**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

February 5, 1997

**NOTICE**



**No. 95-2772**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

**MICHAEL A. BLAWAT,**

**Plaintiff-Appellant,**

**v.**

**COMMISSIONER OF INSURANCE,**

**Defendant-Respondent.**

APPEAL from an order of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Michael A. Blawat has appealed from a trial court order affirming a decision issued by the Office of the Commissioner of Insurance (OCI) revoking Blawat's license as an insurance agent and imposing a forfeiture of $10,000. Although Blawat raises numerous issues, none of them provide a basis for relief. We therefore affirm the trial court's order.

Blawat was a licensed insurance agent who was president and sole shareholder of Allied Senior Services Insurance and Investments Ltd., Inc.

(Allied). Allied contracted with independent insurance agents to handle the transmittal of insurance applications and premiums to insurance companies for them. When it received commissions from insurance companies, Allied would retain a portion of the commission itself before paying the agent.

The Allied Council of Senior Citizens of Wisconsin, Inc. (the Council), a not-for-profit agency located in the same building as Allied, also contracted with Allied to provide health insurance services for its members. This action arose from fliers mailed out by the Council, which stated that the Council had "an agreement with one of the top experts in the state to analyze health insurance policies so we can recommend the most cost effective ones." The flier included a coupon and advised recipients to mail in the attached coupon if they believed they were paying too much for health care. Similar coupons were included with brochures distributed by Waukesha Memorial Hospital in the Waukesha area between 1990 and 1992. Those brochures advertised the Waukesha Care Wise 65 Program to senior citizens and solicited memberships in that program. Blawat's aunt administered the Care Wise program.

After a lengthy hearing at which evidence indicated that the coupons sent out with the Council fliers and the Care Wise brochures were returned to Allied, Blawat was found guilty by OCI of violating various administrative code provisions and state statutes. Specifically, he was found guilty of violating WIS. ADM. CODE § INS 3.39(15), which requires issuers and agents to file with OCI copies of any advertisements used in connection with the sale of Medicare supplement policies issued after December 31, 1989 (the presubmission rule). He was also found guilty of violating WIS. ADM. CODE § INS 3.39(24)(c)3, which prohibits "cold lead advertising," defined as making use "directly or indirectly" of any method of marketing which fails to disclose that a purpose is the solicitation of a sale of insurance and that a contact will be made by an agent or issuer.

Blawat was additionally found guilty of violating WIS. ADM. CODE § INS 3.39(24)(e)2, which provides that in regard to any transaction involving a Medicare supplement policy, no agent may knowingly attempt to prevent or dissuade any person from cooperating with the OCI in any investigation. The OCI found that Blawat violated this rule by threatening an agent who provided information regarding use of the coupons to OCI, and by designing two letters

(the privacy letters) to be signed by Allied policyholders requesting, among other things, that insurance companies which issued policies through Allied refrain from releasing the policyholders' names or documents concerning them to any regulatory agency.

Blawat was also found guilty of violating § 628.34(1)(a), STATS., which provides that no licensed insurance agent "may make or cause to be made any communication" which contains false or misleading information, including information which is misleading because of incompleteness, relating to an insurance contract or the insurance business. OCI found that Blawat violated this statute by his use of the fliers and brochures and by giving incorrect, evasive and misleading information to OCI during its investigation and his testimony. Pursuant to § 601.65(2), STATS., OCI found Blawat to be liable for a forfeiture of $10,000 for the various violations. It also revoked his license as an insurance agent, providing that he could reapply for a license in five years.

Blawat's first argument is that OCI acted unconstitutionally and abused its discretion by revoking his license as retaliation for his exercise of his First Amendment rights. He contends that OCI retaliated against him by commencing this investigation one day after he spoke at a public hearing in opposition to a rule change being proposed by OCI. He contends that OCI also retaliated against him for his use of the privacy letters, which he alleges reflected his legitimate interest in senior citizen privacy rights and were not intended as an obstruction of the OCI investigation.

To establish a First Amendment claim, a claimant must show that the conduct involved was constitutionally protected and was a substantial or motivating factor in the alleged retaliation. *See* ***Mount Healthy City Sch. Dist. v. Doyle***, 429 U.S. 274, 287 (1977). Blawat alleges that retaliation is shown because OCI began investigating him the day after he spoke at the public hearing; OCI delayed releasing a memorandum which established when the investigation began; no other agent of Allied was prosecuted; and there was no evidence that the privacy letters were intended to obstruct the investigation.

Blawat's claim that he was retaliated against is repudiated by testimony that OCI began investigating him in 1989, and that the investigation

was already pending on June 13, 1990, the day after Blawat spoke against the rule change. The memorandum referred to by him does not prove otherwise. It is dated June 13, 1990, but is captioned "Cases Update" and merely indicates that Blawat was discussed at an OCI meeting and that an OCI attorney was told to "look at the file," thus corroborating the testimony that an investigation was already pending.

The mere fact that OCI did not prosecute other Allied agents for use of the coupons does not demonstrate retaliatory motive, particularly since the other agents were found to be honest and cooperative by OCI when it attempted to investigate the matter. In any event, since the evidence clearly supports OCI's findings of violations by Blawat, OCI's decision to investigate and prosecute him cannot be deemed unreasonable or to have been based on retaliation rather than a proper agency interest in enforcing rules and statutes enacted for the protection of the public.

Blawat contends that OCI's finding that his use of the privacy letters was an attempt to obstruct the investigation is against the substantial weight of the evidence, and thus proves that the prosecution was retaliatory. Under the substantial evidence test set forth in § 227.57(6), STATS., a finding of fact made by an agency may not be disturbed if, upon an examination of the entire record, the evidence is such that a reasonable person might have reached the same decision as the agency. *See* ***Omernick v. DNR***, 100 Wis.2d 234, 250, 301 N.W.2d 437, 445 (1981). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See* ***Hamilton v. DILHR***, 94 Wis.2d 611, 617, 288 N.W.2d 857, 860 (1980). The agency's findings of fact are binding even if the evidence is subject to other reasonable or plausible interpretations. *See* ***id.***

Testimony by Allied agents John Clougherty and Joseph Braun supported an inference that the privacy letters were intended to prevent the OCI from learning the names of Allied's policyholders, and thus to prevent an investigation as to whether sales to them involved illegal practices. As discussed in the OCI decision, this inference was corroborated by evidence that the letters were designed by Blawat, that Blawat told Allied agents to get the signatures of Allied policyholders on them, and that the letters pertaining to Medicare supplement policyholders included a line stating that the policyholder's application for coverage "did not come about as a result of any

kind of direct mail advertising," a statement which was relevant to the investigation but completely irrelevant to the privacy issue.

In addition, as noted in the OCI decision, while the letters specified state legislative and regulatory agency recipients, evidence indicated that with the exception of one conversation between Blawat and his state representative, the letters were sent only to companies which issued policies through Allied, asking them not to release information about the policyholders and further supporting an inference that they were intended to affect the investigation, not a public policy debate. Moreover, while Blawat may be correct in asserting that the investigation was not, in fact, impeded by the letters, WIS. ADM. CODE § INS 3.39(24)(e)2 is violated even when there is merely an attempt to prevent or dissuade a person from cooperating with an investigation.

We also reject Blawat's arguments regarding procedural unfairness. Section 601.41(1), STATS., requires the OCI to "act as promptly as possible under the circumstances" on all matters placed before it. This case involved a lengthy investigation and hearing, numerous motions and two intervening suits. Under these circumstances, we cannot say that the matter was not handled as promptly as possible under the circumstances. Moreover, we reject Blawat's argument that he was treated unfairly because the agency did not grant his April 1992 request to present the matter directly to Robert Haese, the then-commissioner of insurance. Haese, who was no longer the commissioner at the time of the hearing in this case, testified at the hearing that in his opinion the fliers and brochures were not advertisements to which WIS. ADM. CODE § INS 3.39(15) applied.

Blawat complains that he suffered prejudice because if the matter had been presented to Haese in 1992, the case would have been dismissed. However, this allegation establishes no procedural unfairness warranting relief under § 227.57(4), STATS., since nothing in the law entitled Blawat to circumvent the investigatory and contested case procedure and present his case directly to the commissioner.[1]

[1] Former commissioner Haese's subsequent testimony that the fliers and brochures did not

Blawat next argues that the hearing examiner who presided in this case lacked the authority to revoke his license. He relies upon § 628.10(2)(b), STATS., which provides that after a hearing, the commissioner may revoke an agent's license. However, § 601.18, STATS., further provides that any power vested in the commissioner by law may be exercised or discharged by any employee of the commissioner's office by the commissioner's delegated authority. In addition, pursuant to § 227.46(3)(a), STATS., an agency may order that the hearing examiner's decision be the final decision of the agency. Here, Acting Commissioner of Insurance John Torgerson directed that the hearing examiner's decision stand as the final decision in the case.

We also reject Blawat's argument that Mary Alice Coan, the attorney who acted as hearing examiner in this case, was precluded from doing so because she was an agency official who participated in the decision to commence the proceeding against him. Blawat's argument is based on § 227.46(5), STATS., which provides that if the decision to file a complaint or otherwise commence a proceeding to impose a sanction is made by one or more of the officials of an agency, the hearing examiner shall not be an official of the agency. Blawat appears to argue that because Torgerson participated in the decision to file a complaint against Blawat, he could not appoint Coan, an agency attorney, as hearing examiner. He also argues that Torgerson's appointment of Coan as the final decision maker elevated her to the level of an agency official, and thus rendered her unable to act as the hearing examiner.

The latter argument is circular and unreasonable. Section 227.46(1), STATS., expressly permits an agency to designate an employee on its staff as a hearing examiner to preside over a contested case. The appointment of the employee does not convert that employee to an official and thus render the appointment improper. Since nothing in the record indicates that Coan was an agency official or a participant in the investigation or the filing of the complaint, no basis exists to conclude that her appointment was improper.

Blawat next argues that the hearing examiner's findings were contrary to the substantial weight of the evidence, evincing bias. We will address Blawat's arguments on this issue seriatim.

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constitute advertising was merely an opinion which the OCI was not required to accept.

Blawat first contends that bias is shown because in finding that he threatened agent Clougherty, the hearing examiner ignored testimony which established a legitimate basis for Blawat's statements and letter to Clougherty. However, when, as here, evidence permits more than one reasonable inference to be drawn, the inference drawn by the factfinder must be accepted by this court. *See* ***Hamilton***, 94 Wis.2d at 618, 288 N.W.2d at 860. Moreover, bias against a party is not demonstrated merely because an issue is decided adversely to that party.

Clougherty's testimony clearly supported the hearing examiner's finding that he was threatened by Blawat. According to Clougherty, Blawat asked him what he told OCI and told him that if he said anything against Blawat he was "going to be in big trouble." While Clougherty also testified that Blawat told him to "remember correctly" when he spoke to OCI, the hearing examiner was not required to infer from this that Blawat was merely telling Clougherty to tell the truth. When read with the remainder of Clougherty's testimony on the subject, Blawat's statements as related by Clougherty clearly support a finding that he was threatening to withhold renewal commissions from Clougherty or sue him if he gave OCI information harmful to Blawat. A letter later sent by Blawat's counsel to Clougherty warning of possible contract violations and suggesting that his renewal commissions might be affected further corroborated the examiner's finding that Blawat was threatening Clougherty in an attempt to dissuade him from cooperating with OCI's investigation.

Blawat also contends that bias was shown when the hearing examiner failed to grant him relief when OCI delayed producing a letter written by agent Braun to OCI until after completion of the hearing in this case. However, nothing in the record compels a finding that the delay was intentional rather than inadvertent as found by the hearing examiner. Most importantly, the letter was written by Braun to OCI in response to a letter he received from Blawat's counsel. Blawat's counsel was obviously aware of the letter he sent Braun, which was like the one sent to Clougherty. As noted by the hearing examiner, Braun was cross-examined on the issues which were the subject of the letter during the hearing in this case and testified consistently with the statements made by him in the letter. Because the information which was the subject of the letter was presented and discussed at trial, we agree with OCI that Blawat was not deprived of due process and his right to confront Braun merely

because he was unaware that Braun had previously relayed that information in a letter to OCI.[2]

Blawat also contends that bias was revealed when the hearing examiner found that he lied when he omitted the names of Clougherty, Braun and insurance agent Phyllis Warden when asked the names of his agents. Blawat contends that he simply was unable to remember their names, and that only bias could have led the examiner to use his inability to remember as evidence that he made a false communication regarding an insurance matter in violation of § 628.34(1)(a), STATS.

As set forth in OCI's decision, in finding misrepresentation under § 628.34(1)(a), STATS., the hearing examiner considered not only Blawat's professed inability to remember the agents' names, but also statements made by him denying knowledge of how the Council coupons were distributed, who received the return coupons, and how his agents got them.[3] It also considered that he denied receiving Care Wise coupons and distributing them to his agents, and represented that a Council officer and his aunt distributed the coupons to Allied agents without his knowledge. Based on the contradictory testimony of Clougherty, Braun and Warden and the remaining evidence in the record, OCI was entitled to conclude that these representations were untruthful. Based on this determination, it could also infer that Blawat's professed inability to remember the agents' names was untruthful and find that he violated § 628.34(1)(a).

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[2] Blawat contends that the failure to timely produce the letter was not harmless because at his deposition Braun denied reporting receipt of counsel's letter to OCI. He contends that if OCI had timely produced the letter, he could have challenged Braun's credibility by arguing that he lied at his deposition. However, because the letter itself had limited relevancy for the reasons already discussed, and because Blawat extensively challenged the credibility of Braun and the other agents at the hearing, we are not persuaded that Blawat's inability to use the letter as one additional basis for challenging credibility had any material effect on the proceeding or deprived Blawat of any constitutional right to confront the witnesses against him.

[3] OCI also found that Blawat's use of the fliers and Care Wise brochures violated § 628.34(1)(a), STATS., because the fliers, brochures and attached coupons failed to disclose that an insurance agent would call in response to the returned coupon.

Blawat also contends that § 628.34(1)(a), STATS., applies only to the use of misleading information while marketing insurance to a consumer and is inapplicable to misrepresentations made by him to OCI. We disagree. The statute is broadly written to prohibit "any communication relating to ... the insurance business" which contains false or misleading information, including information misleading because of incompleteness. Since Blawat's answers to OCI's deposition questioning was a communication relating to the insurance business, OCI was entitled to conclude that it fell within the scope of the statute.

Blawat also contends that OCI erroneously interpreted the law by finding him liable as an individual for violations committed by Allied agents under WIS. ADM. CODE § INS 3.39(15) and (24)(c). Again, we disagree. The evidence supported a finding that Blawat himself arranged to have the coupons distributed with the Council fliers and the Care Wise brochures and to have them returned to Allied, after which he distributed them or arranged for their distribution to Allied agents for followup calls and solicitation of sales. Because Blawat was a licensed agent himself, he was required to presubmit the advertisements before distributing them and to refrain from engaging in cold lead advertising.

The fact that Blawat may not personally have solicited any sales or sold any policies using the returned coupons is irrelevant. WISCONSIN ADM. CODE § INS 3.39(15) provides that if an advertisement does not reference a particular issuer or Medicare supplement policy, each agent utilizing the advertisement shall file it with the commissioner prior to using it. Blawat as an individual agent utilized the fliers and brochures to obtain the return coupons, which, according to the testimony of Clougherty, Braun and Warden, he then passed on to Allied agents for use as leads in the solicitation of sales. Similarly, by engaging in these activities, Blawat personally made indirect use of a method of marketing which failed to disclose that its purpose was solicitation of an insurance sale and that a contact would be made by an insurer or agent. He thus personally violated WIS. ADM. CODE § INS 3.39(24)(c)3, which prohibits indirect as well as direct use of such marketing methods.

In conjunction with this argument, Blawat also contends that OCI erroneously interpreted § 601.65(2), STATS., when it imposed a forfeiture on him for violations committed by agents who contracted with Allied. Section 601.65(2) provides that a firm is liable for a forfeiture for each violation by an

insurance agent of specified statutes and rules. Blawat as an individual fell within the definition of a "firm," which is defined in § 601.65(1) as a "person that markets insurance." As a person who marketed insurance, Blawat also regularly utilized Clougherty, Braun and Warden to market insurance policies. He was thus personally liable for a forfeiture under § 601.65(2)(a) based on their admitted violations of WIS. ADM. CODE § INS 3.39(15) and (24)(c)3.[4]

Blawat's final challenge is to the penalty imposed on him, which he contends was unduly harsh and inconsistent with prior OCI practice. In reviewing an administrative agency's exercise of discretion, we may not substitute our judgment for that of the agency and may reverse only if the agency failed to exercise discretion or exercised it in violation of the law, an agency policy, or prior agency practice, if deviation therefrom is not satisfactorily explained. *See* ***Galang v. Medical Examining Bd.***, 168 Wis.2d 695, 699-700, 484 N.W.2d 375, 377 (Ct. App. 1992); § 227.57(8), STATS.

We conclude that OCI acted within the scope of the broad discretion afforded it. OCI's findings that Blawat committed multiple statutory and rule violations, attempted to impede its investigation, and evaded and misrepresented the truth regarding his activities were amply supported by the evidence. Based upon those findings, as well as the strong public policy interest in protecting senior citizens from misleading insurance sales practices, OCI's selection of the sanctions imposed by it was reasonable. While Blawat may be able to cite to cases where OCI imposed a lesser penalty, each case is unique. Therefore, even assuming *arguendo* that other cases may be considered by us, we are not persuaded that the difference in sanctions establishes an abuse of discretion by OCI.[5]

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[4] Even if Blawat were not personally liable for the other agents' violations, he personally violated WIS. ADM. CODE § INS 3.39(15) and (24)(c)3 and (e)2, as well as § 628.34(1)(a), STATS. For those violations alone, OCI could impose the sanctions it did.

[5] Blawat cites ***Lewis Realty v. Wisconsin Real Estate Brokers' Bd.***, 6 Wis.2d 99, 94 N.W.2d 238 (1959), to support his argument that the penalties imposed here should be set aside because of disparities with other cases. We do not find ***Lewis*** to be controlling here. While the ***Lewis*** court compared penalties in different cases, it set penalties aside only after also rejecting a large portion of the findings of fact and conclusions of law made by the board. In addition, unlike the situation in ***Lewis***, the penalties imposed here do not shock the court's conscience. *Cf.* ***id.*** at 124-26, 94 N.W.2d

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

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at 252-53. Since the violations found by OCI were amply supported by the record, and the penalties were reasonable based upon those violations, we conclude that ***Lewis*** provides no basis for relief.