IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MICHELLE HOLCOMB; FORE PEAKS SALES GROUP L.L.C.,
Plaintiffs/Appellants,

v.

ARIZONA DEPARTMENT OF REAL ESTATE,
Defendant/Appellee.

No. 1 CA-CV 18-0200
FILED 9-17-2019

Appeal from the Superior Court in Maricopa County
No. LC2017-000208-001
The Honorable Patricia A. Starr, Judge

AFFIRMED

COUNSEL

The Holper Group, PLLC, Bozeman, MT
By Richard D. Holper
Counsel for Plaintiffs/Appellants

Arizona Attorney General's Office, Phoenix
By Lynette J. Evans
Counsel for Defendant/Appellee

OPINION

Chief Judge Peter B. Swann delivered the opinion of the court, in which Presiding Judge Kenton D. Jones and Judge David D. Weinzweig joined.

S W A N N, Chief Judge:

¶1 Michelle Holcomb and Fore Peaks Sales Group, LLC (collectively, "Licensees"), appeal the superior court's decision affirming the Arizona Department of Real Estate ("Department") Commissioner's order revoking their real estate licenses. The Licensees contend that (1) they were denied procedural due process during the revocation proceedings, (2) insufficient evidence supports the Commissioner's conclusions that they violated multiple provisions of A.R.S. § 32-2153, and (3) the revocation of their licenses was excessive and disproportionate in light of the evidence. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Holcomb was a licensed real estate broker and the designated broker of Fore Peaks, a real estate brokerage in the Fountain Hills area.

¶3 In October 2016, an auditor from the Department contacted Holcomb to schedule an audit of Fore Peaks' records, explaining the scope of the audit and the documents Holcomb would need to make available. Ten days later, the auditor visited Fore Peaks' office to conduct the audit and found the brokerage's recordkeeping was "literally a mess," with records not stored in "any organized fashion." The auditor and a Department investigator randomly selected twenty sales transactions for review, but Holcomb could not locate the files for eight. Holcomb ultimately provided files for twenty transactions, but eighteen did not contain earnest money receipts, one was missing a purchase contract, and two were missing documentation of cancelled contracts. The auditor gave Holcomb ten days to produce the missing documents and reminded her of the deadline via voicemail and email, but no documents were provided. Unable to reach Holcomb, the auditor issued a subpoena for the missing documents, to which Holcomb did not respond.

¶4 The auditor then referred the matter to the Department's Enforcement and Compliance manager. The Enforcement and Compliance manager emailed and called Holcomb several times until he received a response, in which Holcomb promised to send the missing documents. A week later, Holcomb had not sent the documents, so the manager warned her via email that "[f]ailure to [cooperate with the Department's investigation] may result in disciplinary action." Then, approximately two weeks later, in December 2016, the manager sent the Licensees a cease and desist order demanding that neither Holcomb nor Fore Peaks engage in any

real estate activity "without first demonstrating full compliance with all applicable laws."

¶5 In January 2017, the auditor and investigator visited Fore Peaks' office to find the Licensees continuing to operate in disregard of the cease and desist order. Holcomb told the Department officials she never received the cease and desist order. The auditor later confirmed that the order was delivered and signed for by a Fore Peaks employee, but had not been opened. Holcomb blamed the holidays and a funeral for her silence, admitting she should have responded to the Department's requests.

¶6 By February 2017, the Department still had not received the missing documents, and it sent the Licensees a notice of hearing and complaint for an administrative hearing in March. Holcomb did not appear for the hearing or send a representative. The Department presented testimony from a single witness—the auditor in charge of the case. The administrative law judge ("ALJ") ultimately found that the Licensees violated multiple provisions of A.R.S. § 32-2153 and recommended revocation of their licenses, which the Commissioner adopted in a final order. The Licensees filed a "Motion for Rehearing or Review of Commissioner's Final Order," and attached an affidavit from Holcomb with new facts. The Commissioner denied the motion, and the Licensees appealed for review to the superior court. The court heard oral argument, denied the Licensees' request for an additional evidentiary hearing, and ultimately affirmed the Commissioner's final order.

¶7 The Licensees now appeal the superior court's decision.

DISCUSSION

¶8 The Licensees contend that (1) they were denied procedural due process during the administrative proceedings, (2) insufficient evidence supports the Commissioner's conclusions that they violated multiple provisions of A.R.S. § 32-2153, and (3) the revocation of their licenses was excessive and disproportionate in light of the evidence.

¶9 In reviewing the superior court's decision affirming an administrative order, we engage in the same process as the superior court, which is to assess whether "the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12–910(E); *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436, ¶¶ 11–12 (App. 2009). While we defer to the agency's factual findings, we independently examine the record to determine whether the evidence supports the judgment. *Webb v. State ex*

rel. Ariz. Bd. of Med. Exam'rs, 202 Ariz. 555, 557, ¶ 7 (App. 2002). We review de novo any legal issues addressed by the agency or the superior court. *Eaton v. Ariz. Health Care Cost Containment Sys.*, 206 Ariz. 430, 432, ¶ 7 (App. 2003).

I. THE LICENSEES RECEIVED ADEQUATE DUE PROCESS THROUGHOUT THE ADMINISTRATIVE PROCEEDINGS.

¶10 The Licensees argue that they were denied due process during the administrative proceedings because (A) they did not receive sufficient notice of the Department's subpoena, cease and desist order, or notice of hearing and complaint, and (B) the Commissioner did not consider Holcomb's affidavit attached to the Licensees' motion for rehearing.

¶11 Procedural due process requires that a party receive notice and the opportunity to be heard at a meaningful time and in a meaningful manner. *Comeau v. Ariz. St. Bd. of Dental Exam'rs*, 196 Ariz. 102, 106–07 (App. 1999). We discern no denial of due process here.

A. The Department's Subpoena and Cease and Desist Order Were Immaterial to the Result, and the Licensees Received Sufficient Notice of the Department's Notice of Hearing and Complaint.

¶12 Notice is sufficient when it is "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Iphaar v. Indus. Comm'n*, 171 Ariz. 423, 426 (App. 1992). Under Arizona's Administrative Procedures Act ("APA"), "every notice or decision . . . shall be served by personal delivery or certified mail, return receipt requested, or by any other method reasonably calculated to effect actual notice." A.R.S. § 41-1092.04. We review due process issues de novo. *See Eaton*, 206 Ariz. at 432, ¶ 7.

¶13 The Licensees aver that they did not receive the subpoena or the cease and desist order. The Department presented evidence, and the ALJ found that the Department sent the subpoena via certified mail with return receipt requested and that the Licensees received a slip from the mail carrier notifying them that a package was being held at the post office. Evidence also showed that the Department's cease and desist order was signed for by a Fore Peaks employee and then, unbeknownst to Holcomb, placed with other unopened mail. But whether the Licensees received sufficient notice of the Department's subpoena or cease and desist order is not material to the result here because the Commissioner's conclusion that the Licensees failed adequately to participate in the audit was based upon

an array of communications notifying the Licensees of their duty to participate in the audit, and the Licensees' failure to do so. A.R.S. § 32-2153(A)(17) does not specifically penalize a failure to respond to a subpoena or cease and desist order, but rather, more generally, penalizes a failure to produce records demanded by the Department. The record indicates that the Licensees simply ignored the Department and its audit, flouting their duty to participate and cooperate with regulators despite persistent warnings and reminders.

¶14 The Licensees' contention that they did not receive the Department's notice of hearing and complaint is not supported by the evidence. The Department presented evidence that it mailed the notice of hearing and complaint on February 3, and that Holcomb received and signed for the notice on February 10. Holcomb admitted as much in her affidavit attached to her motion for rehearing. The Licensees therefore received sufficient notice.

B. The Commissioner Properly Considered Holcomb's Affidavit Attached to the Licensees' Motion for Rehearing.

¶15 The Licensees argue the Commissioner failed to properly consider Holcomb's affidavit attached to its motion for rehearing.

¶16 A party aggrieved by an administrative agency's decision may move for a rehearing and a review of the decision, and may attach an affidavit in support thereof. A.A.C. R4-28-1310(A), (C)(2). The agency may grant the motion if the moving party establishes that its rights are materially affected by any one of a variety of enumerated factors, including newly discovered evidence, procedural irregularity, or excessive penalty. *See id.* at -1310(B)(1) to (8).

¶17 Here, Holcomb's affidavit makes several factual assertions that she argues support a less severe penalty for her failure to participate in the audit, including that she was caring for her ill mother-in-law during the audit, that she was unaware of the subpoena and cease and desist order, and that she had finally compiled the requested documents for review. In its ruling denying Holcomb's motion for rehearing, the Commissioner noted that she "carefully reviewed the entire record in this matter, including the Respondents' Request [for rehearing and review] and the Department's Response thereto." The superior court therefore did not err in finding that the Commissioner properly considered Holcomb's affidavit. Moreover, the Commissioner did not err in finding that none of Holcomb's assertions warranted a rehearing or reconsideration. For instance, even if

the affidavit presents new evidence showing that Holcomb may have maintained certain records, that evidence nevertheless could have been discovered with reasonable diligence before the original hearing, and therefore does not warrant reconsideration. *See* A.A.C. R4-28-1310(B)(4) (rehearing may be warranted when moving party presents "[n]ewly discovered material evidence that could not with reasonable diligence have been discovered and produced at the original hearing").

¶18 Accordingly, the Licensees were not denied due process.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSIONER'S CONCLUSION THAT THE LICENSEES VIOLATED MULTIPLE PROVISIONS UNDER A.R.S. § 32-2153.

¶19 Holcomb and Fore Peaks argue that insufficient evidence supports the Commissioner's conclusions that they failed to maintain the necessary sales transaction documents, as required by A.R.S. § 32-2153(A)(18), and failed to produce the missing documents after a demand from the Department, as required by § 32-2153(A)(17). Holcomb separately argues that insufficient evidence supports the Commissioner's conclusion that, as a consequence of the Licensees' violations, Holcomb failed to exercise reasonable supervision over the activities of the brokerage, as required by § 32-2153(A)(21). Additionally, attacking the evidence on which the Commissioner's conclusions were founded, the Licensees contend that the Department's sole witness did not present reliable testimony. We find sufficient evidence in the record to support the Commissioner's conclusions. *See* A.R.S. § 12–910(E); *Gaveck*, 222 Ariz. at 436, ¶ 11 ("If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.").

A. Substantial Evidence Supports the Commissioner's Conclusions That the Licensees Violated A.R.S. § 32-2153(A)(17), (18), and (21).

¶20 Section 32-2153(A)(18) allows the Commissioner to suspend or revoke a real estate broker's license if the broker or brokerage has "[f]ailed to maintain a complete record of each transaction which comes within [title 32, chapter 20]." Section 32-2151.01, which falls within Title 32, Chapter 20, provides several recordkeeping requirements for real estate brokers, including that "licensed employing broker[s]" keep copies of earnest money receipts, closing statements, and sales contracts for each transaction, and that individual brokers record "the type of earnest money

received in any real estate transaction." A.R.S. § 32-2151.01(A), (C), (E). The statute further requires that sales transaction records be "kept in a chronological log or other systematic manner" that is easily accessible by the Department. A.R.S. § 32-2151.01(E); *see* A.R.S. § 32-2101(8), (24) (providing that a "licensed employing broker" includes a licensed brokerage company, while a "broker" refers to an individual licensed broker).

¶21 Here, the Department's auditor testified that the Licensees' recordkeeping was "literally a mess." When the Department first selected twenty sales transaction files at random for review, Holcomb was unable to find eight of them. And after the Department selected eight other files so that it could review a full twenty, it found that eighteen were missing earnest money receipts, which the auditor testified are a "very important" part of a sales transaction file. One of the reviewed files was missing a purchase contract and two were missing documentation on the cancellation of contracts. The Department allowed the Licensees additional time to produce the missing documents, but they failed to do so. Accordingly, the Licensees' failure to produce important business records during the audit and throughout the prolonged investigation that followed allowed the Commissioner reasonably to infer that the Licensees did not maintain the required records. *See Bluffestone v. Abrahams*, 125 Ariz. 42, 45 (App. 1979) ("[T]he trier of fact may indulge all reasonable inferences from the facts shown by the evidence.").

¶22 Next, § 32-2153(A)(17) allows the Commissioner to suspend or revoke a broker's license if the broker or brokerage has "[f]ailed or refused upon demand to produce any document . . . that is in the licensee's possession or that the licensee is required by law to maintain." Here, again, the evidence shows that the Department persistently pressed the Licensees after the audit to produce the required documents and warned them of the repercussions of non-production, yet by the time of the hearing, the Licensees still had not produced the documents. Substantial evidence therefore supports the Commissioner's conclusion.

¶23 Finally, § 32-2153(A)(21) allows the Commissioner to suspend or revoke a broker's license if the broker "failed to exercise reasonable supervision over the activities of salespersons, associate brokers or others under the broker's employ or failed to exercise reasonable supervision and control [over a brokerage]." Here, Holcomb opened the Fore Peaks offices and was the brokerage's "designated broker." *See id.* (specifically placing liability on the "designated broker" of the brokerage). Because Holcomb is the supervisor of Fore Peaks and, as discussed above, Fore Peaks failed to

maintain and produce important documents, substantial evidence supports the Commissioner's conclusion that Holcomb did not exercise reasonable supervision over the brokerage.

B. The Department's Witness's Testimony Was Sufficiently Reliable.

¶24 The Licensees also contend that the testimony of the Department's sole witness—the auditor assigned to the case—was not sufficiently reliable because it relied on hearsay. But hearsay evidence is admissible in administrative proceedings so long as it bears sufficient indicia of reliability. *Wieseler v. Prins*, 167 Ariz. 223, 227 (App. 1990). "Hearsay evidence is considered reliable where the circumstances tend to establish that the evidence offered is trustworthy." *Id.* Hearsay is unreliable when, for instance, "the speaker is not identified, when no foundation for the speaker's knowledge is given, or when the place, date and time, and identity of others present is unknown." *Id.* (citation omitted). Here, when the auditor relied on hearsay, his testimony was otherwise supported by exhibits or by his assertion that he was in the room during the conversation between identified parties. Further, the auditor testified to the time, place, and context of the statements—for instance, he explained that the relevant statements came from investigators who joined him for the October 2016 initial audit and the January 2017 follow-up visit. We therefore find the Department's auditor's testimony sufficient to support the decision.

III. REVOCATION OF HOLCOMB AND FORE PEAKS' LICENSES WAS NOT A DISPROPORTIONATE PENALTY IN LIGHT OF THE EVIDENCE.

¶25 The Licensees argue that the Commissioner's revocation of their licenses was not supported by substantial evidence and was "so disproportionate to the offense in light of the circumstances as to be shocking to one's sense of fairness." After independent review, however, we find that substantial evidence supports the Commissioner's penalty. *See* A.R.S. § 12-910(E).

¶26 Our supreme court has expressly departed from the shock-one's-sense-of-fairness standard for reviewing administrative decisions because it is an imprecise attempt to define the "arbitrary and capricious" or "substantial evidence" standard in § 12-910(E). *See Maricopa Cty. Sheriff's Office v. Maricopa Cty. Emp. Merit Sys. Comm'n*, 211 Ariz. 219, 223, ¶ 17 (2005); *Coplan v. Ariz. St. Bd. of Appraisal*, 222 Ariz. 599, 602, ¶ 8 (App. 2009).

Instead, in determining whether an administrative agency has imposed an arbitrary or disproportionate penalty, "we review the record to determine whether there has been 'unreasoning action,' without consideration and in disregard for facts and circumstances." *Maricopa Cty. Sheriff's Office*, 211 Ariz. at 223, ¶ 17. Simply put, "we must affirm the agency's decision if there is substantial evidence in support thereof, and the action taken by the agency is within the range of permissible agency dispositions authorized by the governing statute." *Howard v. Nicholls*, 127 Ariz. 383, 388 (App. 1980). The Commissioner therefore has broad discretion in imposing a penalty so long as the penalty is within the range provided by statute. *See id.*; *see also* A.R.S. § 41-1092.08(B) (explaining that the Commissioner "may review the [ALJ's] decision and accept, reject or modify it").

¶27 Here, A.R.S. § 32-2153(A) gives the Commissioner authority to "suspend or revoke a license, . . . issue a letter of concern to a licensee, . . . or deny the renewal or the right of renewal of a license" if the Commissioner finds that the licensee has violated any one of twenty-six enumerated requirements. As discussed above, the Commissioner reasonably concluded that the Licensees violated (A)(17) and (A)(18), and that Holcomb violated (A)(21). Each of these violations independently warranted revocation under the statute, and when considered together, we cannot say the Commissioner's revocation of Holcomb and Fore Peaks' licenses was excessive or an abuse of discretion. *See Maricopa Cty. Sheriff's Office*, 211 Ariz. at 222, ¶ 16 n.6 (noting that only in rare situations can a punishment that is within the prescribed range be "so unreasonably disproportionate to the offense as to be arbitrary and without reasonable cause").

CONCLUSION

¶28 For the foregoing reasons, we affirm the decision of the superior court.

AMY M. WOOD • Clerk of the Court
FILED: AA