STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 18, 2023]

KUMUDU GUNARATHNE	:	
	:	
v.	:	**C.A. No. PC-2019-5078**
	:	
STATE OF RHODE ISLAND DEPARTMENT OF LABOR & TRAINING	:	

DECISION

MONTALBANO, J. Now before the Court is an appeal from the April 11, 2019 decision of the Assistant Director of Workforce Regulation and Safety of Appellee Rhode Island Department of Labor and Training (DLT), adopting the recommendation of the DLT Mechanical Board to uphold fines relating to findings that Appellant Kumudu Gunarathne (Appellant) committed three violations of G.L. 1956 § 28-27-5. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

Following a complaint by an East Providence homeowner, a DLT mechanical investigator determined that Appellant had advertised, contracted for, and engaged in mechanical work requiring a master pipefitter license that Appellant did not hold in violation of § 28-27-5. *See* R. at 3. Section 28-27-5(a) provides that

> "[n]o person shall: (1) Engage in this state in the business of the mechanical trades . . . ; (2) Enter into contracts or agreements for the installation, maintenance, repair, or servicing in the mechanical trades; (3) Advertise or represent in any form or matter that they are masters or that they will install pipefitting or refrigeration/air conditioning, or air distribution systems . . . unless the person

> possesses a valid license issued by the department of labor and training under this chapter." (Section 28-27-5(a).)

After interviewing the homeowner and reviewing an HVAC quote containing a header with Appellant's company name—K&B Mechanical, LLC—and indicating that the quote was "FROM: KUMUDA GUNARATHNE," the investigator determined that Appellant had advertised "new HVAC unit installing," specifically a "[f]urnace with AC[,] [n]ew duct work with [f]lue pipe" in violation of § 28-27-5(a)(3). *Id.* at 3, 8. After reviewing the work performed at the homeowner's residence (the Job Site) and obtaining a written statement from the homeowner indicating that the homeowner's general contractor—Turner Construction—had subcontracted "the HVAC work" to Appellant's company, the investigator also determined that Appellant had contracted for and engaged in installation of the hot air furnace without the required master pipefitter 1 or 2 license, further violations of § 28-27-5(a)(1) and (2). *Id.* at 3. The investigator recommended a $1,500 fine for each violation, totaling $4,500. *Id.*

The DLT's Mechanical Board conducted an April 3, 2019 evidentiary hearing during which it voted to confirm the recommended violations and uphold the fines. *See* Tr. 29:5-30:21. At the start of the hearing, the investigator read his report into the record. *Id.* at 4:16-5:20. Appellant's counsel stated that he did not object to any statement by the investigator as to "what he observed," but did object to the admission of any statement by the homeowner included in the investigator's report as hearsay. *Id.* at 6:15-7:1 The Board's counsel advised that the homeowner's statements were admissible, notwithstanding that the homeowner was not present to testify, and that it would then be the Board's responsibility to consider the weight to afford such statements. *Id.* at 7:7-17. After questioning the investigator, the Board chairman stated that, at minimum, the advertising violation could be established by (1) the quote containing Appellant's name that included "furnace" work to be performed at the Job Site address, (2) Secretary of State records

stating that Appellant's company engaged in "heating," and (3) the mechanical permit for the Job Site indicating that the work included "INSTALLING NEW FURNACE" and listing Appellant as the relevant "Contractor Name." *Id.* at 14:23-15:10, 19:14-18, 20:24-21:2; *see also* R. at 6-9.

Appellant then agreed through counsel to respond to questions from the Board. *See* Tr. 26:18-27:3. Asked whether he performed work at the Job Site, Appellant stated that he did "air conditioning, piping, and duct work." *Id.* at 27:2-3. As a Board member started to ask about the furnace work, Appellant interjected and stated, "Someone else[ ] did the piping and everything else." *Id.* at 27:4-6. The Board member completed his question, specifically asking who installed the furnace, to which Appellant responded that although he ordered the furnace, he then didn't do "anything." *Id.* at 27:7-11. Appellant stated that the Job Site's general contractor picked up the furnace, delivered it to the site, and installed it. *Id.* at 27:15-28:9. The Board then voted to confirm all three violations and uphold the fines, after which the DLT's Assistant Director of Workforce Regulation and Safety issued an April 11, 2019 decision adopting the Board's recommendation. *Id.* at 29:5-30:21; R. at 1-2.

Appellant timely appealed to this Court and now argues that the investigator and the Board relied upon impermissible hearsay—namely, the homeowner's statements as included in the investigator's report—and as a result, the April 11, 2019 decision was not supported by legally-competent evidence. (Pl.'s Br. on the Merits (Pl.'s Br.) 2-4.) More specifically, Appellant claims that hearsay is inadmissible in administrative proceedings unless "effectively inconsequential." *See* Pl.'s Br. 2-3 (quoting § 42-35-10(1) ("[W]hen necessary to ascertain facts not reasonably susceptible of proof under [the Rhode Island Rules of Evidence], evidence not admissible under those rules may be submitted . . . if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs."). Appellant now also claims, in his briefing and

not otherwise supported by affidavit, that "had anyone asked him," he "would have testified that he simply hired someone else to do the installation." *Id.* at 2.

II

Standard of Review

The Administrative Procedures Act confers jurisdiction on the Superior Court to review final administrative orders in contested cases. (Section 42-35-15(b).) When reviewing the decisions of an administrative agency, "the Superior Court sits as an appellate court with a limited scope of review." *Mine Safety Appliances Co. v. Berry*, 620 A.2d 1255, 1259 (R.I. 1993). Notably, "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." (Section 42-35-15(g).)

> "The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant 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 statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id.*

"In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" *Auto Body Association of Rhode Island v. State of Rhode Island Department of Business Regulation*, 996 A.2d 91, 95 (R.I. 2010) (quoting *Rhode Island Public Telecommunications Authority v. Rhode Island State Labor Relations Board*, 650 A.2d 479, 485 (R.I. 1994)). Legally competent or substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a

scintilla but less than a preponderance." *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981). The Court cannot "weigh the evidence [or] pass upon the credibility of witnesses[.]" *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977).

III

Analysis

In opposing the Board's admission of the homeowner's witness statement into the record, Appellant relies exclusively on a 2015 Superior Court decision, *In re Tolias, Petry, Wrenn*, No. PC-2012-5551, 2015 WL 631628 (R.I. Super. Feb. 10, 2015). (Pl.'s Br. 3-4.) Notwithstanding that the decisions of other Superior Court justices are not binding on this Court, *see Forte Brothers, Inc. v. State Department of Transportation*, 541 A.2d 1194, 1196 (R.I. 1988), Appellant overstates the holding of that decision.

Contrary to Plaintiff's assertion that *In re Tolias, Petry, Wrenn* "specifically held that any relaxation of the hearsay rule in the administrative setting is limited to matters that are effectively inconsequential," that decision actually stated that "a hearing officer *should admit* reliable hearsay evidence" and that "[t]he decision on admission and weight of hearsay evidence is left within the sound discretion of the hearing officer[.]" *In re Tolias, Petry, Wrenn*, 2015 WL 631628, at *9 (emphasis added). Hearsay is admissible in the agency context because "the purpose of the hearsay exclusion is to prevent juries from rendering a verdict based on 'unreliable or confusing testimony'"; and that "danger is not present in administrative hearings because the hearing officer is trained to be an expert in his or her capacity, unlike the layperson on a jury[.]" *Foster-Glocester Regional School Committee v. Board of Review*, 854 A.2d 1008, 1018 (R.I. 2004) (quoting *DePasquale v. Harrington*, 599 A.2d 314, 316 (R.I. 1991)); *see also In re Tolias, Petry, Wrenn*,

2015 WL 631628, at *9 n.16. Consequently, our Supreme Court has plainly stated that "hearsay evidence is admissible in administrative hearings." *Foster-Glocester Regional School Committee*, 854 A.2d at 1018. Neither Rhode Island's courts nor the Administrative Procedures Act have limited admissible hearsay to "effectively inconsequential" matters. *See id.*; § 42-35-10(1) (mandating exclusion only for "[i]rrelevant, immaterial, or unduly repetitious evidence").

In any event, the record reflects that the Board did not exclusively rely on the homeowner's statements in making its findings and recommendation. *See* R. at 2; Tr. 14:23-15:10, 19:14-18, 20:24-21:2. Instead, the Board explicitly referenced the "Quote for New HVAC Unit Installing" containing Appellant's name and company information; Secretary of State records pertaining to Appellant and his company; and the Job Site's mechanical permit to infer that Appellant had advertised, contracted, and engaged in unlicensed heating-related work. *See* R. at 6-9. The record also included the investigator's personal observations at the Job Site "view[ing] the work that was done," including installation of a new gas-fired hot air furnace and central air conditioning system. *Id.* at 3. Taken together, this admissible, non-hearsay, and legally competent evidence adequately supports the Board's permissible inference that Appellant had committed the charged violations. *See E. Grossman & Sons, Inc.*, 118 R.I. at 285, 373 A.2d at 501; *Correia v. Norberg*, 120 R.I. 793, 799, 391 A.2d 94, 97 (1978) ("We may not pass on issues of credibility nor determine if evidence is strong or weak, direct or circumstantial" so long as the record reflects "any legal evidence to support the decision[.]").

Having made clear to Appellant during the hearing that the Board believed there existed sufficient evidence to support the three charged violations, Appellant had the right to present a defense—a right he chose to forego. *See* § 42-35-9(c) ("Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.") Consequently, Appellant's

argument to this Court that "had anyone asked him, [he] would have testified that he simply hired someone else to do the installation" is misguided—he had the opportunity to make such exculpatory statements in his own defense and to present any potentially corroborating evidence. *See* Pl.'s Br. 2; § 42-35-9(c). While Appellant's counsel repeatedly stated that it was not Appellant's burden to contribute facts to establish the DLT's prima facie case, once the Board communicated that they had found sufficient evidence in the record to support the charges, any subsequent decision by Appellant to forego a viable defense—that he had not performed the disputed work—and instead elect to appeal the evidentiary sufficiency of the DLT's prima facie case was his own tactical decision, a decision he will have to live with. *Cf. State v. Welch*, 114 R.I. 187, 190, 330 A.2d 400, 401 (1975).

Even more fatal to Appellant's after-the-fact claim that he had hired someone else to perform the furnace work is that such a claim wholly contradicts his explicit statement before the Board. *Compare* Pl.'s Br. 2, *with* Tr. 27:7-28:9. Appellant was, in fact, asked at the hearing who installed the furnace, and he named the general contractor, not his own subcontractor. *Id.* at 27:21-28:23. Any contrary, unsworn, post-hearing statement included in a memorandum by counsel is not competent evidence upon which this Court could reverse the DLT's determination. *See Martin v. Howard*, 784 A.2d 291, 298-99 (R.I. 2001) ("Arguments of counsel are not evidence."); § 42-35-15(f) (judicial review of an agency decision "shall be confined to the record").

IV

Conclusion

For the reasons set forth herein, this Court affirms the DLT's April 11, 2019 decision. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Kumudu Gunarathne v. State of Rhode Island Department of Labor & Training**
CASE NO:	**PC-2019-5078**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 18, 2023**
JUSTICE/MAGISTRATE:	**Montalbano, J.**
ATTORNEYS:	
For Plaintiff:	**John C. Revens, Jr., Esq.**
For Defendant:	**Robert J. Cosentino, Esq.**