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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0894**

In the Matter of Richard J. Geckler, Sr.,
Trevor Geckler and Geckler Companies, Inc.

**Filed February 18, 2014
Affirmed
Connolly, Judge**

OAH File No. 16-1005-22600-2

Richard J. Geckler, Sr., Lakeville, Minnesota; and

Trevor Geckler, Burnsville, Minnesota (pro se relators)

Lori Swanson, Attorney General, Michael J. Tostengard, Assistant Attorney General,
St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relators challenge the determination by respondent commissioner of commerce that relators offered and sold unregistered securities in violation of Minn. Stat. § 80A.49 (2012) and that they misled investors in violation of Minn. Stat. § 80A.68 (2012). We affirm.

FACTS

Geckler Companies Inc. (GCI) was a wholesale company owned by relator Richard Geckler and his wife that conducted, among other activities, fundraising programs for schools, clubs, and other organizations. In July 2009, relator Trevor Geckler, an employee of GCI and Richard Geckler's son, forwarded S.W., a long-time friend of the Gecklers, the following e-mail:

Our company is experiencing a temporary cash shortage and we are sending this letter to a few of our friends to raise some operating cash. Last year we acquired another company (a school supply company); we underestimated our cash needs for this company and we are at the maximum limit of our bank[']s lending capability. We would not be soliciting our friends for this money if there was time now to find new bank financing; or if we felt there was any chance this money would not be paid back on time. We have designed an offer that will reward those who are able to help us thru this situation. I have attached several sheets which explain the offer and provide an example of the rewards the participant will receive; as well as my financials. **Timing is critical** as we have orders that need to be shipped, and cash is needed to fill these orders.

The spreadsheet attached to the e-mail represented that the Gecklers planned to raise \$1.1 million in "short term financing." S.W. invested \$50,000, partially in cash and partially by borrowing from three credit cards. On July 27, 2009, Richard Geckler sent her a promissory note agreeing to repay the balance in full by January 31, 2010, along with 20% interest per annum, and to pay the minimum monthly payments on the credit cards. She was also promised a share of GCI's profits and a "thank you bonus."

Trevor Geckler also contacted his high school friends B.K. and J.H. in July 2009. B.K. testified that the Gecklers forwarded the same e-mail to them as was sent to S.W.

J.H. testified that he and B.K. also met with Trevor and Richard Geckler, who stated that they would be raising “a bunch of cash” for the purpose of filling existing merchandise orders. B.K. testified that the Gecklers characterized their loan as a “bridge loan.” B.K. and J.H. together invested \$200,000, partially in cash, partially on credit cards, and partially through a line of credit on a life insurance policy. The Gecklers agreed to make the minimum payments on the cards until January 31, 2010, when the balance, interest and profits would come due.

S.W., B.K. and J.H. received some payments on their credit-card balances, but in December 2009, GCI checks began bouncing. In February 2010, a bank creditor seized GCI’s assets. S.W., B.K. and J.H. testified that they have received no further payments.

S.W. filed a complaint with the commissioner of commerce. Following an investigation, the commissioner commenced this proceeding. An administrative-law judge (ALJ) conducted a hearing and concluded that relators offered and sold unregistered securities in violation of Minn. Stat. § 80A.49 and misled investors in violation of Minn. Stat. § 80A.68. The ALJ recommended a monetary fine. The commissioner adopted the ALJ’s findings of fact and conclusions of law, and ordered relators to pay a civil penalty of \$15,000 each.

This certiorari appeal follows.

D E C I S I O N

Relators challenge the commissioner’s determination that they offered and sold unregulated securities and misled investors. This court gives great deference to an agency’s findings of fact. *Pomrenke v. Comm’r of Commerce*, 677 N.W.2d 85, 93

(Minn. App. 2004), *review denied* (Minn. May 26, 2004). “We defer to an agency’s conclusions regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from testimony.” *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). We apply the substantial evidence test to the agency’s findings. *Pomrenke*, 677 N.W.2d at 93. Substantial evidence is “(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.” *Id.* at 94. We evaluate the evidence relied on by the agency in light of the entire record as submitted, and will affirm if the agency engaged in reasoned decision-making, even if this court might have reached a different conclusion than the agency. *Id.*

I.

Minn. Stat. § 80A.49 makes it unlawful for a person to “offer or sell a security in this state unless: (1) the security is a federal covered security; (2) the security, transaction, or offer is exempted from registration under sections 80A.45 through 80A.47 (2012); or (3) the security is registered under this chapter.” In an administrative proceeding, “a person claiming an exemption, exception, preemption, or exclusion has the burden to prove the applicability of the claim.” Minn. Stat. § 80A.70 (a) (2012).

Relators argue that the transactions at issue here are exempt under Minn. Stat.

§ 80A.46 (14) (2012).¹ Subsection 14 exempts:

[A] sale or an offer to sell securities by an issuer, if the transaction is part of a single issue in which:

(A) not more than 35 purchasers are present in this state during any 12 consecutive months, other than those designated in paragraph (13);

(B) a general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;

(C) a commission or other remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer registered under this chapter or an agent registered under this chapter for soliciting a prospective purchaser in this state; and

(D) the issuer reasonably believes that all the purchasers in this state, other than those designated in paragraph (13), are purchasing for investment.

Individuals seeking an exemption under this provision are also required to submit advance notice of the transaction to the commissioner of commerce unless they make “sales to ten or fewer purchasers in Minnesota during any period of 12 consecutive months.” *Id.*

The ALJ concluded without discussion that relators “failed to demonstrate that their securities were exempt from registration under Minn. Stat. § 80A.45 through 47.”

The commissioner likewise concluded without discussion that relators “did not

¹ Relators previously asserted that the sales to B.K. and J.H. were also exempt under Minn. Stat. § 80A.46 (13)(B) (2012) as sales to accredited investors. This argument was not raised on appeal.

demonstrate that the securities that they offered and sold were exempt from registration under Minn. Stat. § 80A.44 through 47.” Relators argue that the commissioner’s conclusion is erroneous because they presented sufficient evidence to meet their burden of establishing an exemption.

The commissioner’s decision lacks “articulated standards and reflective findings,” indicating that it did not engage in “reasoned decisionmaking” on this point. *See Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 669 (Minn. 1984) (quotation omitted). But in light of the record as a whole, and relators’ failure to carry their burden on the exemption issue, we conclude that the commissioner’s decision is not unsupported by substantial evidence or arbitrary and capricious.

In order to carry their burden under Minn. Stat. § 80A.46 (14), relators had to present evidence on five factors. Relators, who were pro se throughout this proceeding, declined to testify before the ALJ, but submitted some documentary evidence. The ALJ also took into account narrative statements made by Richard Geckler during the hearing. Although relators point to some evidence in support of their claim, they largely failed to present any evidence on the required factors.

A. Number of purchasers

Relators had to show that “not more than 35 purchasers are present in this state during any 12 consecutive months, other than those [otherwise exempted].” Minn. Stat. § 80A.46 (14)(A). Relators argue that S.W.’s complaint form, Richard Geckler’s phone conversation and follow-up e-mail with the commissioner’s investigator, along with

statements in the pretrial conference order and the findings of fact, prove that there were only three investors from whom the Gecklers solicited funds.

The record establishes only that these three individuals loaned money and were not fully repaid. It is entirely unclear whether any other individuals were approached or loaned money. The e-mail forwarded to S.W., however, indicates that at least one other individual was approached: the e-mail was previously sent to B.S., who is not a party to this proceeding.

B. General solicitation or advertising

Relators had to show that “a general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities.” Minn. Stat. § 80A.46 (14)(B). Relators argue that S.W.’s complaint form and the testimony from the three investors shows that the Gecklers solicited these individuals only as friends and family. But again, relators did not testify on this issue, and none of the exhibits address whether any other general solicitation or advertising was made. The only evidence in the record addresses the two transactions at issue.

C. Commission paid

Relators had to show that “a commission or other remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer registered under this chapter or an agent registered under this chapter for soliciting a prospective purchaser in this state.” Minn. Stat. § 80A.46 (14)(C). Relators assert that “no commission or other remuneration [was] paid or given, directly or indirectly, to anyone by the Gecklers,” but there is no evidence in the record on this factor.

D. Purchases for investment

Relators had to show that “the issuer reasonably believes that all the purchasers in this state, other than those [otherwise exempted], are purchasing for investment.” Minn. Stat. § 80A.46 (14)(D). Relators argue that the testimony from the three investors shows that they believed, as did the Gecklers, that all purchasers were purchasing for investment. Again, there is no evidence concerning any transactions or purchasers other than those at issue here.

E. Notice

Finally, individuals claiming an exemption under Minn. Stat. § 80A.46(14) must show either that they provided notice of the transaction to the commissioner, or that they made “sales to ten or fewer purchasers in Minnesota during any period of 12 consecutive months.” Relators assert that “[t]he record verifies that the Gecklers only solicited funds from 3 individuals.” The only evidence in the record concerning any additional sales is the fact that the e-mail forwarded to S.W. had previously been sent to another individual.

The Gecklers bore the burden of establishing the elements of the exemption. Although the record is not inconsistent with the possibility that the exemption might have applied, that is not sufficient to reverse the commissioner’s decision. Similarly, the absence of evidence disproving the factors of the exemption is insufficient. Because the Gecklers did not present evidence sufficient to establish the required factors, the commissioner’s determination was not in error.

II.

Under Minn. Stat. § 80A.68:

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

(1) to employ a device, scheme, or artifice to defraud;

(2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make a statement made, in the light of the circumstances under which it is made, not misleading; or

(3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

“‘Fraud,’ ‘deceit,’ and ‘defraud’ are not limited to common law deceit.” Minn. Stat. § 80A.41 (10) (2012).

The commissioner concluded that relators violated Minn. Stat. § 80A.68 by “misleading investors.” In addition to adopting the ALJ’s findings of fact and conclusions of law, the commissioner specifically found that Geckler “blamed the inability to honor their promises on his claim that the 2009 fall sales did not meet his expectations due to the faltering economy” and that this contradicted his representations that “GCI already had orders and that the investment capital was going to be used to fill those orders.” The commissioner also found that relators “misled investors with respect to their claim that they would be raising at least \$1,000,000 to recapitalize GCI.” Relators argue that the commissioner’s decision is not supported by substantial evidence and is arbitrary and capricious. Their arguments are without merit.

First, relators argue that the commissioner improperly relied on the fact that Richard Geckler faced criminal charges of issuing dishonored checks and the assertion in the statement of charges that J.H. and B.K. were unable to locate Geckler. These facts do not appear in the ALJ's recommendations or in the commissioner's memorandum. There is no evidence that the ALJ or the commissioner relied on these facts in reaching their conclusion.

Relators argue that the commissioner's finding that the Gecklers only provided a cash-flow projection and not full financials is not supported by the evidence showing that the e-mails contained five attachments. These attachments are not part of the record, however, so it is impossible to know what they contained. The relators argue that these were "withheld" by the investors, but either of the Gecklers could have testified as to the content of these attachments, and chose not to do so. The only evidence in the record supports the conclusion that the Gecklers failed to disclose their financials to the investors.

Relators challenge the commissioner's conclusion that Geckler contradicted his representation that the invested capital was needed to fill existing orders when he stated that the failure to honor their promises was because 2009 fall sales did not meet his expectations due to the faltering economy. They argue that the statements are not contradictory because the orders referenced in the e-mail existed and related to the school supply business, while the fall sales related to fundraising. Although this may be one reasonable interpretation of the record, the presence of evidence supporting an alternative conclusion does not give this court reason to reverse the commissioner's decision. *See*

Pomrenke, 677 N.W.2d at 94 (noting that this court will affirm if the agency engaged in reasoned decision-making, even if this court might have reached a different conclusion).

Relators challenge the commissioner's conclusion that Geckler "misled investors into believing that he would be raising at least \$1,000,000 to recapitalize GCI to get [relators] through their high-sales 2009 fall season." Relators argue that the record reflects that the pressing need was to fill orders and that raising \$1,000,000 would have done nothing to prevent the failure of GCI. They argue that if the solicitation was intended to raise money to meet GCI's financial obligations, it would have stated as much in the e-mail.

Again, relators interpret the record to reach a different conclusion than the commissioner did, but that interpretation does not undermine the commissioner's conclusion. The record shows that the request included a cash-flow projection indicating that GCI expected to receive \$1,000,000 in short-term funding. This supports the commissioner's conclusion that relators misled investors into believing that GCI was in better financial shape than it was.

Finally, relators raise a series of arguments challenging the credibility of the witnesses. We defer to the ALJ's weighing of evidence and credibility on appeal and will not reverse on these grounds. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d at 278.

The commissioner's decision is supported by substantial evidence. The decision largely relied on the testimony of the three investors. Each testified that she or he was provided with a minimal amount of information prior to the transaction, and relied on the

fact that the Gecklers were family friends in making the decision to invest in GCI. The e-mail solicitation characterized the need for cash as “temporary” and emphasized that “[t]iming is critical as we have orders that need to be shipped, and cash is needed to fill these orders.” GCI raised less than half of the short-term capital the cash-flow projection indicated it would receive, and was seized by the bank only a few months after the e-mail was sent. Each investor received only a few of the credit-card payments promised, and none of the promised principal or bonus payments. In hindsight, the investors testified that they would never have invested in the company if they had known it was in this condition and that they believed Richard Geckler knew or should have known that his company was failing and that he used the money for purposes other than filling preexisting orders.

Given this record, and the fact that the relators failed to carry their burden in establishing an exemption to Minn. Stat. § 80A.49, we conclude that the commissioner did not err in ordering the relators to pay a civil penalty for violations of Minnesota securities law.

Affirmed.