

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA07-1192

ERMC, LP, and EMERSON RUSSELL,
APPELLANTS

V.

ARK. BOARD of PRIVATE
INVESTIGATORS and PRIVATE
SECURITY AGENCIES,
APPELLEES

Opinion Delivered SEPTEMBER 24, 2008

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CV2007-2304]

HONORABLE TIM FOX, JUDGE

AFFIRMED

KAREN R. BAKER, Judge

Appellants, ERMC, LP and Emerson Russell, appeal from the Circuit Court's order finding that there was substantial evidence to support the Agency's action and from a decision of the Arkansas Board of Private Investigators and Private Security Agencies, which found that the actions of ERMC and Russell constituted a violation of Arkansas Code Annotated section 17-40-350(A)(1) and Arkansas Code Annotated section 17-40-350(A)(5) and assessing a fine of \$200 against ERMC. ERMC appealed to the Pulaski County Circuit Court, and the Board's order was affirmed. Appellants present three arguments on appeal. First, appellants argue that the Board's findings and order were not supported by substantial evidence and the finding against Emerson Russell was by unlawful procedure. Second, appellants argue that there was no rule, regulation, or statute prohibiting the conduct that was the basis for the Board's order. Third, appellants argue that "incompetence or untrustworthiness" was not demonstrated. We affirm.

Emerson Russell was the manager of ERMC, a licensed private security agency in Arkansas.

Michael Kelly was employed by ERMC as a certified trainer. Kelly's job was to administer tests to security guard applicants before they applied for a license from the Arkansas Board of Private Investigators and Private Security Agency. On December 7, 2006, Kelly administered an exam to applicant Joseph Williams. At the conclusion of the examination, Williams left the test facility with the examination in his possession. Williams then took his application, along with his examination, to the Board to apply for a license as a private security guard.

On December 18, 2006, the Board sent ERMC notice of a hearing regarding its violation of Arkansas Code Annotated section 17-40-350 by allowing Williams to leave the testing facility with the examination. A hearing was held on January 10, 2007. After testimony, the Board entered its findings of fact, conclusions of law, and assessment of a fine of \$200 against ERMC. ERMC and Russell appealed the Board's decision to the Pulaski County Circuit Court, which affirmed the Board's order. From that decision, appellants bring this appeal.

It is not this court's role to conduct a de novo review of the circuit court proceeding; rather, our review is directed at the decision of the administrative agency. *Arkansas Dep't of Human Servs. v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998). When reviewing administrative decisions, we review the entire record to determine whether there is any substantial evidence to support the administrative agency's decision, whether there is arbitrary and capricious action, or whether the action is characterized by abuse of discretion. *Arkansas Dep't of Human Servs. v. Schroder*, 353 Ark. 885, 122 S.W.3d 10 (2003).

To determine whether a decision is supported by substantial evidence, we review the whole record to ascertain if it is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* To establish an absence of substantial evidence to support the

decision, the party challenging the decision must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusions. *Id.* Substantial evidence is valid, legal, and persuasive evidence. *Id.* To set aside an agency decision as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoned, without consideration and with a disregard of the facts and circumstances of the case. *See Partlow v. Arkansas State Police Comm'n*, 271 Ark. 351, 609 S.W.2d 23 (1980).

First, ERMC and Russell argue that the Board's findings and order were not supported by substantial evidence and the finding against Emerson Russell was by unlawful procedure. This court may reverse the agency decision if it concludes the decision is . . . "made upon unlawful procedure." Ark. Code Ann. § 25-15-212(h)(4) (Supp. 2005); *Vancleave v. Arkansas Dept. of Health and Human Services*, 98 Ark. App. 299, 254 S.W.3d 770 (2007). The Board's order was clear in that it assessed a \$200 fine against ERMC. Under these facts, it is clear that the Board took action against Russell only in his capacity as manager of ERMC and ultimately did not make any findings against him individually. Because the Board made no findings against Russell individually, we will not address this portion of appellants' first argument.

Appellants also assert that there was a lack of substantial evidence against ERMC; thus, the Board's findings were arbitrary and capricious. Appellants contend that the only evidence presented against ERMC was that of Corporal Briggs, who testified that Williams brought the examination to him when turning in his application for a security guard license. Appellants assert that outside of Corporal Briggs's testimony, the Board had no other evidence that ERMC was in violation of the statutes. ERMC and Russell, as the parties challenging the Board's decision, have the burden of proving an absence of substantial evidence. *Williams v. Arkansas State Bd. of Physical Therapy*, 353

Ark. 778, 120 S.W.3d 581 (2003). To establish an absence of substantial evidence to support the decision, the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fairminded persons could not reach its conclusion. *Id.* That is not the case here.

The testimony at the hearing was as follows. Corporal Briggs testified that Joseph Williams submitted an application for a license as a private security guard. As Corporal Briggs was speaking to Williams and reviewing his application, Corporal Briggs noticed that Williams had a copy of the written examination. The Board Investigator then interviewed Williams to determine how he obtained the examination. Williams told the investigator that he and one other gentleman took the examination that day. Corporal Briggs stated that his office was unsure of the identity of the other individual that was tested that day, so the office would have “to redo the whole process again.”

Russell testified that he was unaware of the incident involving Williams until he received notice from Corporal Briggs’s office. He stated that the examination found in Williams’s possession was newly written and had been created the year before. Russell also testified that when a copy of the new examination was distributed to ERMC’s Arkansas employees, it was accompanied by a memo from Corporal Briggs emphasizing the confidentiality of the examination material. Clearly, Williams left the testing facility with a copy of the written examination. Corporal Briggs’s testified that as a result of that situation, the “operation here has been compromised.”

It is the Board that determines the weight to be given to the evidence. *McQuay v. Arkansas State Bd. of Architects*, 337 Ark. 339, 989 S.W.2d 499 (1999). In reviewing the record, we give the evidence its strongest probative force in favor of the agency’s ruling. *Arkansas Contractors Licensing Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001). Under these facts,

we hold that there was substantial evidence to support the Board's decision.

Second, appellants assert that there was no rule, regulation, or statute prohibiting the conduct that was the basis for the Board's order. This is untrue. Arkansas Code Annotated section 17-40-350(a)(5) provides:

The Arkansas Board of Private Investigators and Private Security Agencies may revoke, place on probation, or suspend any registration, license, or security officer commission and may either fine in an amount not to exceed one thousand dollars (\$1,000) for each violation of this chapter or reprimand any registrant, licensee, or commissioned security officer, or both, or the board may deny an application for a registration, license, or security officer commission, or renewal thereof, on proof that the applicant, licensee, commissioned security officer, or registrant has: demonstrated incompetence or untrustworthiness in his or her actions.

Here, an applicant left the testing facility with a copy of the examination in hand. While there is no specific prohibition against leaving the testing facility with a copy of the examination, common sense dictates that there was a violation of the trustworthiness of the testing process, and there was sufficient evidence of such a violation.

For appellants's third argument, they assert that "incompetence or untrustworthiness" were not demonstrated, however, the merits of this argument were determined in the above analysis.

Based on the foregoing, we hold that there was substantial evidence to support the Board's decision and affirm.

Affirmed.

GLOVER and VAUGHT, JJ., agree.