

ARKANSAS COURT OF APPEALS

DIVISION III

No. CV-13-39

GORE ENGINEERING ASSOCIATES,
INC.

APPELLANT

V.

ARKANSAS CONTRACTORS
LICENSING BOARD

APPELLEE

Opinion Delivered May 29, 2013

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CV-2012-434-5]HONORABLE XOLLIE DUNCAN,
JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is a second appeal following the Benton County Circuit Court's affirmance of an order of the Arkansas Contractors Licensing Board. The Board found that appellant, Gore Engineering Associates, Inc., during a repair and remediation project performed on the Collier Center in Johnson, Arkansas, had acted as a general contractor without obtaining a license or posting a bond in violation of Ark. Code Ann. §§ 17-25-101 *et seq.* and §§ 17-25-401 *et seq.* (Repl. 2010). In the first appeal, we held that the Board failed to make specific findings of fact that were susceptible to review, and we remanded for the Board to make appropriate findings of fact. *Gore Engineering Associates, Inc. v. Arkansas Contractors Licensing Board*, 2011 Ark. App. 640.

On remand, the Board made findings accompanied by a concise and explicit statement of the underlying facts supporting them; therefore, we are now able to reach the merits of appellant's arguments that the Board erred (1) in finding that the work appellant performed

in managing the project was not work of the type “normally carried out by engineers” and (2) in failing to find that appellant’s client, Mel Collier, acted as his own general contractor. We affirm.

Our courts have on numerous occasions outlined our standard of review of administrative–agency decisions that fall under the Arkansas Administrative Procedure Act:

The standard of review in this area of the law is well–developed. The appellate court’s review is directed not toward the circuit court, but toward the decision of the agency. That is so because administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies. Our review of administrative decisions is limited in scope. Such decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion.

Arkansas State Police Commission v. Smith, 338 Ark. 354, 357, 994 S.W.2d 456, 458 (1999) (internal citations omitted). Appeals from the Arkansas Contractors Licensing Board are governed by the Administrative Procedure Act, Ark. Code Ann. § 25–15–201 *et seq.* (Repl. 2002 and Supp. 2011). The Act requires that the scope of appellate review be limited to ascertaining whether there is substantial evidence to support the agency’s decision or whether the agency’s decision runs afoul of one of the other criteria set out in section 25–15–212(h).¹

¹ Under that section, the court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the agency’s statutory authority;
- (3) Made upon unlawful procedure;
- (4) Affected by other error or law;
- (5) Not supported by substantial evidence of record; or
- (6) Arbitrary, capricious, or characterized by abuse of discretion.

Arkansas Contractors Licensing Board v. Pegasus Renovation Co., 347 Ark. 320, 64 S.W.3d 241 (2001).

To establish an absence of substantial evidence, appellant must demonstrate that fair-minded people could not, on the evidence submitted, reach the conclusion arrived at by the Board. *Id.* In determining whether there is substantial evidence to support the Board's decision, we review the record, giving the evidence its strongest probative force in favor of the agency's findings. *Id.* The question is not whether the evidence would support any other finding but, instead, is whether the evidence supports the finding that was made; it is the prerogative of the Board to believe or disbelieve any witness and to decide what weight to afford the evidence. *Id.*

Appellant's arguments challenge the sufficiency of the evidence to support the Board's finding that appellant was acting as a contractor and was thus required to have a contractor's license and to post a bond with the Board before performing the work. Arkansas Code Annotated section 17-25-101(a)(1) defines "contractor" as:

[A]ny person, firm, partnership, copartnership, association, corporation, or other organization, or any combination thereof, that, for a fixed price, commission, fee, or wage, attempts to or submits a bid to construct or demolish, or contracts or undertakes to construct or demolish, or assumes charge, in a supervisory capacity or otherwise, or manages the construction, erection, alteration, demolition, or repair, or has or have constructed, erected, altered, demolished, or repaired, under his or her, their, or its direction, any building, apartment, condominium, highway, sewer, utility, grading, or any other improvement or structure on public or private property for lease, rent, resale, public access, or similar purpose, except single-family residences, when the cost of the work to be done, or done, in the State of Arkansas by the contractor, including, but not limited to, labor and materials, is twenty thousand dollars (\$20,000) or more.

At the hearing, there was evidence that appellant acted as the agent of the client in construction administration, including obtaining bids; in evaluating the bids and hiring the construction subcontractors; in supervising the subcontractors' work; in approving completed work for disbursement of payment; and in establishing the work schedule so that the facility could remain operational while the remediation was being performed. There was also evidence that the client was not involved and entrusted all of these duties entirely to appellant.

Appellant's first argument is directed to an exception in the licensing requirements for work of the type normally carried out by engineers.² In challenging the Board's finding that appellant's management of the project was not work of the type "customarily furnished by engineers," appellant concedes that there was testimony to support the finding, but argues that the weight of the evidence was insufficient because the witness (Gregory Crow) was biased and thus lacking in credibility. However, matters of weight and credibility are outside the scope of our review. *Arkansas Contractors Licensing Board v. Pegasus Renovation Co.*, *supra*. Here, Crow testified that, in attempting to determine the type of work customarily engaged in by engineers, he spoke to several persons at the State Board of Engineers regarding appellant's role in the Collier Center project and that they were unanimously of the opinion that the supervision in which appellant was engaged in the project was not of the type of supervision normally furnished by engineers. Appellant also argues that the challenged

² A contractor license is not required of "[a]rchitects and engineers, whose only financial interest in a project shall be the architectural or engineering fees for preparing plans, specifications, surveys, and supervision that is customarily furnished by architects and engineers." Ark. Code Ann. § 17-25-102(2) (Repl. 2010).

testimony was based on hearsay. However, because admission of hearsay is permitted in administrative hearings and may itself constitute substantial evidence to support a finding, *see Arkansas Health Planning and Development Agency v. Hot Springs*, 291 Ark. 186, 723 S.W.2d 363 (1987), this argument, too, goes to the weight of the evidence rather than the sufficiency thereof. Based on the record before us, we cannot say that there is no substantial evidence to support the Board's finding that appellant's supervision of the project exceeded that customarily exercised by engineers.

Under this point, appellant further argues that the investigation conducted by the Board was a sham, motivated by political issues, and that the outcome was predetermined. It is the appellant's obligation to raise an issue first to the administrative agency and obtain a ruling thereon in order to preserve an argument for appeal. *Mountain Pure, LLC v. Little Rock Wastewater Utility*, 2011 Ark. 258. This argument was not ruled on by the Board and therefore is not properly before us on appeal.

Appellant's remaining argument is addressed to section 17-25-101(a)(2), an exception in the statutory licensing requirement that applies when the property owner acts as his own general contractor.³ Appellant argues that the Board erred in finding that Mel Collier did not act as his own general contractor. This argument is specious in light of Mr. Collier's

³ [W]hen a person or an entity acts as a contractor in the construction, erection, alteration, demolition, or repair of his or her own or its own property, such action shall not result in the person or entity being required to obtain a license, but the person or entity shall comply with all other provisions of this subchapter.

testimony that he knew of no contracts between appellant and any subcontractors, that he did not know how appellant was negotiating prices with subcontractors, that he never heard any mention of a subcontractor, and that he considered appellant to be in charge of administering the project. We find no error on this point.

Affirmed.

WALMSLEY and WOOD, JJ., agree.

J. Jason Boyeskie, PLLC, by: *J. Jason Boyeskie*, for appellant.

Vicki M. Pickering, Arkansas Contractors Licensing Board, for appellee.