This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0441

In the Matter of the Licensing Order Issued to Gaffney Construction LLC, and Steven Gaffney, Individually.

Filed February 14, 2022
Affirmed
Bratvold, Judge

Minnesota Department of Labor and Industry
OAH 8-1902-36513

Daniel M. Gallatin, Gallatin Law, PLLC, Hugo, Minnesota (for relators Gaffney Construction LLC and Steven Gaffney)

Keith Ellison, Attorney General, Allen Cook Barr, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Department of Labor and Industry)

Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Relators challenge a decision by the commissioner of labor and industry revoking one relator's residential building contractor license and ordering both relators to cease and desist from acting or holding themselves out as residential building contractors and to pay a penalty. Relators argue the commissioner's findings of violations are not supported by substantial evidence and rest on legal error, the sanction imposed is arbitrary and

capricious, and the administrative law judge (ALJ) was biased and made evidentiary errors. We affirm.

FACTS

The following summarizes the commissioner's factual findings after contested case proceedings before an ALJ. Relator Steve Gaffney (individually, Gaffney) is the sole owner of relator Gaffney Construction LLC (collectively, relators). The ALJ determined respondent Minnesota Department of Labor and Industry (department) issued a residential building contractor license, No. BC730208, to Gaffney Construction, effective September 14, 2017, and valid until March 31, 2019.

In early 2017, J.S. (homeowner) hired Gaffney as a licensed real-estate agent to help homeowner find and purchase a home. Gaffney also aided homeowner in the sale of her current home. After failing to find an appropriate existing residence, Gaffney suggested homeowner buy land and build a home. Homeowner testified that, by May 2017, she and Gaffney agreed to build a new home. Gaffney also offered homeowner rent-free parking for her recreational vehicle on Gaffney's Forest Lake property after the sale of her current home. Homeowner accepted this offer and later moved into a camper on Gaffney's property. In June 2017, homeowner bought land in Columbus Township.

In July 2017, Gaffney talked to homeowner about being the residential building contractor for homeowner's new home. Gaffney told homeowner he led a building firm in the past. Gaffney agreed to begin construction in exchange for homeowner paying some expenses. Gaffney testified homeowner wanted him to "move forward with construction

of the house." Relators did not hold a license as a residential building contractor at that time.

Homeowner wrote three checks to relators totaling $16,300. On July 5, 2017, homeowner wrote a $10,000 check to "Steve Gaffney Construction." On July 19, homeowner wrote a $2,500 check to "Steve Gaffney Construction." On August 1, homeowner wrote a $3,800 check to "Steve Gaffney." Homeowner testified the checks were for the costs of drafting building plans, excavating, and purchasing building materials. Gaffney cashed the checks.

Gaffney's physicians told him in August 2017 that he should not participate in heavy labor because of a serious heart condition that would require bypass surgery. In October 2017, Gaffney had bypass surgery and was hospitalized.

On October 11, 2017, Gaffney and homeowner signed a contract drafted by Gaffney to have Gaffney Construction complete the building of homeowner's house. The contract stated, among other things, that Gaffney Construction would begin the work "within 30 days of October 11, 2017 and shall complete the work on or before January 31, 2018, time being of the essence of this contract."

In October or November 2017, homeowner began living in the basement of Gaffney's house at his invitation. On November 28, homeowner obtained a loan for the construction costs. She deposited the loan proceeds in a trust account, from which Gaffney "reimbursed himself" and paid vendors for working on the new home.

As of January 31, 2018, the house was not completed, and homeowner could not move in. The ALJ found homeowner moved into the house on a temporary certificate of

occupancy in May 2018, though construction was still ongoing. Leon Ohman, the local building inspector, visited the house several times between November 2017 and November 2019 to determine whether the final certificate of occupancy should be issued.

On April 15, 2019, Ohman found two violations. Ohman ordered relators to correct the violations within seven days, but when he returned for another inspection four months later, the violations had not been addressed. Ohman issued the final certificate of occupancy stating the "dwelling and the garage meet the minimum building code standards" on November 7, 2019.

Homeowner filed a complaint with the department in spring 2019 because "although she had been allowed to move into her house, the house still wasn't completed." Wayne Gartland was the investigator assigned to homeowner's complaint. As a result of Gartland's investigation, the commissioner assessed a penalty of $31,300 against relators, revoked Gaffney Construction's license, and ordered relators to cease and desist both holding themselves out as and acting as a residential building contractor. The licensing order concluded relators "held themselves out as a residential building contractor . . . before having a license," breached the building contract, "failed to correct violations of the State Building Code after violations were documented," and "provided misleading or incomplete information to the Commissioner." The $31,300 penalty consisted of $16,300 for the checks homeowner wrote to relators before the contractor license was issued, $2,500 for installing a 20-year-old fireplace, $2,500 for insurance relators did not purchase, and a $10,000 fine under Minn. Stat. § 326B.082, subd. 12(b) (2020) (allowing a $10,000 penalty for each violation).

Relators appealed the commissioner's order. An ALJ conducted an evidentiary hearing July 15–16, 2020, and received testimony from homeowner, Ohman, Gartland, and Gaffney. In a November 5, 2020 order, the ALJ recommended that the commissioner deny the appeal, affirm the revocation of the license, affirm the cease-and-desist order prohibiting Gaffney from holding Gaffney Construction out as a residential building contractor, and modify the penalty by reducing it to $16,300. On March 3, 2021, the commissioner adopted the ALJ's findings of fact and conclusions of law without change and modified the penalty to $16,300.

Relators petitioned for a writ of certiorari.

DECISION

I. The commissioner's factual findings are supported by substantial evidence and are not based on legal error.

Appellate courts review an agency's final decision in a contested case in accordance with the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.001–.69 (2020). *Eneh v. Minn. Dep't of Health*, 906 N.W.2d 611, 613 (Minn. App. 2018). An administrative agency's decision enjoys a presumption of correctness; the appellate court defers to the agency's expertise and special knowledge in its field. *In re Annandale NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 513 (Minn. 2007).

A reviewing court may reverse or modify an agency's decision if the decision: (a) violates a constitutional provision; or (b) exceeds the statutory authority or jurisdiction of the agency; or (c) is made upon unlawful procedure; or (d) is affected by other error of law; or (e) is unsupported by substantial evidence; or (f) is arbitrary or capricious. Minn.

Stat. § 14.69. "Substantial evidence is defined as (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Cannon v. Minneapolis Police Dep't*, 783 N.W.2d 182, 189 (Minn. App. 2010) (quotation omitted).

The commissioner may revoke a contracting license if the commissioner finds that the person holding the license "committed one or more violations of the applicable law." Minn. Stat § 326B.082, subd. 11(b)(1) (2020). If the commissioner determines a license should be revoked, then the commissioner must issue an order. *Id.*, subd. 12(a) (2020). The commissioner's order "may include an assessment of monetary penalties and may require the person to cease and desist from committing the violation." *Id.*, subd. 12(b) (2020). The monetary penalty "may be up to $10,000 for each violation or act, conduct, or practice committed by the person." *Id.*

The commissioner found relators committed four violations: they (1) acted or held themselves out as a residential building contractor without a license; (2) breached the construction contract with homeowner and thereby injured her; (3) "did not timely comply with correction orders" issued by a certified building official; and (4) provided incomplete information to the commissioner about insurance policies for homeowner's project. Relators argue the commissioner's findings are not supported by substantial evidence or are affected by legal error. Because the commissioner assessed a penalty of $16,300, we must affirm two violations to affirm the commissioner's decision. *Id.*

A. Relators acted or held themselves out as a residential building contractor without a license.

A residential building contractor must be "licensed as a residential building contractor by the commissioner." Minn. Stat. § 326B.805, subd. 1 (2020). With limited exceptions not relevant here, "no persons required to be licensed by subdivision 1 may act or hold themselves out as a residential building contractor . . . without a license issued by the commissioner." *Id*., subd. 3 (2020).

The commissioner found relators held themselves out "as capable to perform residential home construction, accepted money for this work, and acted as [a] residential building contractor[]" without a license. Record evidence supports this finding. Homeowner testified she agreed with Gaffney to build her house "in April of 2017." Gaffney and homeowner had more discussions in July, and they agreed Gaffney would proceed if homeowner paid for expenses. Gaffney accepted $16,300 in payments from homeowner in July and August 2017. The ALJ found homeowner credibly testified that "she understood that the[] payments were to underwrite the costs of drafting building plans, excavating and purchasing building materials." Gaffney testified he paid a drafting company in July 2017 for designing the plans "ultimately used for [homeowner's] house." It is undisputed relators did not have a residential building contractor license when Gaffney agreed to build the house and accepted these payments because the department did not issue the license until September 2017.

Relators argue the commissioner's determination lacks substantial evidence for four reasons. First, relators argue homeowner knew Gaffney was not licensed when she made

the July and August payments. But homeowner's knowledge is irrelevant to a violation of Minn. Stat. § 326B.805, subd. 1. As the department argues in its brief, Minnesota "prohibits [unlicensed] people from offering to perform construction services." The situation is akin to a person offering to perform legal services while disclosing to the potential client that they are not a licensed attorney. *See In re Disciplinary Action Against Grigsby*, 815 N.W.2d 836, 839, 841–42 (Minn. 2012) (determining a lawyer committed misconduct by filing an appellate brief on behalf of a former client after being suspended, even though the client knew of the lawyer's suspension when he filed the brief).

Second, relators argue Gaffney accepted the payments from homeowner to pay for his living expenses, not to build the home. In essence, relators ask us to reject the commissioner's determination that homeowner "testified credibly" she understood the payments were to underwrite costs for her home. We are not persuaded because this court defers to the "credibility determinations made by an agency's fact-finder." *In re License of Thompson*, 935 N.W.2d 147, 156 (Minn. App. 2019), *rev. denied* (Minn. Dec. 17, 2019).

Third, relators contend the building contract was signed after the license was issued. While accurate, this fact does not undermine the commissioner's finding that relators acted or held themselves out as a residential building contractor *before* Gaffney Construction had a license. The violation did not occur when the contract was signed, but when relators acted or held themselves out as a residential building contractor in July and August 2017. *See* Minn. Stat. § 326B.805, subd. 3 (providing "no persons required to be licensed" by law may "act or hold themselves out as a residential building contractor").

Fourth, relators argue no "special skills" were provided to homeowner before the contract was signed, and the statutory definition of residential building contractor requires the performance of "two or more special skills." A person is a residential building contractor if they are in the business of "building residential real estate, or of contracting or offering to contract with an owner to build residential real estate, by providing *two or more special skills*," which are defined by statute as excavation, masonry or concrete, carpentry, interior finishing, exterior finishing, drywall and plaster, residential roofing, or general installation specialties. Minn. Stat. § 326B.802, subds. 11, 15 (2020) (emphasis added).

We reject this argument. The plain language of subdivision 3 does not require proof a person performed special skills as a residential building contractor; it only requires proof of acting or holding oneself out as a residential building contractor who could perform such special skills. *See* Minn. Stat. § 326B.805, subd. 3. The definition of a residential building contractor includes those in the business of "offering to contract" with another "to build residential real estate, by providing two or more special skills." Minn. Stat. § 326B.802, subd. 11. As discussed above, the commissioner found homeowner credibly testified she paid relators to provide excavation and "building materials." The special skills listed in the appliable statute include both excavation and interior and exterior finishing. *See id.*, subd. 15. The applicable statutes prohibit exactly what relators did: they acted or held themselves out as a residential building contractor when Gaffney offered to build a home for homeowner before Gaffney Construction had a residential building contractor's license.

Thus, the commissioner's finding that relators acted or held themselves out as a residential building contractor without a license is supported by substantial evidence and is not affected by legal error.

B. Relators breached the contract with homeowner.

Residential building contractors are subject to discipline if they "performed negligently or in breach of contract, so as to cause injury or harm to the public." Minn. Stat § 326B.84(4) (2020). The commissioner found relators breached the contract with homeowner as follows: (1) the house was completed "nearly two years after the agreed-upon completion date for construction"; (2) neither "Gaffney nor his firm maintained a list of each party that furnished materials or labor towards construction of [homeowner's] home and the dollar amounts that were expected to be due"; (3) "Gaffney and his firm deviated from the agreed-upon specifications without obtaining signed change orders"; and (4) relators "failed to maintain workers' compensation insurance, general risk insurance, and builders' risk insurance." We need only consider the first of these breaches.

Relators argue the commissioner's conclusion that a breach of contract occurred was erroneous for three reasons, which we discuss in turn. First, relators contend they "substantially performed all the essential elements" of the contract. We are not persuaded. The contract specifically provides, "time being of the essence." The contract included a promise to complete the home in January 2018. Relators missed that date by 22 months; the final certificate of occupancy was not issued until November 2019. We interpret and apply unambiguous contract terms that declare time is of the essence. *See Grant v. Munch*, 55 N.W. 902, 903 (Minn. 1893) ("[T]he intention of the parties must govern, and if the

intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, then the time of completion, or of performance, or of complying with the terms, will be regarded as essential in equity, as much as in law."). Because relators and homeowner included "time being of the essence" in the contract, the commissioner did not err by determining the delayed completion was a material breach. *Cf. Baker Domes v. Wolfe*, 403 N.W.2d 876, 878 (Minn. App. 1987) (pointing to the parties' failure to include a "time is of the essence" clause as a reason to reject the argument that time was of the essence).

Second, relators argue the commissioner's findings failed to include harm to the public or homeowner from the breach. We disagree. The commissioner determined relators' "substandard performance injured" homeowner, commenting on the 22-month delay in completion of the contract and homeowner living in Gaffney's basement for months before she moved into the unfinished house "while construction was still underway." These findings support the commissioner's conclusion that homeowner was harmed by the breach of contract.

Third, relators argue the harsh, early winter and Gaffney's medical issues excuse any breach of contract because of the force majeure clause in the contract. The commissioner determined the force majeure clause did not apply because cold temperatures between November and January were foreseeable and Gaffney's physicians informed him in August that he needed surgery and that he should not perform heavy labor. We are not persuaded that this determination is erroneous. Force majeure includes unanticipated or uncontrollable events. *See Black's Law Dictionary* (11th ed. 2019) (defining a force

majeure event as unanticipated and uncontrollable). Additionally, relators never provided written notice to the homeowner though the force majeure clause required "prompt written notice" of "causes beyond either party's reasonable control." Even if we accept relators' force majeure argument for weather delays from November 2017 to January 2018 and health delays from April 2018 to June 2018, approximately 16 months still passed before relators completed construction. Thus, the commissioner correctly rejected relators' force majeure defense.

In sum, to affirm the commissioner's penalty of $16,300, we need only affirm the commissioner's determinations that relators committed two violations. *See* Minn. Stat. § 326B.082, subd. 12(b) (stating a fine of up to $10,000 can be assessed for each violation). Because we discern no error in the commissioner's determination that relators (1) acted or held themselves out as a residential building contractor without a license, and (2) breached the contract with homeowner by completing construction long after the agreed-upon date, we need not determine whether relators committed other violations. Based on the two violations discussed, we affirm the commissioner's determination that relators violated applicable law and the commissioner's decision to revoke Gaffney Construction's license.

II. The sanctions imposed by the commissioner are neither arbitrary nor capricious.

Sanctions lie within an agency's discretion. *In re Comm'n Investigation of Issues Governed by Minn. Stat. § 216A.036*, 724 N.W.2d 743, 748 (Minn. App. 2006). A reviewing court may reverse an agency decision if it is arbitrary and capricious. Minn. Stat. § 14.69. "[A]n agency ruling is arbitrary and capricious if the agency (a) relied on factors

not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise." *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006). In imposing a sanction, an agency must consider: (1) "the willfulness of the violation"; (2) "the gravity of the violation"; (3) "the history of past violations; (4) the number of violations; (5) the economic benefit gained by the person by allowing or committing the violation; and (6) other factors that justice may require." Minn. Stat. § 14.045, subd. 3(a).

Relators support their argument that the commissioner's decision was arbitrary and capricious by citing *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). In *Blue Cross*, the supreme court stated, "rejection of the ALJ's recommendations without explanation" may make an agency decision arbitrary and capricious. *Id.* We are not persuaded because citation to *Blue Cross* is inapt. The commissioner did not reject the ALJ's recommendation but adopted it along with the ALJ's reasoning.[1]

[1] The ALJ reasoned,

> there is useful public purpose in levying a penalty that requires Mr. Gaffney to surrender the money that he received for home construction, but before he was licensed as a residential building contractor. A fine of $16,300 has a direct, one-to-one relationship with the benefits that Mr. Gaffney should not have obtained in the first instance. Likewise, the signaling that the Department makes to others from such a penalty, so as to deter them from similar misconduct, is clear: If unlicensed builders

Relators also argue the commissioner ignored "mandatory elements" when imposing the sanctions against relators. While relators cite no caselaw or statutory authority to identify "mandatory elements," we understand the argument to refer to the factors listed in Minn. Stat. § 14.045, subd. 3. The commissioner adopted the ALJ's reasoning, and the ALJ cited these factors as supporting the decision to sanction Gaffney $16,300. Relevant to our analysis of this issue, the commissioner concluded there was a "useful public purpose in levying a penalty that requires Mr. Gaffney to surrender the money that he received" before he was licensed. Reduction of the penalty was warranted, however, because as the ALJ explained, the "connections between" the factors and the other violations "are much less clear." The commissioner therefore applied the statutorily required factors, and we conclude the commissioner's sanctions are neither arbitrary nor capricious.

III. We decline to consider relators' argument about ALJ bias and evidentiary rulings.

Relators argue the ALJ "displayed plain bias and contradicted his own acknowledgement of his role," as well as made evidentiary errors. Relators raised neither issue to the ALJ or the commissioner. Generally, we do not consider issues raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We therefore need not consider these issues further.

Affirmed.

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receive money for home construction, they won't be able to keep it.