their metals concentrations. NWI argued, on the basis of these data sets, that the pollutant concentrations measured by Region III in the October 21, 2002 samples were uncharacteristically low and thus provided an unsuitable basis for the reasonable potential analysis.

In its response to these comments on the draft permits, Region III asserted that the pollutant concentrations detected in the October 21, 2002 samples fell within the range of other samples and thus apparently could legitimately be used in the reasonable potential analysis. In other instances, the Region did not respond to NWI's data sets at all. On appeal, NWI argues that Region III responded inadequately to its comments.

Upon review of the administrative record and applicable federal law and Agency guidance, the Board holds that Region III clearly erred by failing to respond, adequately or in some cases at all, to significant comments NWI submitted on the Washington Aqueduct's draft NPDES permits. According to the Board, a response to comments must address the issues raised in a meaningful fashion and be clear and thorough enough to adequately encompass the issues raised by the commenter. Moreover, the administrative record must reflect the permit issuer's considered judgment, meaning that the permit issuer must articulate with reasonable clarity the reasons for its conclusions and the significance of the crucial facts it relied upon in reaching those conclusions. In this case, Region III chose to conduct the reasonable potential analysis using pollutant concentration levels that appear, on the basis of competing data compiled by NWI, to be substantially lower than worst-case or even average pollutant levels discharged from the Aqueduct, and yet the record contains virtually nothing explaining the Region's decision to proceed as it did. The record also contains no explanation or acknowledgment of the NPDES regulatory requirement that permit issuers use procedures to evaluate pollutant variability in effluent samples when analyzing reasonable potential, despite NWI's comments that clearly indicated pollutant variability was a significant issue in Aqueduct discharges.

***3** The Board therefore remands the NPDES permit to Region III so that the Region may revisit the reasonable potential analysis, ensure that its use of procedures to account for pollutant variability in conducting the analysis are clearly documented in the administrative record, and respond to NWI's comments in a meaningful fashion that is sufficiently clear and thorough enough to adequately encompass the issues raised. Review of all other issues is denied.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.
Opinion of the Board by Judge McCallum:

In the mid-1800s, the Congress of the United States enacted legislation creating the "Washington Aqueduct Water Supply System" ("Washington Aqueduct" or "Aqueduct") as a division of the U.S. Army Corps of Engineers, Baltimore District, for the purpose of providing drinking water to the Washington, D.C. metropolitan area. Today, the Washington Aqueduct supplies

potable water to approximately one million residents of the District of Columbia, Arlington County, Virginia, the City of Falls Church, Virginia, and portions of Fairfax County, Virginia.

In the course of its operation of the Aqueduct over the past few decades, the Corps of Engineers' Baltimore District obtained a National Pollutant Discharge Elimination System ("NPDES") permit for discharges of pollutants from the Aqueduct into the waters of the United States, pursuant to section 402 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1342. On March 14, 2003, Region III of the U.S. Environmental Protection Agency ("EPA" or "Agency") issued a revised version of the NPDES permit to the Corps of Engineers for discharges from the Washington Aqueduct into the Potomac River and Rock Creek.

On April 11, 2003, the National Wilderness Institute ("NWI"), a non-profit environmental organization based in Alexandria, Virginia, filed a petition for review of Region III's permit decision. NWI requested on several grounds that the permit be remanded to the Region for further consideration. Region III subsequently issued a modified version of the permit on February 27, 2004, [1] which is now before the Environmental Appeals Board ("Board"). For the reasons set forth below, we remand the Washington Aqueduct's NPDES permit to the Region for further consideration consistent with this decision.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

In 1972, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits the discharge of pollutants into the waters of the United States unless such discharge proceeds in compliance with a CWA permit. CWA § 301(a), 33 U.S.C. § 1311(a). The CWA permitting program of relevance in the instant case is the NPDES program, set forth at section 402 of the CWA, 33 U.S.C. § 1342, and implementing regulations developed by EPA at 40 C.F.R. part 122. NPDES permits typically contain provisions that incorporate or otherwise address two central CWA elements: (1) effluent limitations, which are established by EPA or permit issuers; and (2) water quality standards, which are promulgated by states and approved by EPA. *See* CWA §§ 301, 303, 304(b), 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. pts. 122, 125, 131.

***4** Effluent limitations control pollutant discharges into the waters of the United States by restricting the types and amounts of particular pollutants a permitted entity may lawfully discharge. CWA § 304(b), 33 U.S.C. § 1314(b); 40 C.F.R. § 122.44. Effluent limitations are either "technology-based" or "water quality-based," whichever is more stringent. CWA §§ 301(b)(1), 302, 33 U.S.C. §§ 1311(b)(1), 1312. Technology-based effluent limitations are generally developed on an industry-by-industry basis and establish a minimum level of treatment that is technologically available and economically achievable for facilities within a specific industry. CWA §§ 301(b), 304(b), 33 U.S.C. §§ 1311(b), 1314(b); 40 C.F.R. pt. 125, subpt. A; *see* 40 C.F.R. pts. 405-471 (effluent limitations guidelines for various point source categories). In some cases no industry-specific effluent limitations guidelines exist, and in those instances, permit issuers must use their "best professional judgment" to establish appropriate technology-based effluent limitations on a case-by-case basis. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 122.44, 125.3.

Water quality-based effluent limitations, on the other hand, are designed to ensure that state water quality standards are met regardless of the decisions made regarding technology and economics in establishing technology-based limits. State water quality standards are comprised of three parts: (1) one or more "designated uses" (i.e., public water supply, agriculture, recreation) for each water body or water body segment in the state; (2) water quality "criteria" expressed in numerical concentration levels for short ("acute") or longer ("chronic," "human health") exposure times and/or narrative statements specifying the amounts of various pollutants that may be present in the water without impairing designated uses; and (3) an antidegradation provision. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-.12. Water quality-based effluent limitations, or "WQBELs," are derived on the basis of the second component of water quality standards, i.e., the numeric or narrative water quality criteria for various pollutants established for particular water bodies.

Under the federal regulations implementing section 402 of the CWA, 33 U.S.C. § 1342, permit issuers must determine, among many other things, whether a given point source discharge "causes, has the reasonable potential to cause, or contributes to" an exceedance of the narrative or numeric criteria for various pollutants set forth in state water quality standards. 40 C.F.R. § 122.44(d)(1)(ii). This regulatory requirement, sometimes described as the "reasonable potential analysis," provides in full:

> ***5** When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a [s]tate water quality standard, the permitting authority shall use procedures [that] account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

Id. If a discharge is found to cause, have the reasonable potential to cause, or contribute to such an exceedance, the permit writer must calculate WQBELs for the relevant pollutants. [2] 40 C.F.R. § 122.44(d)(1)(i), (iii)-(vi). The permit writer must then compare the resulting WQBELs to any technology-based effluent limits developed for particular pollutants and incorporate the more stringent set of effluent limitations into the permit. CWA §§ 301(b)(1)(C), 302, 33 U.S.C. §§ 1311(b)(1)(C), 1312; 40 C.F.R. § 122.44(d).

B. *Factual and Procedural Background*

Over the course of the last few years, EPA Region III has issued several rounds of draft and final NPDES permits for the Washington Aqueduct and has attempted to respond to extensive comments on these permits from an array of governmental entities, public interest organizations, and private citizens. Various components of the permits have been challenged in federal court as well as before this tribunal, and some of that litigation is still ongoing. [3] For reasons of practicality and efficiency, we have chosen to limit our survey of the extensive background information in this case to only those matters that have relevance to the specific issues we have been asked to decide. We commend to interested parties the lengthy administrative record in this case as a starting place for research and further investigation into other details concerning the CWA and the Washington Aqueduct's NPDES-regulated discharges.

1. *Washington Aqueduct Operations*

We begin with a brief overview of the Washington Aqueduct's operations. The Aqueduct "manufactures" drinking water by taking in raw Potomac River water at two dams — Great Falls and Little Falls, Maryland — and piping the water to the Dalecarlia Reservoir, a forty-six-acre earthen basin situated on Washington, D.C.'s northwestern border with the State of Maryland. Once in the Reservoir, river water receives passive "pretreatment" of sorts, as approximately fifty-one percent of the sediments suspended in the water settle out, simply by virtue of gravity and the stillness of the water, and thus are removed from the water. These sediments are periodically dredged out of the bottom of the Reservoir and applied to land as a high-quality soil amendment. Meanwhile, the now-"pretreated" river water is sent from the Dalecarlia Reservoir to one of two drinking water treatment plants in the District of Columbia: the Dalecarlia plant and the McMillan plant.

***6** At both of these plants, the drinking water "manufacturing" or treatment process consists of three steps: (1) chemically induced sedimentation, in which aluminum sulfate, a widely used flocculant, is added to the water to induce further separation of solids from the water; [4] (2) filtration; and (3) disinfection. The sedimentation step, which is at the heart of this appeal, occurs in "sedimentation basins" at the two water treatment plants. The Dalecarlia plant is served by four sedimentation basins, which are denoted "Dalecarlia Sedimentation Basins #1 through #4," while the McMillan plant is served by two sedimentation basins, called "Georgetown Sedimentation Basins #1 and #2."

Over the course of weeks and months, the aluminum sulfate flocculant and settled solids build up in the bottom of the sedimentation basins and can interfere with the daily production of drinking water if they are not periodically removed. Accordingly, from two-to-five times per year per basin (depending on basin size and use), the Corps cleans out the basins by discharging the treated sediments and supernatant (i.e., the liquid sitting on top of the settled solids) into the Potomac River. The Dalecarlia basins discharge through Outfall 002, which is located just south of the Maryland/District of Columbia boundary and north of Chain Bridge, while the Georgetown basins discharge through Outfalls 003 and 004, which are situated south of Fletcher's Boat House and north of Georgetown University on the north/south borders of the basins, respectively. Historically, each discharge episode has occurred over the course of several days in batch releases lasting approximately four-to-twelve hours. *See, e.g.*, EPA Ex. 7, at 18.

2. *Recent Permitting History*

On March 28, 2002, Region III issued a new draft NPDES permit for the Washington Aqueduct, designated for purposes of these proceedings the "first draft NPDES permit." *See* EPA Region III Response to Petition for Review Exhibit ("EPA Ex.") 5 (EPA Region III, Draft NPDES Permit No. DC0000019 for the Washington Aqueduct (Mar. 27, 2002)) ("First Draft Permit"). The Region also issued a fact sheet explaining the first draft permit and a request for public comments on the permit. *See* EPA Ex. 7 (EPA Region III, Draft NPDES Permit No. DC0000019 Fact Sheet (Mar. 27, 2002)) ("First Draft Permit Fact Sheet"). A large number of entities, including NWI, submitted comments on the first draft permit. *See* Letter from Rob Gordon, Director, NWI, to Environmental Appeals Board, Exhibit ("NWI Ex.") 3 (Apr. 11, 2003) & EPA Ex. 8 (NWI Comments on First Draft Permit (June 28, 2002)) ("NWI's First Comments").

Region III made substantial revisions to the first draft permit in response to the comments received on that version of the permit. On December 18, 2002, the Region issued a revised draft permit, referred to in these proceedings as the "second draft NPDES permit," along with a response to comments document, a revised fact sheet, and a request for comments on the new draft permit. *See* EPA Ex. 10 (EPA Region III, Draft NPDES Permit No. DC0000019 for the Washington Aqueduct (Dec. 17, 2002)) ("Second Draft Permit"); EPA Ex. 12 (EPA Region III, Response to Public Comment on Washington Aqueduct NPDES Draft Permit (undated; prob. Dec. 17, 2002)) ("RTC on First Draft Permit"); EPA Ex. 2 (EPA Region III, Draft NPDES Permit No. DC0000019 Fact Sheet (Dec. 17, 2002)) ("Second Draft Permit Fact Sheet"). The Region again received extensive comments on the draft permit from a variety of parties, including NWI. *See* NWI Ex. 4 & EPA Ex. 26 (NWI Comments on Second Draft Permit (Jan. 30, 2003)) ("NWI's Second Comments").

***7** On March 14, 2003, Region III issued a final NPDES permit to the Corps for the Washington Aqueduct, along with a response to comments on the second draft permit. *See* EPA Ex. 1 (EPA Region III, NPDES Permit No. DC0000019, Washington Aqueduct (Mar. 14, 2003)); EPA Ex. 3 (EPA Region III, Response to Public Comment on Washington Aqueduct NPDES Revised Draft Permit (Mar. 14, 2003)) ("RTC on Second Draft Permit"). The final permit incorporated a number of modifications to address comments on various matters pertaining to sediment discharges and the spring spawning season, emergency discharges, genetic and habitat studies, the permit reopener clause, and related topics. *See, e.g.*, RTC on Second Draft Permit at 7-15, 21.

As mentioned in the introduction, NWI filed a petition for review of the March 14, 2003 permit with the Board on April 11, 2003. *See* Letter from Rob Gordon, Director, NWI, to Environmental Appeals Board (Apr. 11, 2003) ("NWI Pet'n"). Region III filed a response to the petition for review on July 7, 2003. *See* EPA Region III's Response to Petition for Review ("EPA Resp."). On December 16, 2003, in response to a number of motions and other procedural developments in this case, the Board placed a stay on further proceedings in NWI's appeal while Region III reconsidered various portions of the March 14th NPDES permit. *See* Order Denying Motion for Partial Remand and Staying Further Proceedings During Reconsideration of Permit Conditions (Dec. 16, 2003).

Region III subsequently filed a motion with the Board on March 30, 2004, reporting that it had modified several conditions of the March 14th permit and reissued the permit in final form on February 27, 2004. *See* EPA's Motion for Lifting Stay of Further

Proceedings; *id.* Ex. 5 (EPA Region III, NPDES Permit No. DC0000019, Washington Aqueduct (Feb. 27, 2004)). The Region therefore requested that the Board lift the stay of NWI's appeal. On April 23, 2004, the Board granted the Region's motion and reinitiated proceedings in this case. *See* Order Lifting Stay of Proceedings (Apr. 23, 2004). Notably, because NWI's appeal raises issues the Region did not address during its reconsideration and reissuance of the February 27, 2004 permit, and because the February 27, 2004 permit has superseded the March 14, 2003 permit, the final NPDES permit before us now is the February 27, 2004 permit. We will therefore apply NWI's arguments to that permit. The case stands ready for decision by the Board.

II. *DISCUSSION*

A. *Standard of Review*

Under the rules governing this proceeding, an NPDES permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants Board review. 40 C.F.R. § 124.19(a); 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 341-43, 345-47, 357 (EAB 2002) (remanding portions of NPDES permit pursuant to section 124.19(a)). The Board's analysis of NPDES permits is guided by the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permit issuer's] level." 45 Fed. Reg. at 33,412; *accord In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001). The burden of demonstrating that review is warranted rests with the petitioner. 40 C.F.R. § 124.19(a); *In re Town of Westborough*, 10 E.A.D. 297, 304 (EAB 2002).

***8** In permit appeals, the Board traditionally assigns a heavy burden to petitioners seeking review of issues that are technical in nature. *See, e.g., In re Phelps Dodge Corp.*, 10 E.A.D. 460, 517-19 (EAB 2002); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 201 (EAB 2000); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). As we have explained:

> [W]hen presented with technical issues, we look to determine whether the record demonstrates that the [permit issuer] duly considered the issues raised in the comments and whether the approach ultimately adopted by the [permit issuer] is rational in light of all the information in the record. If we are satisfied that the [permit issuer] gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the [permit issuer's] position. Clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the alternative theory is unsubstantiated.

In re MCN Oil & Gas Co., Order Denying Review, UIC Appeal No. 02-03, slip op. at 25-26 n.21 (EAB Sept. 4, 2002) (citations omitted); *accord In re Three Mountain Power, L.L.C.*, 10 E.A.D. 39, 50 (EAB 2001); *Steel Dynamics*, 9 E.A.D. at 180 n.16, 201; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999).

Moreover, with respect to questions pertaining to the "representativeness" of data used as the basis for establishing permit conditions (which is central to this appeal), the Board has repeatedly held, in the context of the Clean Air Act's prevention of significant deterioration program, that the choice of appropriate data sets is generally left to the discretion of the permitting authority. *E.g., In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 256-57 (EAB 1999) (choice of data sets for air quality analysis largely left to discretion of permit authority); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 147 (EAB 1999) (same, but with the proviso that permit authority's decision is adequately justified in the record). The Board's deference in these circumstances stems partly from the fact that selecting an appropriate data set is a technical matter, but it also stems from the fact that EPA has issued guidelines for determining whether data is sufficiently "representative" to be legitimately used

in an air quality analysis, and permit issuers have discretion to act within the spirit of those guidelines. *See, e.g., Encogen*, 8 E.A.D. at 256 (quoting EPA guidance that recommends consideration of air quality monitor location and data quality and currentness when determining "representativeness" of data); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 97 (EAB 1998) (same); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 128 (EAB 1997) (ambient air monitoring guidelines give permit issuers discretion to allow representative data submissions on case-by-case basis). Guidance of a similar nature exists to ensure effluent is meaningfully characterized for reasonable potential purposes under the NPDES program, although the Board has not had prior cause to address that guidance in depth. *See* Office of Water, U.S. EPA, EPA/505/2-90-001, *Technical Support Document for Water Quality-Based Toxics Control* § 3, at 47-66 (Mar. 1991); *cf. In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 336-37, 340 & n.18 (EAB 2002) (noting Region's decision that derivation of WQBELs using methods in Technical Support Document was not feasible due to insufficient information regarding magnitude, variation, and frequency of river and storm water discharge flow rates).

B. *Water Quality Analyses*

***9** In its appeal of the Washington Aqueduct's NPDES permit to this Board, NWI is primarily interested in the effects the Aqueduct's activities will have on the water quality of the Potomac River. To analyze these effects, Region III initially relied on two studies prepared by environmental consulting companies on behalf of the Corps' Baltimore District, as well as on supplemental studies conducted by one of the companies. Second Draft Permit Fact Sheet at 4, 18-19; *see* EPA Ex. 16 & NWI Ex. 6 (EA Engineering, Science & Technology, Inc., *Water Quality Studies in the Vicinity of the Washington Aqueduct* (Oct. 2001)) ("*2001 Water Quality Studies*"); EPA Ex. 17 (Memorandum Reevaluating 1 December 1999 Acute Toxicity Test Value (Mar. 19, 2002)) ("*Supplemental Studies*"); Dynamac Corp., *Impacts of Sedimentation Basin Discharge from the Dalecarlia and Georgetown Reservoirs on the Potomac River* (Sept. 1, 1992). These studies included effluent toxicity testing and effluent fate and transport modeling of the Aqueduct's discharges conducted from 1997 through 2001, as well as modeling of discharge plumes for each outfall into the Potomac River at various river flow conditions. *2001 Water Quality Studies* pts. 2-4; *Supplemental Studies* at 2-12; *see* Second Draft Permit Fact Sheet at 18. The Region imposed water quality-based restrictions in the first draft permit, including a prohibition on sediment discharges during the spring spawning season, on the basis of these studies. First Draft Permit Fact Sheet at 3, 5, 7, 9-12, 17-19.

Region III subsequently decided, after it had received substantial public comment on the first draft permit, that it needed "additional reliable up-to-date values for various pollutants, particularly metals, in the Washington Aqueduct's discharge." [5] EPA Resp. at 7. Apparently, prior to this time, the Region had not prepared a formal, on-the-record analysis of the Washington Aqueduct's reasonable potential to cause an exceedance of D.C. water quality standards for metals and other pollutants likely to be in the Aqueduct's effluent. [6] The Region therefore collected grab samples of effluent (i.e., supernatant and settled solids) being discharged from Dalecarlia Sedimentation Basin #2 on October 21, 2002, and analyzed those samples to determine the concentration of total suspended solids ("TSS"), dissolved and total metals, and other contaminants in the effluent. EPA Ex. 18 (Marilyn Gower, Environmental Scientist, U.S. EPA, *Washington Aqueduct Special Sampling Inspection Report* (Nov. 26, 2002)); EPA Ex. 19 (Office of Analytical Services & Quality Assurance, U.S. EPA Region III, *OASQA Laboratory Report: Washington Aqueduct* (Nov. 18, 2002)). Laboratory analysis indicated that the effluent samples contained, among other things, aluminum at 983 milligrams per liter ("mg/L"), iron at 39.8 mg/L, a variety of other metals (e.g., arsenic, copper, magnesium, mercury, zinc) in small quantities, and TSS at 4,300 mg/L. EPA Exs. 18-19.

***10** The Region proceeded to use the pollutant concentrations detected in the October 21, 2002 grab samples to analyze the reasonable potential of the Washington Aqueduct's pollutant discharges to exceed D.C. water quality standards, pursuant to 40 C.F.R. § 122.44(d)(1)(ii). Second Draft Permit Fact Sheet at 19 ("EPA performed a reasonable potential analysis using the results of the October 21 sampling"); *see* EPA Ex. 20 (reasonable potential analysis); *see* D.C. Mun. Regs. tit. 21, ch. 11 (as amended May 24, 2002) (EPA Ex. 23) (D.C. water quality standards). At the outset of its analysis, Region III decided that of three types of numeric water quality criteria in the D.C. standards — acute, chronic, and human health [7] — only the acute criteria, representing one-hour average concentrations of the pollutants, had relevance to the Aqueduct's relatively short-duration discharges. EPA Resp. at 14; EPA Ex. 20.

On this basis, the Region eliminated iron, antimony, and thallium from consideration in the reasonable potential analysis because, though present in the October 21, 2002 grab samples, these metals lack designated acute criteria in the D.C. water quality standards.[8] EPA Resp. at 15; *see* D.C. Mun. Regs. tit. 21, § 1104.7 tbl. 2. The Region also ruled out a reasonable potential analysis for arsenic, cadmium, chromium, copper, lead, nickel, selenium, silver, and zinc because, though also determined to be present in the Aqueduct's effluent on October 21, 2002, these metals were not detected in quantifiable amounts and/or in amounts that exceeded their respective acute water quality criteria, and thus the Region assumed concentrations of zero for these pollutants. *See* EPA Resp. at 17; RTC on Second Draft Permit at 31-32; RTC on First Draft Permit at B.25; EPA Ex. 20. Finally, the Region excluded mercury, though detected in the effluent in quantifiable amounts, because the concentration nonetheless fell below the acute criterion for that metal.[9] EPA Resp. at 18.

The Region concluded that only aluminum, of all the metals, had a reasonable potential to cause an exceedance of the D.C. water quality criteria. Notably, the D.C. standards contain no numeric criteria — acute, chronic, or human health — for aluminum. *See* D.C. Mun. Regs. tit. 21, § 1104.7 tbl. 2. The standards do contain, however, a relevant narrative water quality criterion, which specifies, "The surface waters of the District shall be free from substances in amounts or combinations that * * * [c]ause injury to, are toxic to, or produce adverse physiological or behavioral changes in humans, plants, or animals." *Id.* § 1104.1(d). Region III relied on this criterion and other considerations in deciding to adopt, for purposes of this permit, the acute criterion for aluminum included in the Great Lakes Water Quality Criteria (i.e., 750 µg/L). RTC on Second Draft Permit at 19. The Region computed a "wasteload allocation" for aluminum in Washington Aqueduct effluent using this criterion,[10] and, because the effluent concentration found in the October 21, 2002 grab samples exceeded the wasteload allocation, the Region proceeded to calculate WQBELs for aluminum. *See* EPA Ex. 20 (computing average monthly limit for aluminum of 5,529 µg/L (5.5 mg/L) and maximum daily limit of 8,074 µ g/L (8 mg/L)). After comparing these WQBELs to the technology-based effluent limits it had also derived for aluminum (i.e., 4 mg/L monthly average and 8 mg/L daily maximum), Region III found the technology-based limits to be slightly more stringent and therefore incorporated those limits, rather than the WQBELs, into the permit. RTC on Second Draft Permit at 18-19; *see* EPA's Motion for Lifting Stay of Further Proceedings Ex. 5 (EPA Region III, NPDES Permit No. DC0000019, Washington Aqueduct pts. I.A-.F (Feb. 27, 2004)).

C. *NWI's Arguments on Appeal*

***11** In two rounds of comments on draft permits for the Aqueduct, NWI attempted, in a variety of ways, to persuade EPA Region III that it had failed to adequately evaluate the concentrations of various metals (e.g., aluminum, arsenic, chromium, copper, iron, lead, mercury, selenium, zinc) and TSS in the Aqueduct's discharges and, as a consequence, failed to incorporate into the permit appropriate effluent limitations — specifically WQBELs — for these contaminants. *See* NWI's Second Comments at 1-8; NWI's First Comments at 18-23, 45-50 & tbls. I-VII. Because EPA remained unconvinced that deficiencies existed in its water-quality analyses, the Region did not modify the permit in response to these concerns. NWI therefore asks this Board to remand the permit to Region III for further analyses of water quality issues and establishment of WQBELs.

NWI argues on two separate (though related) grounds that Region III responded inadequately to comments it submitted on the draft permits regarding the Region's "reasonable potential to cause an exceedance of water quality standards" analysis. First, NWI contends that the October 21, 2002 data Region III relied on to conduct the reasonable potential analysis for the second draft permit were not representative, in terms of levels of pollutant concentrations, of the pollutant load typically carried by discharges from the Washington Aqueduct sedimentation basins. Second, NWI claims that Region III chose to defend its October 21, 2002 sampling results rather than consider alternative metals data sets NWI had submitted or identified in its comments. NWI also raises a number of minor subsidiary points having to do with federal facilities compliance agreements,[11] the Data Quality Act, and incorporation of comments by reference. We address these issues in turn below.

1. *Reasonable Potential Analysis*

a. *Representativeness of October 21, 2002 Sampling Data*

To begin, NWI points out that in its comments on the second draft permit, it had argued that the samples collected by Region III on October 21, 2002, were not representative of the range of pollutant concentrations actually discharged from Outfalls 002, 003, and 004. NWI Pet'n at 1-3; *see* NWI's Second Comments at 1-4. To support this argument with respect to Outfall 002, NWI reviewed ten years of Discharge Monitoring Reports ("DMRs"), from January 1992 through May 2002, for the four Dalecarlia sedimentation basins. The DMRs reported actual discharge concentrations of aluminum, iron, and TSS that were higher, NWI asserts, in virtually every instance than the concentrations recorded in the Region's October 21, 2002 samples. [12] According to NWI: (1) forty-eight of fifty-six values for monthly average aluminum concentrations reported on the DMRs exceeded 983 mg/L (the October 21, 2002 sample value), with the average of the monthly average values being 2,359 mg/L; (2) fifty-four of fifty-four values for monthly average iron concentrations reported on the DMRs exceeded 39.8 mg/L (the October 21, 2002 sample value), with the average of monthly average values being 688 mg/L; and (3) fifty-three of fifty-five values for monthly average TSS concentrations reported on the DMRs exceeded 4,300 mg/L (the October 21, 2002 sample value), with the average of monthly average values being 20,374 mg/L. NWI's Second Comments at 1-2; *cf.* NWI's First Comments at 45-50 & tbls. I-VII.

***12** To support the argument with respect to Outfalls 003 and 004, NWI pointed out that EPA had "apparently made the assumption," in its reasonable potential analysis, that a discharge from Dalecarlia Sedimentation Basin #2 through Outfall 002 could adequately represent discharges from the two Georgetown Sedimentation Basins through Outfalls 003 and 004. NWI's Second Comments at 2. NWI discussed differences in management of the two sets of sedimentation basins, noting that the basin sizes, chemicals added, sediment retention times, means of cleaning the basins, and discharge frequencies differed between the Dalecarlia and Georgetown facilities. *Id.* at 2-3. NWI also alleged that DMRs for the Georgetown basins indicate that "substantially higher pollutants on average" are discharged from the Georgetown basins through Outfalls 003 and 004 than from the Dalecarlia basins through Outfall 002. *Id.* at 3.

On appeal, NWI contends that Region III responded to its comments regarding Outfall 002 by stating only that the October 21, 2002 samples were "'representative of the Dalecarlia basin discharge at the time they were taken.'" NWI Pet'n at 2 (quoting RTC on Second Draft Permit at 30). NWI argues that this response is inadequate, stating:

> NWI did not contend that the samples taken by EPA were not representative of the effluent and supernatant that was being discharged at the event sampled by EPA but that all of the available historical data from DMR's indicates that the concentrations detected in that event showed that the event itself is not representative of the discharges that actually occur. Therefor[e], the EPA's samples were an inappropriate basis for conducting [the] reasonable potential analysis.

Id.

With respect to its comments on Outfalls 003 and 004, NWI notes that Region III expressed its awareness that discharges from Outfall 002 are "somewhat different" from those of Outfalls 003 and 004 but stated that those differences "do not affect the requirements of the permit because the technology-based limitations for TSS will remove aluminum and other metals to levels well below the limits needed to protect water quality." RTC on Second Draft Permit at 32 (quoted in NWI Pet'n at 3). NWI argues that this response is also inadequate because the Region remained focused on its October 21, 2002 samples of an Outfall 002 discharge rather than evaluating discharges from Outfalls 003 and 004. NWI Pet'n at 3.

Upon examination of the record, it becomes clear that Region III provided a little more information in response to NWI's and another commenter's concern about data representativeness than NWI admits. The Region explained that experienced EPA professionals had obtained and analyzed the October 21, 2002 samples in accordance with EPA sampling methods, chain-of-

custody protocols, and quantification techniques, and that Region III believed the methods used were reliable and appropriate for establishing effluent limits. RTC on Second Draft Permit at 27, 30-31. More significantly, the Region asserted that "[w]hile the analytical results were not the highest concentrations ever recorded for the basins, they were within the range found by other samplers (see *2001 Water Quality Studies*)." [13] *Id.* at 27. The Region amplifies this point in its response to NWI's appeal, pointing specifically to three tables in the *2001 Water Quality Studies* that summarize chemistry monitoring data collected for the Dalecarlia sedimentation basins from 1997 through 2001. EPA Resp. at 13 & n.7 (citing *2001 Water Quality Studies* ch. 4 & tbls. 4-1a, 4-2a, 4-3). Region III contends that the data reported in these tables demonstrate that the results for aluminum, iron, and TSS from the October 21, 2002 samples "were within the range found for other samples taken at other times from that basin" ("that basin" presumably meaning Dalecarlia Sedimentation Basin #2). *Id.* at 13.

***13** In light of Region III's assessment, on the basis of the *2001 Water Quality Studies*, that the October 2002 samples could serve as an adequate data set upon which to conduct the reasonable potential analysis, we turn our attention to the *Studies* report itself. Chapter 4 of the *Studies*, entitled "Effluent Chemical Characterization," summarizes existing grab sample data collected by Aqueduct staff from 1997 through 2001 in tables 4-1 and 4-2, [14] as well as six samples collected for effluent toxicity testing purposes in table 4-3. [15] The data reveal three matters of relevance to the issue before us.

First, we are struck by the variability in the concentrations of aluminum, iron, and TSS the *2001 Water Quality Studies* reports as being discharged from the Aqueduct's sedimentation basins. The grab sample data collected by Aqueduct staff and included in table 4-2 reveal that from 1997-2001, the average yearly concentrations of aluminum, iron, and TSS discharged from the four Dalecarlia sedimentation basins varied from 651 to 4,180 mg/L for aluminum, 47.3 to 1,400 mg/L for iron, and 5,020 to 48,900 mg/L for TSS. [16] *2001 Water Quality Studies* tbl. 4-2a. The variation is even more dramatic when discharges from the Georgetown sedimentation basins are included (i.e., 26 to 8,250 mg/L for aluminum; 4 to 1,400 mg/L for iron; and 377 to 69,452 mg/L for TSS). *Id.* tbls. 4-2a,-2b. In addition, four other data points collected in 1999-2001 for toxicity testing purposes indicate discharges from Dalecarlia Sedimentation Basins #2 and #3 of 270 to 1,830 mg/L of aluminum, 69 to 118 mg/L of iron, and 2,500 to 8,030 mg/L of TSS. *Id.* tbl. 4-3. Given this wide variability in discharge concentrations of these three pollutants, which NWI also identified, and assuming that it is scientifically valid to compare the October 2002 sampling data to these data (as the Region suggests we do, *see* EPA Resp. at 13 & n.7), [17] we conclude that the Region is generally correct in asserting that the October 2002 sampling data, which reported an aluminum concentration of 983 mg/L, an iron concentration of 39.8 mg/L, and a TSS concentration of 4,300 mg/L, fall within the range of samples reported in the *2001 Water Quality Studies*. [18]

Second, although the evidence seems to support Region III's observation that the October 21, 2002 data fall within the range of other samples, at least for aluminum, iron, and TSS, the evidence also seems to indicate, as NWI argued in its comments, that the aluminum, iron, and TSS levels in the October 2002 samples are situated on the low end of the concentration ranges for those three pollutants. According to the *Studies*, the overall discharge concentrations for the four Dalecarlia basins during 1997-2001 averaged 2,275 mg/L for aluminum, 431 mg/L for iron, and 20,825 mg/L for TSS. *2001 Water Quality Studies* § 4.1, at 4-1 & tbl. 4-1a. For Dalecarlia Sedimentation Basin #2 alone, the discharge concentrations for 1997-2001 averaged 1,270 mg/L for aluminum, 217 mg/L for iron, and 12,300 for TSS. [19] *Id.* tbl. 4-1a. When compared to the October 21, 2002 results of 983 mg/L aluminum, 39.8 mg/L iron, and 4,300 TSS — and again making the assumption that these data set comparisons are scientifically appropriate — these figures establish that the October 2002 concentrations of aluminum, iron, and TSS are substantially lower than average discharges of these three pollutants through Outfall 002 analyzed in the *2001 Water Quality Studies*. Notably, moreover, the mean concentration values from the *2001 Water Quality Studies* report are closer in magnitude to the average values computed by NWI from the Aqueduct's 1992-2002 DMRs (i.e., 2,359 mg/L for aluminum, 688 mg/L for iron, and 20,374 mg/L for TSS) than they are to the October 2002 concentrations used in Region III's reasonable potential analysis.

***14** Third, the Corps' contractor that prepared the *2001 Water Quality Studies* noted, "It should be understood that because of the way the basins and reservoirs are cleaned (fire hoses at Dalecarlia and front end loaders at Georgetown), grab sample data can be quite variable from minute to minute. Thus, mean effluent concentration data are probably the most reliable when evaluating the discharges." *2001 Water Quality Studies* § 4.1, at 4-1. The Region acknowledged this statement in its response

to comments on the first draft permit and thus was aware that, given the special circumstances at the Washington Aqueduct, single grab sample concentrations could be less reliable when characterizing effluent than averages of multiple grab sample concentrations. *See* RTC on First Draft Permit at B-42 (because of variability of grab sample data, "mean effluent concentration data were considered more reliable").

In summary, although Region III indicated that the *2001 Water Quality Studies* supported its choice of data for the reasonable potential analysis, the evidence presented in that document instead raises questions about that choice. We therefore are hesitant to grant deference to the Region's data choice in this regard, as we otherwise might have been inclined to do. *See In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 97-105 (EAB 1998) (remanding air permit where permit issuer failed to respond adequately to comments questioning representativeness of air quality data used to establish permit conditions); *cf. In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 256-57 (EAB 1999) (choice of data sets left to discretion of permit authority); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 147 (EAB 1999) (same, but noting that permit authority's decision must be adequately justified in the record).

As mentioned in Part I.A above, the regulations require a permitting authority to use procedures to account for pollutant variability in effluent in analyzing a discharger's reasonable potential to exceed water quality standards. 40 C.F.R. § 122.44(d)(1)(ii). EPA has published detailed technical guidance to assist permit writers in conducting reasonable potential analyses and ensuring variability is considered therein. *See* EPA Exs. 24-25 (1985 and 1991 editions of EPA's "Technical Support Document for Water Quality-Based Toxics Control"). In cases where, as here, effluent monitoring data are available, the guidance recommends that agencies use all such data to characterize pollutant concentrations in the effluent. [20] Office of Water, U.S. EPA, EPA/505/2-90-001, *Technical Support Document for Water Quality-Based Toxics Control* § 3.3.1, at 51 (Mar. 1991). In cases where monitoring data are limited in quantity (as here with respect to all metals other than aluminum and iron), the guidance asserts that it is "impossible to determine from one piece of monitoring data" where in the range of effluent variability that particular data point would fall. *Id.* § 3.3.2, at 52. Accordingly, EPA developed a statistical approach "to better characterize the effects of effluent variability and reduce uncertainty in the process of deciding whether to require a [WQBEL]." *Id.* The guidance explains:

> ***15** This [statistical] approach combines knowledge of effluent variability as estimated by a coefficient of variation with the uncertainty due to a limited number of data to project an estimated maximum concentration for the effluent. The estimated maximum concentration is calculated as the upper bound of the expected lognormal distribution of effluent concentrations at a high confidence level.

Id.; see id. box 3-2, at 53 (statistical approach includes: (1) determining number of effluent samples for particular pollutant and selecting highest value from that data set; (2) multiplying highest value by coefficient of variation for data set (0.6 for sets containing less than six data points); (3) factoring in appropriate dilution; and (4) comparing maximum receiving water concentration result to water quality criterion to determine reasonable potential to exceed ambient standards). EPA therefore intends the reasonable potential analysis to reflect "worst-case" effluent conditions. *Id.* § 3.3.2, at 52; *accord Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1001 (D.C. Cir. 1997) (1991 Technical Support Document reflects EPA's long-established view that reasonable potential analyses incorporate worst-case estimates of effluent quality).

As far as we have been able to determine in this case, the Region's reasonable potential analysis and related documents in the record contain no discussion of the Agency's policy and practice of considering effluent variability in analyzing reasonable potential or whether or how this practice and policy was carried out in this case. *See, e.g.*, EPA Ex. 20 (reasonable potential analysis); Second Draft Permit Fact Sheet at 17-19; RTC on Second Draft Permit at 18-20, 30-38. It appears that the Region simply relied on the raw numbers reported from the laboratory on the October 21, 2002 grab samples alone, without any statistical analysis to reduce the uncertainty caused by using single samples or to ensure that worst-case conditions were evaluated, and without considering actual monitoring data that were available on some of the pollutants. *See* EPA Ex. 20.

Certainly, NWI's and another's comments questioning this analysis brought the issues of representativeness, data variability in general, [21] and the reasonable potential analysis to the Region's attention (albeit without citing the relevant regulatory provision). As mentioned above, Region III offered a nominal response to these comments, and, consequently, we cannot completely rule out the possibility that the Region evaluated data variability in some manner (although if it did so it did not document the evaluation in the record). [22] We can and do conclude, however, on the basis of that nominal response, that the Region failed to respond to NWI's significant comments in an adequate fashion.

***16** Under the regulations that govern this permitting proceeding, a permit issuer must "briefly describe and respond to all significant comments on the draft permit." 40 C.F.R. § 124.17(a)(2). The Board has interpreted this provision as meaning that a response to comments need not be of the same length or level of detail as the comments and that related comments may be grouped together and responded to as a unit. *E.g., In re Hillman Power Co.*, 10 E.A.D. 673, 695-97 & n.20 (EAB 2002); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 582-84 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). The Board has also held, however, that a response to comments must address the issues raised in a meaningful fashion and that the response, though perhaps brief, must nonetheless be clear and thorough enough to adequately encompass the issues raised by the commenter. *See, e.g., Hillman*, 10 E.A.D. at 696 n.20; *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 174-81 (EAB 2000); *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 555-58 (EAB 1999); *In re Tallmadge Generating Station*, Order Denying Review in Part and Remanding in Part, PSD Appeal No. 02-12, slip op. at 8-12, 22-28 (EAB May 21, 2003). Moreover, the administrative record must reflect the permit issuer's "considered judgment," meaning that the permit issuer must articulate with reasonable clarity the reasons for its conclusions and the significance of the crucial facts it relied upon in reaching those conclusions. *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997).

In the case before us, the NPDES regulations mandate use of procedures to evaluate pollutant variability in effluent, yet Region III chose to conduct the reasonable potential analysis using pollutant concentration levels that appear to be, as NWI pointed out in its comments, substantially lower than worst-case or even average pollutant levels discharged from the Aqueduct. The Region's response to the comments questioning the validity of this approach — in which it stated that the pollutant concentrations detected in samples collected on one day in October 2002, from one of the six sedimentation basins at the Aqueduct, "fall within the range of other samples" and thus apparently could legitimately be used in a reasonable potential analysis — is, at least without further elaboration or explanation, an insufficient justification for the Region's decision, considering the weight of the evidence in the record that seems to indicate much higher average (and even higher worst-case) discharge levels for three of the targeted pollutants and potentially others. [23] We therefore hold that the Region failed to comply with 40 C.F.R. § 124.17(a)(2) (i.e., the duty to respond to significant comments) in responding to NWI's comments on data representativeness and in so doing clearly erred. *See Steel Dynamics*, 9 E.A.D. at 174-81 (permit issuers must adequately document their decisionmaking processes); *RockGen*, 8 E.A.D. at 555-58 (permit issuers must give "thoughtful and full consideration" to public comments before making final permit determinations); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 134-42 (EAB 1999) (remand appropriate where comments raised legitimate questions but were rejected by permit issuer without adequate explanation).

b. *Metals Data Sets*

***17** Next, NWI notes that in comments on the second draft permit, it had argued that WQBELs should be included in the permit for a number of metals because actual measured concentrations of these metals in Washington Aqueduct discharges indicated they had a reasonable potential to exceed D.C. water quality standards. NWI Pet'n at 3. To support this argument, NWI submitted three sets of data showing higher quantities of various metals being discharged by the Aqueduct into waters of the United States than EPA had detected in its October 21, 2002 grab samples. *See* NWI's Second Comments at 4-7.

The first data set consisted of samples of Aqueduct discharges taken by NWI and unspecified "others" on March 29, 2002, October 19, 2002, and November 2, 2002, and contained measurements of arsenic, copper, lead, nickel, selenium, and zinc concentrations in the effluent. NWI's Second Comments at 5. The second data set consisted of measurements of chromium, lead, nickel, and zinc submitted in 1988 by the Corps of Engineers as part of an NPDES permit renewal application. *Id.* at 6;

NWI's First Comments at 19; *see* NWI Ex. 13 (Corps NPDES permit application). The third data set consisted of cadmium, copper, lead, nickel, and zinc measurements taken by a Corps consultant in February 1979.[24] NWI's Second Comments at 6; *see* NWI Ex. 14 (Camp Dresser & McKee, Inc., *Report on Site Disposal Study for Water Treatment Plant Residues, Dalecarlia Water Treatment Plant and Georgetown Reservoir* (1979)).

On appeal, NWI quotes Region III's response to its metals data, in which the Region acknowledged receipt of the data and then simply stated, "'EPA stands by the results of its [October 21, 2002] sampling.'" NWI Pet'n at 3 (quoting RTC on Second Draft Permit at 34). The Region also reiterated, in its response to NWI's comments, that its October 21, 2002 samples had been collected and tested in accordance with EPA-approved methods and protocols. RTC on Second Draft Permit at 27, 31. NWI now argues that Region III's response to its comments indicate that the Region chose to take the position "of defending the results of a particular sampling event it engaged in, almost as [if] EPA itself is the permittee, rather than appropriately considering the information that had been provided" in the course of the public comment process. NWI Pet'n at 3.

In its response to the petition for review, Region III enlarges upon its response to NWI's comments in this regard. According to the Region, the metals data in the 1979 technical report and the Corps' 1988 permit application "were not useful because more recent data were available" and also because the Region had in its possession a more-recent permit application from the Corps.[25] EPA Resp. at 19. As for the NWI sampling data, the Region asserts that NWI failed to submit documentation indicating that it had "complied with the protocols for taking the samples or that the results were validated using quality assurance/quality control procedures."[26] *Id.* The Region concludes by stating that it did follow these protocols itself and reiterates that it "stands by the sampling results it obtained." *Id.*

***18** Under EPA permitting rules, NWI's submission during the comment period of three sets of metals data (two of which consisted of data collected by the Corps or a Corps' contractor) appears to qualify as a "significant" comment to which the Region owes consideration and at least a brief response in its response to comments document. *See* 40 C.F.R. § 124.17(a)(2); *see, e.g., In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 180 (EAB 2000) ("[a]n allegation that an agency underestimated lead emissions, accompanied by a detailed alternative analysis of such emissions * * * is significant enough to warrant consideration and at least some form of acknowledgment and response"); *In re Pennzoil Exploration & Prod. Co.*, 2 E.A.D. 730, 732-33 (Adm'r 1989) (petitioner's 1911 map identifying underground injection wells within boundaries of proposed project and identification of abandoned well in same area are significant comments that must be considered and responded to by permit issuer). While the Region responded to the 1988 data in its response to comments on the first draft permit,[27] the Region did not mention the 1979 and NWI's own metals data even summarily in the comment responses, thus leaving us to guess as to whether or not the Region dismissed these data for valid reasons or failed to consider them. *See* RTC on Second Draft Permit at 30-38. Instead, as NWI observed, the Region decided to focus on defending its October 2002 sampling data by asserting that it "stands by" that data, thereby seemingly exhibiting an unwillingness to engage other data that might complicate the reasonable potential analysis and/or lead to different conclusions about necessary WQBELs. Moreover, the Region cannot through its arguments on appeal augment the record upon which the permit decision was based. *E.g., In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 144, 151-52 (EAB 1995) (rejecting permit issuer's explanation for permit condition because explanation was raised for first time on appeal, rather than in response-to-comments document); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993) (same).

Region III's apparent failure to consider and respond to NWI's significant comments in a meaningful fashion, coupled with its belated efforts to supplement the record on appeal, is in our view clearly erroneous and grounds for a remand of the permit. *See, e.g., In re Weber #4-8*, UIC Appeal No. 03-01, slip op. at 6-8 (EAB Dec. 11, 2003), 11 E.A.D. ___ (vacating and remanding underground injection well permit on ground that "40 C.F.R. §§ 124.17 and 124.18 are designed to ensure that the decisionmaker gives serious consideration to public comments at the time of making his or her final permit decision," even if such consideration will not necessarily alter permit decision); *In re Atochem N. Am., Inc.*, 3 E.A.D. 498, 499 (Adm'r 1991) (vacating and remanding Resource Conservation and Recovery Act permit where EPA failed to respond to public comments before issuing permit).

***19** Moreover, whatever the merits of the Region's arguments on appeal expounding on these issues (*see supra* notes 25-27), the fact remains that, as discussed in Part I.A above, effluent variability must be considered in analyzing reasonable potential to exceed water quality standards. NWI attempted to make this point with respect to metals other than aluminum and iron by marshaling a variety of publicly available data and by collecting some of its own samples of those metals. While the Region may have had valid reasons for finding these data unsuitable for incorporation into the reasonable potential analysis, the Region nonetheless has a legal obligation to take variability into account in some fashion and, as we held in Part II.C.1.a, *supra*, must do so on the record on remand.

c. *Conclusion*

Region III clearly erred in this instance by failing to respond, adequately or in some cases at all, to significant comments about data representativeness and the reasonable potential analysis, in violation of 40 C.F.R. § 124.17(a)(2). We therefore remand the permit so that the Region can revisit the reasonable potential analysis conducted for the Washington Aqueduct and ensure the analysis is clearly explained in the record and consistent with federal law. [28]

2. *Other Issues*

Finally, NWI raises several additional points in its petition for review. For the reasons set forth below, we find that the arguments made on these points lack merit, and review is denied on their basis.

a. *Data Quality Act*

First, NWI asserts in its petition that Region III failed to comply with the Data Quality Act [29] in conducting the reasonable potential analysis and calculating WQBELs. NWI Pet'n at 1, 3, 5. The Region observes that NWI did not raise this argument in its first or second set of comments on the draft permits. EPA Resp. at 21. Moreover, the Region notes that NWI did not demonstrate in its petition that any other party raised this issue during the public comment periods. Region III states that failure to raise an issue during the public comment period and failure to show that any other party raised the issue precludes a petitioner from raising the issue in a permit appeal. *Id.* (citing 40 C.F.R. §§ 124.13, .19(a); *In re City of Phoenix*, 9 E.A.D. 515, 524 (EAB 2000), *appeal dismissed per stipulation*, No. 01-70263 (9th Cir. Mar. 21, 2002)).

Upon review of petitioner's two sets of comments, we agree that NWI did not raise the Data Quality Act in those comments, even though the existence of the statute was a reasonably ascertainable issue prior to the close of the two comment periods on June 28, 2002, and January 30, 2003. *See* 40 C.F.R. § 124.13; NWI's Second Comments; NWI's First Comments. We also agree with Region III that the petition does not identify any other parties as raising the Data Quality Act in their comments on the draft permits. Accordingly, we deny review on this ground. *See* 40 C.F.R. §§ 124.13, .19(a); *see, e.g., In re Kendall New Century Dev.*, PSD Appeal No. 03-01, slip op. at 21-22 (EAB Apr. 29, 2003), 11 E.A.D. ___ (issue regarding size and magnitude of proposed power plant not raised below, so not considered on appeal); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 519-20 (EAB 2002) (breach of trust and fiduciary duty arguments not raised below, so not considered on appeal).

b. *Comments Incorporated by Reference*

***20** Second, NWI concludes its petition by stating that "[n]umerous other flaws within this permit are incorporated herein by reference to NWI's previously submitted comments." NWI Pet'n at 5. The Region retorts that attempts to raise issues before the Board in this manner — i.e., via incorporation by reference of comments on a draft permit, without any further elaboration or examination of the permit issuer's response to those comments — must fail because such attempts do not provide the Board with the requisite specificity and argumentation mandated by the part 124 regulations governing this proceeding. EPA Resp. at 30 (citing *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000); *In re Adcom Wire*, 4 E.A.D. 221, 228-29 (EAB 1992)).

We agree with the Region, as we have frequently held that 40 C.F.R. § 124.19(a) requires petitioners to clearly identify the permit conditions they wish to challenge and present us with arguments explaining how the permit issuer's ultimate decisions on the permit, after considering comments on the draft versions thereof, are clearly erroneous, an abuse of discretion, or otherwise warrant review under that regulatory provision. *E.g., In re Phelps Dodge Corp.*, 10 E.A.D. 460, 520 (EAB 2002) (unsupported assertion that permit issuer failed to analyze adverse effects of permitted project on minority populations is not sufficient for grant of review under § 124.19(a)); *In re New England Plating Co.*, 9 E.A.D. 726, 737-39 (EAB 2001) (unsubstantiated arguments provide insufficient basis for grant of review of permit decision); *In re LCP Chems.*, 4 E.A.D. 661, 664-65 (EAB 1993) (petitioner failed to identify specific permit conditions objected to, thus providing no basis for granting review); *Adcom Wire*, 4 E.A.D. at 228-29 (incorporation of letter by reference not sufficient for review under § 124.19(a)). Because NWI's incorporation of its comments on the draft permits fails to meet the requirements of 40 C.F.R. § 124.19(a), review on this basis is denied.

III. *CONCLUSION*

For the foregoing reasons, we remand this permit to Region III. The Region is directed to reopen the permit proceedings for the limited purposes of: (1) revisiting the reasonable potential analysis and ensuring that its use of procedures to account for effluent variability in conducting the analysis is clearly documented in the administrative record; and (2) responding to NWI's comments in a meaningful fashion that is sufficiently clear and thorough to adequately encompass the issues raised. If the Region cannot justify the permit conditions as written (for example if it finds WQBELs are necessary for some pollutants), it should revise them and provide a justification for the revised conditions. Any party who participates in the remand process and is not satisfied with the Region's decision on remand may file an appeal with the Board pursuant to 40 C.F.R. § 124.19. Any such appeal must be limited to issues within the scope of the remand.

***21** On all other issues, the petition for review is denied.

So ordered.

1 As explained in Part I.B.2 below, we stayed our consideration of NWI's April 11, 2003 petition pending Region III's reconsideration of various portions of the revised permit.

2 EPA has developed guidance for permit issuers to use in developing WQBELs. *See, e.g.*, Office of Water, U.S. EPA, EPA/505/2-90-001, *Technical Support Document for Water Quality-Based Toxics Control* ch. 3 (Mar. 1991); *see also* Office of Water, U.S. EPA, EPA-833-B-96-003, *U.S. EPA NPDES Permit Writers' Manual* ch. 6 (Dec. 1996).

3 *See Nat'l Wilderness Inst. v. U.S. Army Corps of Eng'rs*, No. 1:01-CV-00273 (TFH) (D.D.C. filed Feb. 6, 2001) (alleging Endangered Species Act violations at Washington Aqueduct); *see also Nat'l Wilderness Inst. v. U.S. Army Corps of Eng'rs*, No. 1:02-CV-01244 (TFH) (D.D.C. Mar. 29, 2004) (order granting motion to dismiss for lack of jurisdiction in a citizen suit case filed in June 2002, alleging effluent violations).

4 As EPA explains:
Flocculation refers to water treatment processes that combine small particles into larger particles, which settle out of the water as sediment. Aluminum sulfate (alum) and iron salts or synthetic organic polymers are generally used to promote coagulation. Alum added to water with carbonate alkalinity creates aluminum hydroxide in the form of a visible floc [that] settles to the bottom of the basin. Nutrients, silt, and organic matter sorb to the aluminum hydroxide and hydrogen ions are produced. This process tends to lower the pH of the water[;] however, if the pH remains in the range of 6-8, the nontoxic forms of aluminum will remain. Settling or sedimentation is simply a gravity process that removes flocculated particles from the water.
U.S. EPA Region III, *Fact Sheet, NPDES Permit Reissuance, Washington Aqueduct Water Treatment Plant* 13 (Mar. 27, 2002).

5 NWI's comments on this issue stated, among other things:
Grab samples of sludge discharges from the Washington Aqueduct have indicated concentrations of arsenic, chromium, lead, nickel, selenium, and zinc that may exceed acute, chronic, or human health water quality standards. The draft NPDES permit requires no

testing nor imposes any limit on these metals, several of which are carcinogens, and EPA offers no consideration of these pollutants or justification for not requiring testing or the inclusion of limits. Clearly, limits consistent with DC Water Quality Standards are necessitated by the reasonable potential that discharges will exceed DC standards.
NWI's First Comments at 22.

6 We have been unable to locate such an analysis in the materials submitted to us by the Region and NWI, including the first draft permit, the first draft permit fact sheet, NWI's comments on the first draft permit, and the Region's response to comments on the first draft permit; nor have we found it listed in the certified index to the administrative record. (The response to comments on the first draft permit mentions a reasonable potential analysis, but it is the one conducted using the October 21, 2002 grab samples and as such postdates the first draft permit.) Indeed, the closest thing we have found to a reasonable potential analysis for the first draft permit is an explanation in the fact sheet for that draft permit regarding proposed effluent limits for iron and aluminum. The Region notes in the fact sheet that it had consulted the D.C. water quality standards and found no numeric criteria for aluminum and only a chronic (not an acute) criterion for iron and thus did not pursue WQBELs for either of these pollutants. *See* First Draft Permit Fact Sheet at 17-19. (For definitions of the terms "acute" and "chronic" in the water quality context, see *infra* note 7.)

7 "Acute" water quality criteria represent "the highest concentration of a pollutant to which aquatic life can be exposed for a short period of time (one-hour (1-hour) average) without deleterious effects at a frequency that does not exceed more than once every three (3) years." D.C. Mun. Regs. tit. 21, § 1199.1 (definition of "CMC" or "Criteria Maximum Concentration"). "Chronic" water quality criteria are similarly defined, except that the time period is longer, representing a four-day average. *Id.* (definition of "CCC" or "Criteria Continuous Concentration"). Finally, "human health" water quality criteria are represented by a thirty-day average. *Id.* § 1104.7, tbl. 2.

8 Region III also contends that the D.C. water quality standards do not have an acute water quality criterion for silver. EPA Resp. at 15. On the contrary, in the standards submitted by the Region as EPA Exhibit 23 (May 24, 2002 version), silver is assigned an acute value of $e^{(1.72[\ln(\text{hardness})]-6.52)}$ „ microgram per liter ("µg/L"), as adjusted. D.C. Mun. Regs. tit. 21, § § 1104.7 tbl. 2, 1105.10; *see* 60 Fed. Reg. 22,229, 22,231 tbl. 2 (May 4, 1995) (conversion factors for total recoverable/dissolved metals).

9 An alternative version of the Region's mercury analysis is included in the second response to comments document, in which Region III asserts that the October 21, 2002 samples of supernatant were "below the detection limit for dissolved mercury," and thus the Region assumed the concentration of mercury was zero. RTC on Second Draft Permit at 32. The discrepancy may be due to different mercury measurements in supernatant versus sediments. *See* EPA Ex. 18 (mercury results reported in October 21, 2002 samples, of which all measured below quantitation limit for mercury (0.2 µg/L) except one result from south end of Dalecarlia Sedimentation Basin #2 (where most solids settle out of river water), which measured 0.4 µg/L); *see also* D.C. Mun. Regs. tit. 21, § 1104.7 tbl. 2 (acute water quality criterion for mercury (expressed as total recoverable) is 2.4 µg/L).

10 Region III used the following equation to compute the "wasteload allocation" for aluminum: WLA = (WQC*(Qe+MZ*Qs)-(BC*MZ*Qs))/Qe, where "WLA" = wasteload allocation; "WQC" = acute water quality criterion (750 µg/L); "Qe" = effluent flow (0.132 cubic meters per second ("cms")); "Qs" = stream flow (153 cms); "MZ" = acute mixing factor (0.145); and "BC" = background concentration (390 µg/L). EPA Ex. 20, at 1. The equation yielded a wasteload allocation value for aluminum of 8,086 µg/L. *Id.*

11 *See infra* note 28.

12 In the period covered by the 1992-2002 DMRs, the Corps had an obligation, set forth in its NPDES permit for the Washington Aqueduct, to monitor and report — in DMRs — its discharges of aluminum, iron, and TSS to the waters of the United States. *See* EPA Ex. 4 (EPA Region III, NPDES Permit No. DC0000019, Washington Aqueduct §§ A, C, at 2-3, 12-15 (Apr. 3, 1989)). The Corps had no equivalent obligation in that time frame to monitor or report Aqueduct discharges of any of the other metals of interest to NWI. Accordingly, the DMRs relied upon by NWI in this appeal contain no discharge concentrations or other specific information regarding pollutants of concern to NWI other than aluminum, iron, and TSS.

13 In addition, Region III explicitly acknowledged NWI's survey of historical DMR data for the Washington Aqueduct in its response to comments on the first draft permit. In that instance, NWI had argued that the ten years of DMR data revealed that the toxicity of the Aqueduct's discharges was much greater than reported in the *2001 Water Quality Studies* for Outfalls 002, 003, and 004. NWI's First Comments at 45-50 & tbls. I-VII. The Region rejected NWI's argument on the ground that relative toxicity could not validly be assessed by comparing historical average discharge concentrations reported on DMRs to toxicological evaluations of discharges conducted using numeric water quality criteria for individual pollutants. RTC on First Draft Permit at B40-42. The Region did not

explain why such a comparison is invalid. Instead, the Region simply stated that the Corps' contractor who prepared the *2001 Water Quality Studies* performed the toxicological studies in accordance with EPA methods. *See id.*

In its second round of comments, NWI altered its DMR-based argument to challenge the representativeness of the new data set (i.e., "new" since issuance of the first draft permit) Region III used to conduct the reasonable potential analysis. Because this argument is different than the argument made in its first set of comments, in that it targets a different data set (the October 21, 2002 grab sample data rather than the *2001 Water Quality Studies* toxicity data) from a different angle (i.e., degree of toxicity versus representativeness of data in a reasonable potential context), we cannot find that the Region's response to NWI's first DMR-based comments constitutes a response to NWI's second DMR-based comments.

14 It is possible that some or all of these data might also have been reported on Washington Aqueduct DMRs for the relevant years, as Aqueduct staff routinely collected grab samples of effluent, chemically analyzed the samples for their aluminum, iron, and TSS concentrations, and reported the results on DMRs. *See 2001 Water Quality Studies* § 4.1, at 4-1 to-3 (discussing use in *Studies* of "existing Aqueduct effluent chemistry data"); *see also* EPA Ex. 4 (EPA Region III, NPDES Permit No. DC0000019, Washington Aqueduct §§ A, C, at 2-3, 12-15 (Apr. 3, 1989)) (setting forth monitoring and DMR reporting requirements for TSS, aluminum, and iron).

15 According to the *Studies* report, which covers the period 1997-2001:

Discharge samples from the Dalecarlia and Georgetown basins * * * were collected to be representative of the "worst-case" solids discharge concentrations that would exist during a discharge event (i.e., samples were collected at Dalecarlia when hose cleaning operations were pushing out the largest masses of solids, and at Georgetown when the front end loaders were actively pushing solids into the conduit from the deeper areas of the reservoir.

2001 Water Quality Studies § 3.2.1, at 3-2.

16 This same data set indicates that the average yearly concentrations discharged from Dalecarlia Sedimentation Basin #2 alone varied from 800 mg/L to 1,490 mg/L for aluminum, 61.4 mg/L to 372 mg/L for iron, and 5,520 mg/L to 14,400 mg/L for TSS. *2001 Water Quality Studies* tbl. 4-2a.

17 In this regard, it appears that tables 4-1a, 4-1b, 4-2a, and 4-2b in the *2001 Water Quality Studies* contain grab sample data, as do the Washington Aqueduct DMRs for 1992-2002 that NWI summarized. *See 2001 Water Quality Studies* § 4.1, at 4-1; EPA Ex. 4 (EPA Region III, NPDES Permit No. DC0000019, Washington Aqueduct §§ A, C, at 2-3, 12-15 (Apr. 3, 1989)). EPA also collected the October 21, 2002 effluent using the grab sample technique. EPA Ex. 18. It would therefore appear to us that comparisons between these data sets can legitimately be made. However, lacking full development of this issue in the briefs before us, we decline to rule on the matter and determine only that it "appears" the numbers are variable and, as set forth below, the October 21, 2002 samples contain low-end pollutant concentrations.

18 Notably, the 39.8 mg/L iron value falls below the average iron concentration ranges for the Dalecarlia basins, but it falls within the wider range reported for the Georgetown basins.

19 It is perhaps significant that these Dalecarlia Sedimentation Basin #2 averages are themselves lower than the concomitant average concentration levels for Dalecarlia Sedimentation Basins #1, #3, and #4 and Georgetown Sedimentation Basin #1. *See 2001 Water Quality Studies* tbls. 4-1a, 4-1b (summarizing chemistry monitoring data for 1997-2001).

20 EPA guidance also suggests means by which permit agencies can determine whether WQBELs are needed in cases where no effluent monitoring data are available. *See* Office of Water, U.S. EPA, EPA/505/2-90-001, *Technical Support Document for Water Quality-Based Toxics Control* § 3.2, at 50-51 & box 3-1, at 49 (Mar. 1991).

21 *Cf. Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1000 (D.C. Cir. 1997) (in order for a single data set to be "valid and representative" for a point source affected by the EPA Water Quality Guidance for the Great Lakes System, that data set must account for "variability" of the pollutant in the effluent).

22 The lack of such an evaluation, if established, would be clear error and grounds for a remand in and of itself. *See* 40 C.F.R. § 122.44(d)(1)(ii).

23 With respect to metals other than aluminum and iron, we can do no more at this juncture than recognize that the Region indicated there is a connection of some kind between the level of TSS measured in effluent and the level of metals in their solid form suspended in that effluent. *See* RTC on Second Draft Permit at 24 ("the reduction or removal of TSS will remove or reduce aluminum and the other

metals in the discharge"); RTC on First Draft Permit at C.3 ("[t]he removal of TSS required by the effluent limits for this parameter * * * will remove much of the aluminum in the discharges").

24 In its first set of comments, NWI also submitted metals data for arsenic, chromium, lead, nickel, silver, and zinc from a March 1995 study entitled "Residuals Thickening and Dewatering Pilot Study, Technical Memorandum No. 7," prepared by Whitman, Requardt & Associates on behalf of the Corps' Baltimore District. NWI's First Comments at 22-23; *see* NWI Ex. 22 (pilot study). To our knowledge, Region III did not respond to these data, *see* RTC on First Draft Permit, and NWI did not raise the matter on appeal to this Board.

25 We note in this regard that the newer application, unlike the older one, does not contain any actual metals measurements but only indicates that certain metals "may be present" in the effluent. *See* EPA Ex. 21 (Corps' 2001 permit application).

26 NWI did submit several "Certificates of Analysis," prepared by Phase Separation Science, Inc. of Baltimore, Maryland, and signed by Matt Cohen, a "Quality Assurance Chemist." NWI Ex. 4 attachs. The certificates specify that Phase Separation Science, Inc. analyzed all the metals in the samples using EPA Method 200.8. *Id.* The Region does not mention these certificates in its responses to comments or the petition for review, and thus we lack specific briefing on the question whether the certificates constitute sufficient documentation.

27 In its response to comments document, the Region stated, among other things:
Applicants are not accountable for contaminants in their raw process water, rather, only for those contaminants [that] are added as a result of the treatment process, and only at certain concentrations. The metals of interest [here] are found in the raw process water, which contains high levels of [TSS] and are not found to be added by the Corps in any quantity by its manufacturing process (if they are added at all it is as low level impurities in water treatment chemicals).
RTC on First Draft Permit at B.24. In its response to this appeal, the Region has neither relied on this passage nor pursued this line of argument. Accordingly, we do not consider it further.
In addition, the Region also noted that the Corps' 1988 data were based on analyses of raw water coming into the Aqueduct and thus were "not representative of the effluent." *Id.* at B.27. The Region concluded:
EPA is not aware of any reliable analytical sediment or liquid effluent data [that] supports the conclusion that the discharge has the potential to exceed [D.C. water] quality standards for any metals. The results of the *2001 Water Quality Stud[ies]* show that there is no acute toxicity due to the discharge. The *2001 Water Quality Studies* results for chronic toxicity are not conclusive but appeared to support the results of the 1993 Dynamac Study [, which found little or no chronic toxicity].
Id.; see 2001 Water Quality Studies at ES-3.

28 Because we are remanding the reasonable potential analysis, we need not reach NWI's arguments pertaining to Region III's alleged failure to respond to NWI's comments regarding the Region's analysis of dissolved versus total recoverable metals. *See* NWI Pet'n at 4. The Region responded to these concerns as raised during the comment period by stating, among other things, that because "the permit limit for aluminum is technology-based, not water quality-based, [NWI's contention that Region III's methods did not comply with D.C. water quality standards] is irrelevant." RTC on Second Draft Permit at 33 (response to question G.8). The Region may or may not find it necessary to take NWI's dissolved/total recoverable metals-related comments into consideration in the course of revisiting the reasonable potential analysis and whether WQBELs are needed for this permit.
Similarly, we need not reach NWI's arguments pertaining to the Federal Facilities Compliance Agreement ("FFCA") that Region III entered into with the Corps in June 2003 regarding this NPDES permit. The FFCA specifies that the Corps must achieve compliance with the numeric discharge limits set forth in the NPDES permit no later than March 1, 2008, for at least one of the Aqueduct's sedimentation basins, and no later than December 30, 2009, for all the basins. EPA Ex. 22, at 6 (FFCA ¶ 22). On appeal, NWI notes that under the D.C. water quality standards, a permittee may obtain a variance from a water quality standard that is the basis of a WQBEL only if that permittee can justify, every three years through a public hearing process, that attaining the water quality standard is not feasible for particular reasons. D.C. Mun. Regs. tit. 21, § 1105.1(a)-(c). NWI points out that no such variance has been sought for the Aqueduct, even though the Corps will not be in compliance with its numeric discharge limits (which at the moment are all technology-based) for more than three years from the date of permit issuance. NWI Pet'n at 1-2, 3, 5. Again, because at this juncture it is unclear whether the Region will determine that WQBELs are necessary for the Washington Aqueduct, we need not rule on this issue. We recognize that this D.C. variance issue may become relevant in the course of the Region's revisiting the reasonable potential analysis and may accordingly be considered and discussed during the course of the remand.

29 *See* Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, tit. V, § 515, 114 Stat. 2763, 2763A-153 to-154 (2000) (referred to by various entities as the "Data Quality Act," the "Information Quality Act," or "Section 515").

EPA promulgated procedures to implement the legislation in October 2002. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency, 67 Fed. Reg. 63,657 (2002); EPA Information Quality Guidelines, *available at* http:// www.epa.gov/quality/informationguidelines.

11 E.A.D. 565 (E.P.A.), 2004 WL 3214486

End of Document

2001 WL 35926172 (Minn.Pol.Control Agency)

Office of Administrative Hearings

Pollution Control Agency

State of Minnesota

IN THE MATTER OF THE ADMINISTRATIVE PENALTY ORDER ISSUED TO ERICKSON ENTERPRISES

7-2200-14389-2
September 28, 2001

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

***1** A hearing was held in this matter on August 29, 2001 before Administrative Law Judge (ALJ) Richard C. Luis at the Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota.

Peter L. Tester, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency ("MPCA" or "Agency"). Todd Erickson, 14613 Hanover Lane, Apple Valley, Minnesota 55124, appeared on behalf of Erickson Enterprises ("Appellant"). Mr. Erickson is the owner of the Appellant's business, which operates as a sole proprietorship. The record closed in this matter on August 29, 2001, at the close of the hearing.

STATEMENT OF THE ISSUES

1. Whether the MPCA has demonstrated that Erickson Enterprises failed to meet its duty of candor, as required by Minn. R. 7000.0300; made an omission of material information from the waste manifest prohibited by Minn. Stat. § 115.075; and failed to provide notification of demolition activities, failed to keep disturbed asbestos wet, and failed to meet the requirements for disposal of removed asbestos, as required by Minn. R. 7011.9920.

2. Whether the penalty amount and status of the penalty as non-forgivable is reasonable, based on all the circumstances in this matter.

FINDINGS OF FACT

1. The Shepherd of the Lake Lutheran Church (hereinafter "the Church") sought to have various waste materials removed from an old farm house it owns, located across from 2451 McKenna Road in Prior Lake. After removal of those materials, the structure was to be burned by the local fire department as part of its training exercises. The Church intends to construct buildings on the land for a variety of purposes, including schooling, senior living, and worship. [1] To identify what materials must be removed, the Church contracted with Environmental Demolition Inspections and Consulting (hereinafter "Environmental Demolition") to inspect the premises. Environmental Demolition prepared a report on July 25, 2000 that indicated "400 square feet of linoleum friable paper backing located in the kitchen was found to contain asbestos." [2]

2. On August 9, 2000, Kermit Mahlum, Project Manager for the Church, contacted Jackie Deneen, Asbestos Program Coordinator for the MPCA, to inquire as to the requirements for asbestos disposal. Mr. Mahlum indicated that asbestos was present in a Church-owned building. Mr. Mahlum requested a list of licensed asbestos contractors from Ms. Deneen. Included on the list was Erickson Enterprises.

3. Mr. Mahlum hired Erickson Enterprises on August 10, 2000 to conduct the asbestos removal. Todd Erickson indicated that he and his employees would be going on a fishing trip over the weekend, but that the work could be done the next day (Friday, August 11, 2000).

***2** 4. On August 11, 2000, Mr. Erickson removed most of the regulated asbestos containing material (hereinafter "RACM") from the kitchen of the building. He used a saw with a HEPA vacuum to cut through the linoleum and the plywood substrate below and removed the linoleum intact. The linoleum was wetted along the cut lines and wrapped in plastic sheeting.[3] He carried the wrapped sheets of linoleum-covered plywood out to his trailer to transport the sheets to a landfill. By the time Mr. Erickson finished work on August 11, the landfill had closed and the sheets were left in Mr. Erickson's trailer.

5. Mr. Mahlum observed the building on August 14, 2000 and saw that the flooring had been disturbed and most of the RACM was gone. He telephoned Mr. Erickson and discussed the removal. Mr. Erickson told Mr. Mahlum that the material had been removed "in a nonfriable manner."[4]

6. On August 14, 2000, Mr. Mahlum telephoned Ms. Deneen to express concern that the RACM had not been removed appropriately. At Ms. Deneen's request, Mr. Mahlum faxed a copy of the inspection report by Environmental Demolition.[5] Ms. Deneen reviewed the report and noted that it identified friable asbestos that must be removed prior to burning the structures. The inspection report indicated that MPCA notification of the intent to perform demolition on the asbestos-containing material was required.[6]

7. Mr. Mahlum completed a Notification of Asbestos Related Work form for filing with the MPCA. Mr. Mahlum faxed the completed form to Ms. Deneen on August 15, 2000.[7] That form had not been completed or filed by Mr. Erickson or Erickson Enterprises.

8. On August 16, 2000, Katie Koelfgen (an MPCA staffer) telephoned Erickson and discussed the need to observe the RACM and current storage. Erickson agreed to a meeting on August 17, 2000. Later that night, Erickson telephoned Katie Koelfgen at the MPCA and left a message on her voicemail. The message indicated that he could not make the meeting on August 17, 2000 and that they would have to reschedule. Erickson made no mention of his intent to dispose of the RACM.

9. The morning of August 17th, Deneen and Koelfgen went to Erickson's residence to see if the trailer was still there. Neither the trailer nor the RACM were present. On August 18, 2000, they visited the Elk River Landfill to determine if the RACM could be found. A record of the disposal was maintained there, but the waste itself was not found.[8] The signature of the responsible person at the landfill acknowledging receipt of the RACM was dated August 17, 2000.[9] The receipt generated for payment of that load was dated August 17, 2000 and the time indicated was between 7:00 and 7:50 a.m.[10]

10. Ms. Deneen visited the Church on August 18, 2000 to determine what demolition work had been done. She observed loose material in the kitchen and bathroom that she suspected contained asbestos.[11] That material was dry. Deneen took samples of that material for testing.

***3** 11. Testing was performed by Braun Intertech on the samples collected by Ms. Deneen. Significant amounts of asbestos were found on the fibrous backing of each sample.[12]

12. In her position as the Asbestos Program Coordinator with the MPCA, Jackie Deneen has experience with asbestos demolition and RACM removal. Ms. Deneen has completed coursework regarding the requirements for RACM removal and what constitutes appropriate removal and storage of RACM. Asbestos is regulated under state and federal law because of the possibility of adverse consequences when asbestos fibers become airborne.

13. Erickson Enterprises did not provide either written or oral notice to the MPCA at any time prior to the August 11, 2000 removal of the RACM from the building owned by the Church on McKenna Road.

14. The MPCA reviewed the matter at an internal forum, a meeting of enforcement officials who review alleged violations and recommend possible agency enforcement actions by the Commissioner. The forum recommended that a penalty be assessed against Erickson Enterprises. To calculate the amounts that should be assessed, the forum used a penalty matrix that characterized violations as ranging from minor to moderate to major in two categories, deviation from compliance and potential for harm. Base penalty ranges are set for each level of each category. The penalty is then determined to be forgivable or non-forgivable and adjusted by factors such as willfulness, history of other violations, and economic benefit derived from the violation. [13]

15. In calculating the penalty, the forum treated the alleged violations as forming two groups. The group 1 violations relate to the failure to make the RACM available to the MPCA for inspection and failure to describe the location of the RACM removed prior to disposal. The group 1 violations have a major potential for harm due to the potential for dry asbestos fibers to become airborne. The deviation from compliance was also considered to be major since Erickson Enterprises took actions that prevented the MPCA from conducting an inspection. [14] The base penalty for group 1 was set at $8,500 due to the severity of the violation and the deviation from compliance. The forum noted that the removal methods caused asbestos-containing debris to contaminate the building and potentially expose persons to that hazard. [15]

16. The group 2 violations are the improper removal of RACM violations. The presence of dry RACM throughout the work area was cited as the reason for finding the potential for harm to be major. The deviation from compliance was also considered to be major due to the actions of Erickson Enterprises in preventing the MPCA from inspecting the removal and disposal of the RACM. [16] Using the penalty matrix, the base penalty for the group 2 violations was set at $6,000 (near the low end of the range) due to the relatively small amount of RACM involved.

17. The forum concluded that the total base penalty amount of $14,500 should be enhanced for the willfulness of Erickson Enterprises in violating the rules. The forum noted that Erickson Enterprises is a licensed asbestos abatement company and Mr. Erickson is a certified asbestos site supervisor, thus "the Company had full knowledge of the regulations." [17] The enhancement factor was 25%, resulting in an additional penalty amount of $3,625. [18] The seriousness of the violations was relied upon to determine that the penalty should be non-forgivable. [19]

***4** 18. In late September 2000, the Prior Lake Fire Department destroyed the Church-owned buildings by burning. The burning was conducted with a permit issued by the MPCA. [20]

19. On April 27, 2001, the MPCA issued an Administrative Penalty Order to Erickson Enterprises imposing a non-forgivable penalty of $10,000. [21]

20. On May 18, 2001, Mr. Erickson requested an expedited hearing on the Administrative Penalty Order. [22] The MPCA issued a Notice of and Order for Hearing setting this matter on for contested case hearing before Administrative Law Judge Richard C. Luis.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of the Pollution Control Agency and the Administrative Law Judge have jurisdiction over this matter under Minn. Stat. §§ 14.50 and 116.072.

2. The quantity of asbestos present at the demolition site exceeded the regulatory threshold of 160 square feet of regulated asbestos containing material, triggering the requirements of Minn. R. 7011.9920.

3. Erickson Enterprises was an "operator of a demolition or renovation activity..." when conducting work at this demolition site and was required to comply with the provisions of Minn. R. 7011.9920.

4. The ownership of the building, the intended means of disposal, and the ultimate use of the property removed the building from the residence exception for disposing of asbestos containing materials. Erickson Enterprises failed to take reasonable steps to determine that none of those conditions affected the building's status respecting the residential exception before removing the RACM.

5. Erickson Enterprises failed to provide to the MPCA the notice required by Minn. R. 7011.9920 of the intention to conduct demolition activity in the building owned by Shepherd of the Lake Church, located across from 2451 McKenna Road in Prior Lake, Minnesota, in August 2000.

6. Erickson Enterprises failed to comply with Minn. R. 7011.9920 when it failed to ensure that regulated asbestos containing materials left on the premises were kept wet until collected and contained for disposal.

7. The delay between the removal of the RACM from the building and depositing that material in a landfill does not constitute a violation by Erickson Enterprises of the requirement under Minn. R. 7011.9920 to promptly dispose of RACM.

8. Erickson Enterprises failed to meet the duty of candor imposed by Minn. R. 7000.0300 when Mr. Erickson disposed of waste that he had agreed to retain for inspection by the MPCA.

9. Erickson Enterprises did not omit material information from the waste manifest in a manner prohibited by Minn. Stat. § 115.075.

10. The non-forgivable penalty of $10,000 assessed by the Pollution Control Agency for these violations is appropriate and reasonable in this instance.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

***5** IT IS RECOMMENDED that the Commissioner of the Pollution Control Agency uphold violations 1, 3 and 4 of the Administrative Penalty Order and the $10,000 penalty recommended in this case against Erickson Enterprises.

Richard C. Luis
Administrative Law Judge

MEMORANDUM

There is no factual dispute that Erickson Enterprises removed linoleum with paper backing that contained asbestos. Erickson Enterprises did not provide notice to the MPCA before beginning this demolition on behalf of the Church. The dispute in this matter is whether the asbestos removal contractor has the duty to ascertain the circumstances regarding the property when those circumstances trigger regulated asbestos containing material removal requirements.

The Church had an asbestos survey done indicating the presence of asbestos on the site. Mr. Erickson did not ask if such a survey had been done when he was hired to remove asbestos containing material from the building. Mr. Erickson was aware that the use of the land after demolition of a residence could trigger disposal requirements for RACM. He did not ask about

the ultimate use of the land after demolition. Mr. Erickson made no inquiry as to who owned the property that he had agreed to do asbestos removal work on.

Erickson Enterprises maintains that it had no notice of either the intended use of the land or the potential for the building's use in fire training. Mr. Erickson acknowledged that ownership of the building by a church would remove the building from the residence exception for RACM disposal. He also testified that he knew that demolition of the building by fire would remove the residence exception as well. As the person responsible for such removal, Mr. Erickson has the obligation to inquire into each of these areas. Failing to inquire is not reasonable and does not constitute a defense to failing to meet the RACM disposal requirements.

Erickson Enterprises asserts that the RACM cited by the MPCA as being in the bathroom demonstrates that the citation is improper, since Erickson Enterprises did not remove any material from the bathroom. The MPCA notes that Ms. Deneen photographed the RACM cited.[23] The photograph shows vinyl floor covering and its backing lying on the bathroom floor. The material is not the floor covering in the bathroom itself. The photograph and testing of the material found in the bathroom shows that disturbed, dry RACM was located in several places in the building.

The MPCA contacted Mr. Erickson while the RACM remained in his possession and set a time to observe the RACM. Mr. Erickson then disposed of the RACM in a landfill without further notice to the MPCA. At the hearing, Mr. Erickson asserted that the MPCA had only asked to see the waste, rather than requiring that he retain it. Mr. Erickson had failed to notify the MPCA in advance of removing the RACM from the building. The MPCA, in essence, gave Mr. Erickson the opportunity to have the inspection conducted after the removal. He agreed to meet with the MPCA so that they could observe his handling of the RACM. Under such circumstances, disposing of the waste constitutes a violation of the duty of candor imposed by Minn. R. 7000.0300.

***6** The MPCA has asserted that the failure of Erickson Enterprises to dispose of the RACM promptly is a violation of Minn. R. 7011.9920. The landfill closed before Mr. Erickson could dispose of the RACM on August 11, 2001. The landfill did not open again until August 14, 2001. The MPCA then contacted Mr. Erickson and asked him to retain the waste for inspection. The facts of the matter show no violation of the rule. Similarly, the absence of any notation on the waste manifest of the intervening location of the waste has not been shown to be material. There was no effort to conceal the location of the waste. The omission of a notation showing interim location(s) from the waste manifest does not constitute a violation of Minn. Stat. § 115.075 in this instance.

The Appellant's violations in the handling of RACM and failure to notify the MPCA created a potential for severe harm. The degree of deviation from compliance is accurately characterized as major. While not all the violations alleged were proven in this matter, the violations that were proven support adequately the penalty recommended by agency staff. The upward adjustment of the penalty by $3,625 as proposed by the MPCA is justified. The information needed by Mr. Erickson in order to determine whether the residential exception applied, that is, ownership, intended disposal method, and ultimate use of the property was available and he neglected to ask for it.[24] Further, the contents of the asbestos survey would have provide other needed information, but Mr. Erickson neglected to ask for that document before performing the work. His cavalier approach to the MPCA's request for viewing the waste supports the conclusion that Mr. Erickson was willfully avoiding his obligation to make the RACM available for inspection by the MPCA. The Administrative Law Judge recommends that the Administrative Penalty Order issued to Erickson Enterprises on April 25, 2001 be adopted as the final agency order, after the two modifications discussed above.

R.C.L.

1 Mahlum Testimony.

2 MPCA Exhibit 2, at 3.

3 MPCA Exhibit 17.

4 Mahlum Testimony.

5 MPCA Exhibit 1.

6 MPCA Exhibit 2, at 5.

7 MPCA Exhibit 3.

8 MPCA Exhibit 14.

9 *Id*.

10 *Id*.

11 MPCA Exhibits 5-9.

12 MPCA Exhibit 12

13 MPCA Exhibit 20, at 4.

14 MPCA Exhibit 20.

15 MPCA Exhibit 20.

16 MPCA Exhibit 20.

17 MPCA Exhibit 20, at 3.

18 MPCA Exhibit 20, at 4.

19 *Id*.

20 Mahlum Testimony.

21 MPCA Exhibit 19. The MPCA is limited to a maximum penalty of $10,000 per order by Minn. Stat. § 116.072, subd. 2.

22 MPCA Exhibit 24, Attachment B.

23 MPCA Exhibit 9.

24 The $10,000 limit imposed by Minn. Stat. § 116.072, subd. 2, is not affected by the upward adjustment in the penalty order. The propriety of the upward adjustment supports retention of the penalty amount at the maximum statutory level.

2001 WL 35926172 (Minn.Pol.Control Agency)

End of Document

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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