IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GOMEZ POOLS & SERVICE, LLC, *Appellant*,

v.

ARIZONA REGISTRAR OF CONTRACTORS, *Appellee*.

No. 1 CA-CV 22-0419
FILED 4-27-2023

Appeal from the Superior Court in Maricopa County
No. LC2021-000252-001
The Honorable Daniel J. Kiley, Judge, *Retired*

AFFIRMED

COUNSEL

Wheeler Law Group, PLLC, Tempe
By Julianne C. Wheeler
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Seth T. Hargraves
Counsel for Appellee

MEMORANDUM DECISION

Judge D. Steven Williams delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Angela K. Paton joined.

W I L L I A M S, Judge:

¶1 Gomez Pools & Service ("GPS") appeals the superior court's remand of a license revocation hearing to the Arizona Registrar of Contractors ("ROC"). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 GPS is a licensed contractor owned by Jerry Gomez. In May 2021, in an unrelated matter, an Administrative Law Judge ("ALJ") recommended the ROC revoke GPS's contractor's license. In that matter, the ROC agreed with the ALJ's recommendation and scheduled the license revocation to take effect on August 7, 2021. When GPS continued to try and obtain work permits from the City of Yuma as late as June, the ROC investigated additional complaints made against GPS. The ROC concluded that GPS had (1) failed to obtain workers' compensation insurance and (2) allowed an unlicensed contractor (Jerry's brother, David Gomez) to act under its contractor's license.

¶3 On July 7, the ROC issued an order (1) summarily suspending GPS's license under A.R.S. § 41-1092.11(B) and (2) setting a hearing for July 16 to determine whether to uphold that suspension until the ROC revoked the license on August 7. On July 9, however, the ROC sent supplemental notice to GPS informing it that the ROC would seek outright revocation, rather than suspension, at the July 16 hearing. That change gave GPS only seven days to prepare for the revocation hearing.

¶4 A different ALJ presided over the July 16 hearing at which an ROC official, a City of Yuma representative, and Jerry Gomez testified. Following the hearing, the ALJ issued a decision recommending the ROC uphold its summary suspension of GPS's license, but did not address license revocation. The ROC, through its chief counsel, issued a final administrative decision modifying the ALJ's recommendation and instead revoked GPS's license altogether.

¶5 GPS appealed to the superior court, seeking judicial review of the administrative decision ("JRAD"). GPS raised several concerns, which the court determined could effectively be summed up as two issues: (1) whether the administrative hearing violated GPS's procedural due process rights, and (2) whether sufficient evidence supported the final administrative decision. The court bifurcated its review, taking up the due process question first, and moving to the second issue only if it determined GPS received adequate due process. The court, under A.R.S. § 12-910(A), authorized the parties to engage in additional discovery for the second stage of its bifurcated review.

¶6 The superior court determined the ROC failed to afford GPS adequate due process and, therefore, didn't reach the second stage of its bifurcated review. The court found that a contractor would normally be entitled to at least thirty days to prepare for a revocation hearing, as well as the ability to collect evidence and participate in informal settlement with the ROC. But the ROC "denied [GPS] all of these procedural rights because the ROC unilaterally decided to schedule the revocation hearing on a vastly accelerated basis." The court did agree with the ROC, however, that A.R.S. § 41-1092.11(B) did not require the agency to prove emergency circumstances justifying the summary suspension.

¶7 The superior court set aside the ROC's final administrative decision and remanded the matter to the ROC to allow for a proper revocation hearing. Initially the court refused to set aside the ALJ's recommendation for summary suspension and instead stayed enforcement of the suspension until the revocation hearing. In a subsequent minute entry, however, the court modified ROC's final administrative decision to recommend summary suspension instead, while still staying enforcement of that suspension. The court also determined that GPS was not entitled to attorney's fees under A.R.S. § 12-348.

¶8 GPS timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12–913, -120.21(A)(1), and -2101(A)(1) and JRAD Rule 13. *See Svendsen v. Ariz. Dep't of Transp.*, 234 Ariz. 528, 533, ¶ 13 (App. 2014).

DISCUSSION

¶9 On appeal, GPS alleges the following errors: (1) the superior court incorrectly allowed the ROC to obtain new discovery during the JRAD proceedings; (2) ROC employees lacked authority to enter the orders suspending/revoking GPS's license; (3) the superior court was obligated to

review the ROC's allegation of emergency circumstances; (4) the superior court lacked authority to modify the revocation order or remand the proceedings to the ROC; and (5) GPS was entitled to attorney's fees under A.R.S. § 12-348. We address each argument in turn.

I. Additional Discovery Under A.R.S. § 12-910

¶10 GPS first claims the superior court erred in allowing the ROC to conduct additional discovery for the second stage of its bifurcated review because evidence on review should be limited to "the facts known to the agency at the time that [the ROC] took the action." *See* A.R.S. § 12-910(A). The issue, however, became moot when the court ruled in GPS's favor on due process grounds. A hearing on the second stage of the bifurcated review did not, and now will not, occur. *See Velasco v. Mallory*, 5 Ariz. App. 406, 410–11 (1967) ("We will not render advisory opinions anticipative of troubles which do not exist; may never exist; and the precise form of which, should they ever arise, we cannot predict."). To the extent GPS suggests that any additional discovery the ROC may have obtained should be precluded from future proceedings, it has provided no legal authority to support its position.

II. Authority of ROC Employees

¶11 GPS next argues the superior court incorrectly and "impliedly" held that certain ROC deputies and officials had authority to sign certain agency orders when only the agency head is authorized to sign those orders by statute. More specifically, GPS contends that (1) the ROC's chief of compliance lacked statutory authority to issue a summary suspension order, and (2) the ROC's chief legal counsel lacked statutory authority to sign the final administrative decision modifying the ALJ's recommendation. Because this argument requires us to interpret statutes, our standard of review is de novo. *Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7 (2017).

¶12 As relevant here, A.R.S. § 32-1154(B)(3) grants the "registrar" authority to "temporarily suspend . . . or permanently revoke any or all licenses" when a contractor's actions warrant the same. Likewise, A.R.S. § 41-1092.08(B) vests authority with "the head of the agency" to "accept, reject or modify" an ALJ's recommendation/decision. GPS contends these statutes "permit the ROC to act [only] through the Agency Head." But state officers—including the director of the ROC—"may appoint deputies and assistants . . . [and] clerks and employees for the prompt discharge of the duties of the office." A.R.S. § 38-461(A). And deputies may generally

perform the duties prescribed by law for the head of a state agency. *See* A.R.S. § 38-462.

¶13 GPS acknowledges the same but argues that the appointment of deputies must be in writing and that the statute does not allow the ROC director to "verbally empower" its chief of compliance to issue a summary suspension order or chief legal counsel to modify the ALJ's decision. However, the statute only requires the *appointment* of a deputy to be in writing, not the delegation of specific authority to perform specific acts. And though GPS claims the ROC conceded that the chief of compliance and the chief legal counsel were not appropriately appointed, it has provided no citation to the record supporting the alleged concession. And we have not found one. *See Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62 (App. 2009) (noting that failure to provide adequate record citations can result in waiver of an argument.). GPS's argument fails.

III. Review of Agency Determination under A.R.S. § 41-1092.11

¶14 GPS next contends the superior court was obligated to independently review whether the ROC proved by a preponderance of the evidence that GPS's actions threatened "public health, safety or welfare" under A.R.S. § 41-1092.11(B). As with GPS's previous argument, we review statutory interpretation de novo. *Stambaugh*, 242 Ariz. at 508, ¶ 7.

¶15 Section 41-1092.11(B) requires an agency to provide a licensee both (1) notice and (2) a hearing before suspending or revoking a license. However, "[i]f the agency finds that the public health, safety or welfare imperatively requires emergency action" and it also "incorporates a finding to that effect in its order," the agency may summarily suspend a license pending further proceedings. § 41-1092.11(B). To ensure a licensee receives adequate due process, an agency must hold a "prompt or immediate post-suspension hearing." *Dahnad v. Buttrick*, 201 Ariz. 394, 399, ¶ 19 (App. 2001).

¶16 GPS provides us with no authority to show either that (1) the ROC had the burden of proving the need for emergency action, or (2) the superior court had an independent obligation to review circumstances justifying such action. To the contrary, the statute vests the agency with the discretion to determine whether a threat to public health, safety, and welfare exists, but does not require the agency to set forth a detailed description of the emergency, much less prove that an emergency exists by a preponderance of the evidence. *Wassef v. Ariz. St. Bd. of Dental Examiners ex rel. Hugunin*, 242 Ariz. 90, 94, ¶ 15 (App. 2017).

¶17 Regardless, GPS contends that such a finding "has all the makings of a constitutional disaster" by allowing "a bureaucrat . . . [to] make an unreviewable and perilous finding that results in the taking of a valuable property right." We disagree. Licensees have a prompt or immediate opportunity to contest any suspension, *Dahnad*, 201 Ariz. at 399, ¶ 19, and subsequent proceedings for revocation must be "promptly instituted and determined," § 41-1092.11(B). The superior court did not err in rejecting GPS's argument.

IV. Superior Court's Modification and Remand

¶18 GPS also argues the superior court lacked authority to modify the final administrative decision revoking GPS's license to instead reinstate the summary suspension of GPS's license recommended by the ALJ, and to remand the matter to the ROC for additional revocation proceedings. Because GPS takes the position it was "denied a meaningful opportunity for *any* type of hearing," it believes that the hearing before the ALJ "may not lawfully result in *any action* that deprives GPS or Jerry Gomez of a valuable property right." GPS's argument is essentially that the superior court violated its due process rights. We review the alleged violation of such rights de novo. *Wassef*, 242 Ariz. at 93, ¶ 11.

¶19 Under A.R.S. § 12-910(F), superior courts may modify administrative decisions on review. While the court acknowledged that GPS did not receive sufficient procedural safeguards for revocation, the same cannot be said for summary suspension. It is true that the ROC changed its summary proceeding goal from suspending GPS's license to revoking it. But both the original notice and the supplemental notice relied on the same alleged statutory violations and substantially similar factual contentions as a basis for the discipline sought. Only the requested outcome changed.

¶20 As to remanding the matter to the ROC, "[t]he general rule seems to be that where an administrative agency has . . . acted in violation of procedural requirements . . . the administrative agency is entitled to have the proceedings returned to it." *Zavala v. Ariz. St. Personnel Bd.*, 159 Ariz. 256, 267 (App. 1987) (quoting *Civ. Serv. Comm'n. of City of Tucson v. Mills*, 23 Ariz. App. 499, 502–03 (1975)). On this record, the superior court did not err in modifying the administrative decision or in remanding the matter.

V. Attorney's Fees under A.R.S. § 12-348

¶21 Finally, GPS argues the superior court erred in denying a request for attorney's fees because GPS successfully defended on "the only

issue," which was the revocation of its license. We review de novo whether GPS was entitled to fees under A.R.S. § 12-348(A)(2). *4501 Northpoint LP v. Maricopa Cnty.*, 212 Ariz. 98, 100, ¶ 9 (2006).

¶22 When a party "prevails by an adjudication of the merits" on review of a state agency decision, that party is entitled to attorney's fees. A.R.S. § 12-348(A)(2). A prevailing party must do more than "succeed[] on a significant issue in the litigation," rather they must "receive [some] relief on the merits." *Corley v. Ariz. Bd. Of Pardons and Paroles*, 160 Ariz. 611, 614 (App. 1989). When a court "does nothing more than remand the matter for a new hearing on the merits," a party is not entitled to fees under the statute. *Columbia Parcar Corp. v. Ariz. Dep't. of Transp.*, 193 Ariz. 181, 185, ¶ 21 (App. 1999).

¶23 Here, the superior court did not reach the merits of the license revocation and offered no opinion as to what should happen to GPS's license. The only issue resolved on review was procedural, not merit-based. Because the matter was remanded to the ROC to relitigate the claims involved, GPS did not receive an adjudication on the merits, and is not entitled to fees under the statute. *See 4501 Northpoint LP*, 212 Ariz. at 101, ¶¶ 16, 18.

CONCLUSION

¶24 We affirm the superior court's order. Because GPS did not prevail on appeal, we deny its request for attorney's fees under A.R.S. § 12-348(A)(2).

COURT OF APPEALS
STATE OF ARIZONA

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