IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

RONALD COLEN DEW;
ACME HOME SERVICES LLC, *Plaintiffs/Appellants*,[1]

v.

ARIZONA REGISTRAR OF CONTRACTORS, *Defendant/Appellee*.

No. 1 CA-CV 17-0397
FILED 12-18-2018

Appeal from the Superior Court in Maricopa County
No. LC2016-000260-001
The Honorable Patricia A. Starr, Judge

AFFIRMED

COUNSEL

Anderson Banta Clarkson PLLC, Mesa
By Adam C. Anderson, Nat Clarkson
Counsel for Plaintiffs/Appellants

Arizona Attorney General's Office, Phoenix
By John R. Tellier, Michael Raine
Counsel for Defendant/Appellee

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[1] It is ordered amending the caption as reflected above. This caption shall be used on all further documents filed in this appeal.

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Maria Elena Cruz joined.

H O W E, Judge:

¶1 Ronald Colen Dew appeals the superior court's order affirming the Arizona Registrar of Contractors' Final Administrative Decision and Order that imposed a $1,227,500 civil penalty against him. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Dew previously held a license issued by the Arizona Registrar of Contractors ("ROC") for Abode Air, LLC. Beginning September 2011, the ROC revoked Dew's ROC license 45 times based on consumer complaints, failure to pay civil penalties, and failure to repay residential recovery fund payouts. In October 2011, W.D., Dew's father, formed ACME Home Services, LLC ("ACME"). Later that month, he executed a power of attorney in favor of Dew, which gave Dew complete control of ACME. ACME then applied for a license, listing W.D. as its sole member and manager and making no reference to Dew. The ROC determined, however, that Dew had signed portions of ACME's application in W.D.'s name and had paid for the contractor's bond. Consequently, the ROC denied ACME's application because of Dew's involvement and apparent operational control.

¶3 In June 2012, ACME entered into a stock purchase agreement with M Drive Enterprises, Inc. ("M Drive"), but the change of ownership was not reported to the ROC as A.R.S. § 32–1151.01 required. The agreement required M Drive to apply for and obtain a license, and M Drive placed W.D. as its director and president. The ROC discovered that Dew was running M Drive's daily operations and suspended M Drive's license in March 2014. An administrative law judge ("ALJ") held a hearing in April 2014 to determine whether to revoke M Drive's license. The ALJ found that Dew was in complete control of M Drive. M Drive's qualifying party[2] for

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[2] A "qualifying party" is an employee who is regularly employed by the licensee and is actively engaged in the classification of work for which

the license stated that his only job was to pick up periodic payments for the use of his license. Thereafter, the ALJ recommended revoking M Drive's license, which the ROC adopted.

¶4 In May 2014, ACME entered into a marketing and management agreement with Acclaim Air, LLC ("Acclaim"). R.D. owned Acclaim, and he found Dew while reviewing online advertisements of people seeking control over a license. Acclaim and ACME executed a marketing and management agreement that required Acclaim to obtain and maintain a license. R.D. listed himself as the qualifying party for the license and applied for and received a license for Acclaim.

¶5 As with M Drive and W.D., Dew—not R.D.—ran Acclaim's daily operations. Dew, through ACME, hired employees, set salaries, controlled Acclaim's checkbook, solicited and priced jobs, and supervised the company's work. ACME also provided trucks and tools for Acclaim's employees and purchased materials for the jobs. The trucks that Acclaim used at its jobs displayed ACME's name, not Acclaim's. Acclaim's website listed ACME's phone number and address, which was not the address that Acclaim had registered with the ROC. Additionally, Acclaim's website did not state that it was an unlicensed contractor. The website actively solicited customers and stated, "Call [u]s [t]oday!" on every webpage. R.D. served as the "front man" for Acclaim, appearing at jobsites whenever a complaint was filed because a ROC inspection would follow. Like the situation with M Drive's qualifying party who received periodic payments for the use of his license, ACME paid R.D. $500 per week.

¶6 In September 2015, the ROC issued a Cease and Desist Order ("CDO") and Civil Citation to Dew and ACME. The CDO alleged that ACME and Dew were "engaged in and are engaging in acts of contracting, practices or transactions which constitute violations of A.R.S. § 32–1154(A)(9)." The Civil Citation, filed as part of the CDO, first described how Dew obtained a license for Abode but that the license had been revoked 45 times. The Civil Citation also noted that W.D. formed ACME as its manager and sole member and then applied for a license, and it explained that the application was denied because Dew was acting as ACME's manager through W.D.'s power of attorney and that Dew was running ACME's daily operations. It also described how ACME purchased M Drive and placed W.D. as the director and president of M Drive but did not inform the ROC about the changes to M Drive's officers, directors, or

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he qualifies on behalf of the licensee; the qualifying party is tasked with supervising the work performed by the licensee. A.R.S. § 32–1127.

ownership. The Civil Citation noted that Dew also ran M Drive's daily operations and acted as the equivalent of an officer and a director of M Drive, which resulted in M Drive's license suspension and eventual revocation. It then described how ACME and Acclaim had entered into their marketing and management agreement and that ACME, which Dew controlled, ran Acclaim's daily operations.

¶7 The Civil Citation also asserted that ACME and Dew had violated A.R.S. § 32–1154(A)(9) each day from May 16, 2014, when ACME and Acclaim made their agreement, to September 18, 2015, the date of the Civil Citation. For each violation, the ROC assessed a $2,500 civil penalty, for a total amount of $1,227,500, and Dew requested a hearing to challenge the violations and the civil penalty. In October 2015, the ROC notified Dew that the hearing would concern "the charges contained in the Citation issued and on the assessment of a civil penalty."

¶8 At the hearing, the ROC argued that the issue before the ALJ was whether Dew and ACME had acted as a contractor without a license and had evaded the licensing statutes. Dew questioned the ROC's first witness, a ROC tax attorney, and asked the witness to acknowledge that the agreement between ACME and Acclaim expressly stated that ACME was "under no condition . . . to contract or attempt to contract." He further asked the witness to confirm that, under the marketing agreement, ACME only did tasks that did not require a license. Also, during his questioning of R.D., Dew asked him to clarify that, under the management agreement, ACME was not allowed to contract. Then, during Dew's testimony, he stated that "[ACME] sells the calls to Acclaim or M Drive, we supply the vehicles, we sell the parts, none of which requires licensure. Anything that requires a license, it was in the contract and we spoke to it, hands off."

¶9 The ALJ found that the management agreement between ACME and Acclaim made Dew "tantamount" to Acclaim's manager and that Dew's testimony acknowledged this fact. The ALJ noted that A.R.S. § 32–1154(A)(9) allows the ROC to suspend or revoke a license for aiding or abetting an unlicensed person to contract without a license. She concluded that because neither ACME nor Dew had a license, "it [was] not possible to suspend or revoke a license in this matter." The ALJ then noted that A.R.S. § 32–1151 prohibits unlicensed contracting and found that ACME and Dew had engaged in unlicensed contracting. She also concluded that ACME was "clearly attempting to avoid being discovered" by the ROC. The ALJ further noted that Dew did not argue that the civil penalty was excessive for any reason other than his professed innocence, and he did not argue that he or ACME were unable to pay the penalty. Based on the evidence and the

presence of five aggravating factors under A.A.C. R4–9–131, the ALJ found that a $2,500 civil penalty per day was reasonable. Thus, the ALJ found that the total civil penalty amount of $1,227,500 was "justified by the evidence" and "authorized by the applicable law," and she recommended affirming the ROC's civil penalty. On review, the ROC accepted the ALJ's decision without modification.

¶10 Dew petitioned for rehearing by the ROC, which the ROC denied. ACME and Dew then appealed to the superior court, requesting a trial de novo. The court denied the request, reasoning that ACME and Dew did not explain why additional testimony was required from witnesses who testified before the ALJ and, if ACME and Dew wanted to call new witnesses to testify, they did not say why they did not call them to testify before the ALJ. ACME and Dew then filed their same petition for rehearing, which the court treated as an opening brief. The court dismissed the appeal as to ACME because it was not represented by counsel. In the opening brief, Dew claimed that the civil penalty was based on the allegation that he and ACME had conspired with Acclaim to evade the statutory bar on unlicensed contracting. Dew argued that the services he had provided fell outside the statutory definition of contracting. The superior court affirmed the ROC's order. In doing so, it noted that the penalty imposed was based on Dew's violations of A.R.S. § 32–1151 for unlicensed contracting, which the court concluded the record supported. Dew timely appealed to this Court and filed a transcript of the ALJ's hearing.

¶11 The ROC then moved to strike the hearing transcript because it had not been presented to the superior court. This Court stayed the appeal to allow Dew to file an Arizona Rule of Civil Procedure ("Rule") 60(b) motion to request that the superior court vacate or modify its ruling in light of the transcript. In his Rule 60(b) motion, Dew stated that the ALJ's decision was "not clear" whether he was penalized for violating A.R.S. § 32–1154(A)(9) and that the decision read as though he was penalized for violating A.R.S. § 32–1151. He then claimed for the first time that he did not receive notice that he had violated A.R.S. § 32–1151, which he argued violated his due process rights. The court reviewed the transcript, denied the motion, and specifically concluded that it could not hear the due process issue that Dew had raised for the first time on appeal. Dew filed an amended notice of appeal.

DISCUSSION

1. Due Process

¶12 Dew argues that the ROC violated his due process rights by imposing civil penalties for statutory violations that were not identified in the CDO, Civil Citation, or notice of hearing. He claims that although the ALJ and the ROC ultimately relied on A.R.S. § 32–1151 as a basis for the civil penalties, neither the CDO nor the Civil Citation alleged a violation of that provision. Alleged violations of due process are reviewed de novo. *Wassef v. Ariz. State Bd. of Dental Exam'rs through Hugunin*, 242 Ariz. 90, 93 ¶ 11 (App. 2017). We will not, however, consider any non-jurisdictional claims—including due process claims—raised on appeal that were not first raised to the administrative tribunal. *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 340 (App. 1984).

¶13 As the superior court recognized, Dew did not raise his due process claim before the ALJ. Neither did Dew raise the issue in the petition for rehearing he filed after the ROC's final order, or in his original appeal to the superior court. Instead, he waited until he moved for relief under Rule 60(b) to raise it. The superior court ruled that, sitting as an appellate court, it could not consider the claim in the first instance. For the same reason, we also cannot consider it and deem it waived. *See id*.

¶14 Even if we were to consider Dew's claim, however, it would fail. Due process requires that "a party receive notice and an opportunity to be heard in a meaningful manner at a meaningful time." *Burch & Cracchiolo, P.A. v. Myers*, 237 Ariz. 369, 379 ¶ 37 (App. 2015). An agency's notice of hearing must "[i]dentify the statute or rule that is alleged to have been violated or on which the action is based" and "[i]dentify with reasonable particularity the nature of any alleged violation, including, if applicable, the conduct or activity constituting the violation." A.R.S. § 41–1092.03(A). Under A.R.S. § 32–1166(A), a ROC Civil Citation "shall be in writing and shall clearly describe the violation for which the citation was issued."

¶15 Although the Civil Citation did not cite A.R.S. § 32–1151, Dew was not deprived of due process because he was always aware that contracting without a license was at the heart of the allegations against him. The ROC announced at the beginning of the hearing that it was pursuing civil penalties against Dew for acting as a contractor without a license. Dew's questioning of the ROC's witnesses demonstrated that he knew that unlicensed contracting was the basis for the CDO and Civil Citation. The witnesses' answers to Dew's questions showed that the ROC had been

investigating him for contracting without a license. Dew's own testimony at the hearing also demonstrated that he understood that unlicensed contracting was at issue. Moreover, Dew conceded at oral argument before this Court that he suffered no prejudice from the lack of formal notice on the unlicensed contracting allegations. For these reasons, the failure of the Civil Citation and CDO to specifically cite the statute did not deprive him of due process. *See Volk v. Brame*, 235 Ariz. 462, 470 ¶ 26 (App. 2014) (reversal for due process violations is required only if prejudicial).

2. Rule 60(b)(6) Motion

¶16 Dew argues that the superior court should have used its equitable power to relieve him from the ROC's decision because he contends that his due process rights were violated. This Court reviews the denial of a Rule 60(b) motion for an abuse of discretion. *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 108 ¶ 35 (App. 2017). A Rule 60(b) motion "is not a device for weighing evidence or reviewing legal errors." *Welch v. McClure*, 123 Ariz. 161, 165 (1979).

¶17 Here, after considering the hearing transcript, the superior court first noted that Dew raised issues—including his due process arguments—not previously raised before the ALJ. Therefore, the court considered those issues waived. Next, the court noted that Dew's Rule 60(b) motion otherwise merely asked it to reweigh the evidence, which was inappropriate. *See id.* The court added that after reviewing the transcript, it found that substantial evidence supported the ROC's decision and the decision was not contrary to law. Thus, the court did not abuse its discretion by denying Dew's motion.

3. Substantial Evidence

¶18 Dew argues that substantial evidence did not support the ROC's findings that he violated A.R.S. § 32–1151. In reviewing a superior court's decision affirming an administrative order, "[w]e engage in the same process as the superior court[,]" which is to assess "whether the agency's action was arbitrary, capricious, or an abuse of discretion." *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436 ¶¶ 11–12 (App. 2009). When reviewing an agency's decision, this Court is not bound by a superior court's judgment because it reviews the same record. *Ritland v. Ariz. State Bd. of Med. Exam'rs*, 213 Ariz. 187, 189 ¶ 7 (App. 2006). "If [an agency's] decision is supported by the record, there is substantial evidence to support that decision even if the record also supports a different conclusion." *Id.* This Court may not reweigh the evidence or substitute its own judgment

for that of the agency on factual questions or matters of agency expertise. *Golob v. Ariz. Med. Bd.*, 217 Ariz. 505, 509 ¶ 11 (App. 2008).

¶19 Dew contends that substantial evidence does not support the finding that he had engaged in unlicensed contracting. Under A.R.S. § 32–1101(A)(3), a "contractor" is defined as follows:

> "Contractor" is synonymous with the term "builder" and means any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that, for compensation, undertakes to or offers to undertake to, purports to have the capacity to undertake to, *submits a bid or responds to a request for qualification or a request for proposals for construction services to*, does himself *or by or through others*, or *directly or indirectly supervises others to*:
>
> (a) Construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or any other structure or work in connection with the construction.
>
> (b) Connect such structure or improvements to utility service lines and metering devices and the sewer line.
>
> (c) Provide mechanical or structural service for any such structure or improvements.

(Emphasis added.) Additionally, A.R.S. § 32–1101(B) further defines "contractor" as the following:

> "Contractor" includes subcontractors, specialty contractors, floor covering contractors, landscape contractors, other than gardeners, and *consultants representing themselves as having the ability to supervise or manage a construction project for the benefit of the property owner, including the hiring and firing of specialty contractors, the scheduling of work on the project and the selection and purchasing of construction material*.

(Emphasis added.) The record shows that Dew engaged in the emphasized language above. In particular, substantial evidence shows that Dew had supervised and managed the daily operations of Acclaim, which installed air conditioning units and performed related services such as maintenance and equipment replacement. Also, he actively solicited customers daily through Acclaim's online website. As such, substantial evidence supports the finding that Dew engaged in unlicensed contracting.

¶20 Dew counters that Acclaim's activities fell under the "Handyman Exemption" under A.R.S. § 32–1121(14), which allows an unlicensed contractor to perform projects that cost less than $1,000 in the aggregate. He further argues that the ROC failed to show that the exemption did not apply to any of Acclaim's projects. The burden of proving that an exemption applies is on the party claiming the exemption, however. *See Troutman v. Valley Nat'l Bank of Ariz.*, 170 Ariz. 513, 517 (App. 1992) (noting that the party who asserts a fact has the burden to establish that fact). Additionally, the handyman exemption does not apply to "a person who utilizes any form of advertising to the public in which the person's unlicensed status is not disclosed by including the words 'not a licensed contractor' in the advertisement." A.R.S. § 32–1121(A)(14)(c). The record shows that Dew had advertised Acclaim's services, yet he did not present evidence that he disclosed that he, ACME, or Acclaim was operating as an unlicensed contractor. Thus, Dew did not meet his burden and this argument fails.

4. The ROC's Penalty

¶21 Dew argues that the penalty the ROC imposed on him was excessive because if he committed conspiracy, then only one violation would have occurred rather than 491 violations. He also contends that the ROC's seven-figure penalty for violating statutes that did not cause harm to the public shocks the conscience. An administrative penalty will be affirmed unless the penalty "is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." *Coplan v. Ariz. State Bd. of Appraisal*, 222 Ariz. 599, 602 ¶ 8 (App. 2009) (quoting A.R.S. § 12–910(E)). Only in rare circumstances will a penalty be found arbitrary when it falls within the permissible range. *Id.* at 601 ¶ 7.

¶22 Regarding Dew's first argument, the ROC imposed the penalty based on Dew's unlicensed contracting, which he committed daily in violation of A.R.S. § 32–1151. Therefore, under A.R.S. § 32–1166(A), which permits daily penalties, the record supports the ROC's finding that

491 violations had occurred. As such, we need not address Dew's single-conspiracy argument pertaining to A.R.S. § 32–1154(A)(9).[3]

¶23 Dew's second argument mistakenly relies upon the "shock one's sense of fairness" language in *Schillerstrom v. State*, 180 Ariz. 468, 471 (App. 1994). This Court no longer follows that standard and instead will affirm an administrative penalty unless it constitutes an abuse of discretion. *See Coplan*, 222 Ariz. at 602 ¶ 8. Although the ALJ did not expressly state that Dew had violated A.R.S. § 32–1151, the ALJ described that section as prohibiting unlicensed contracting and then later expressly found that Dew had engaged in unlicensed contracting. Thus, the ROC had authority under A.R.S. § 32–1166(A) to impose penalties for Dew's unlicensed contracting. Further, the evidence showed that Dew had managed and supervised Acclaim's daily operations, which is considered contracting under A.R.S. § 32–1101(A)(3), (B). Also, even though the ROC did not offer evidence that Dew had harmed the public by his conduct, A.R.S. § 32–1166(A) does not require such proof to sustain the penalty imposed. And while A.R.S. § 32–1166(A) allows for discretion in the penalty amount, A.R.S. § 32–1164(B) limits that discretion after an initial offense because each subsequent offense must be assessed at least a $2,000 penalty. Furthermore, the ALJ found that Dew's conduct constituted five aggravating factors within A.A.C. R4–9–131, which the ALJ considered in determining the civil penalty. As such, the penalty falls within the permissible range, and the ROC did not abuse its discretion.

[3] Because the record shows that the basis for the imposed penalty was Dew's violations of A.R.S. § 32–1151 rather than A.R.S. § 32–1154(A)(9), we need not consider Dew's other arguments on appeal concerning A.R.S. § 32–1154(A)(9).

CONCLUSION

¶24 For the foregoing reasons, we affirm. As the unsuccessful party, Dew is not entitled to his attorneys' fees and costs that he requested under A.R.S. § 12–348(A)(2).

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