STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1351

Novation Education Opportunities,
Relator,

vs.

Minnesota Department of Education,
Respondent.

Filed April 23, 2012
Affirmed
Kalitowski, Judge

Minnesota Department of Education

Charles E. Long, Kennedy & Graven, Chartered, Minneapolis, Minnesota (for relator)

Lori Swanson, Attorney General, Martha J. Casserly, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

In this certiorari appeal, relator Novation Education Opportunities (NEO) challenges the decision by respondent Minnesota Department of Education (the department) denying NEO's authorizer-transfer applications on behalf of eight charter schools for the 2011-2012 school year, asserting that the department's denial of the

applications was: (1) in excess of the department's statutory authority; (2) procedurally defective; (3) unsupported by substantial evidence; and (4) arbitrary and capricious. We affirm.

D E C I S I O N

This court upholds an agency's quasi-judicial determination unless the determination is in excess of statutory authority, procedurally defective, based on an erroneous legal theory, unsupported by substantial evidence, or arbitrary and capricious. *Carter v. Olmsted Cnty. Hous. & Redev. Auth.*, 574 N.W.2d 725, 729 (Minn. App. 1998). Agency decisions "enjoy a presumption of correctness," and this 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, 514 (Minn. 2007) (quotation omitted). We recognize the "need for exercising judicial restraint and for restricting judicial functions to a narrow area of responsibility lest the court substitute its judgment for that of the agency." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (parentheses omitted) (quotation omitted).

In 2010, NEO was approved by the department to serve as a single-purpose charter-school authorizer. *See* Minn. Stat. § 124D.10, subd. 3(b)(5) (2010) (defining single-purpose authorizers as "charitable, nonsectarian organizations formed under section 501(c)(3) of the Internal Revenue Code of 1986 and incorporated in the state of Minnesota whose sole purpose is to charter schools"). The approval was based on NEO's submissions, which included a five-year financial plan and the "NEO Charter Transfer Application & Guide," which delineated NEO's process for accepting charter schools'

requests to become authorized by NEO. During the 2010-2011 school year, NEO authorized four charter schools.

In the spring of 2011, NEO submitted 19 applications to the department, requesting to transfer 19 additional charter schools from their current authorizers to NEO for the 2011-2012 school year. The department approved nine applications, and on June 29, 2011, denied the remaining ten applications. NEO challenges the department's denial decisions as to eight schools. Each of those decisions stated:

> [The department] has evaluated the request and determined that NEO's submission on behalf of [this school] when viewed with the . . . other change of authorizer requests submitted by NEO this spring collectively mark a deviation from NEO's growth plan approved by the commissioner on May 12, 2010. Because NEO's submission does not demonstrate that NEO relied upon its commissioner-approved application review process, the request is denied.

The department listed two specific reasons for denial: (1) "[i]neffective [o]rganizational [c]apacity [p]lans," reflecting the department's concern that NEO had not "acknowledged this deviation from [its] plan nor included a formalized, planful proposal representing [its] capacity to accommodate this growth"; and (2) "[m]isrepresentation," based on the department's determination that NEO's website misrepresented its status as an authorizer of 13 schools as to which authorizer-transfer applications had been submitted to the department, but not yet granted, which it deemed "unsatisfactory performance."

I.

NEO contends that the department exceeded its statutory authority by considering NEO's organizational capacity plans and website statements when evaluating its

authorizer-transfer applications, because these are not factors enumerated in Minn. Stat. § 124D.10, subd. 23(c) (2010). We disagree.

"Administrative agencies are creatures of statute and they have only those powers given to them by the legislature." *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010) (citing *Great N. Ry. Co. v. Pub. Serv. Comm'n*, 284 Minn. 217, 220, 169 N.W.2d 732, 735 (1969)). An agency's statutory authority may be either express or implied. *Id.* "In determining whether an administrative agency has express statutory authority, we analyze whether the relevant statute unambiguously grants authority for an administrative agency to act in the manner at issue." *Id.* at 320. "[A]ny enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005) (emphasis omitted). "Whether an administrative agency has acted within its statutory authority is a question of law that [this court] review[s] de novo." *Hubbard*, 778 N.W.2d at 318 (footnote omitted).

Minnesota Statutes section 124D.10, subdivision 23, governs nonrenewal or termination of a charter-school contract:

> If the authorizer and the charter school board of directors mutually agree to terminate or not renew the contract, a change in authorizers is allowed if the commissioner approves the transfer to a different eligible authorizer to authorize the charter school. Both parties must jointly submit their intent in writing to the commissioner to mutually terminate the contract. The authorizer that is a party to the existing contract at least must inform the approved different eligible authorizer about the fiscal and operational status and student performance of the school. Before the commissioner determines whether to approve a transfer of authorizer, the

> commissioner first must determine whether the charter school and prospective new authorizer can identify and effectively resolve those circumstances causing the previous authorizer and the charter school to mutually agree to terminate the contract. If no transfer of authorizer is approved, the school must be dissolved according to applicable law and the terms of the contract.

Minn. Stat. § 124D.10, subd. 23(c). When interpreting statutory provisions, we seek "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010).

NEO contends that, under the statute, the department may consider only the circumstances causing the existing authorizer to terminate its charter and whether the transferee authorizer can resolve those circumstances when determining whether to approve an authorizer-transfer application. But the plain language of the statute provides that the commissioner is required to "determine[] whether to approve a transfer of authorizer" *after* determining "whether the charter school and prospective new authorizer can identify and effectively resolve those circumstances causing the previous authorizer and the charter school to mutually agree to terminate the contract." Minn. Stat. § 124D.10, subd. 23(c). Thus, when the subdivision 23(c) requirements are satisfied, the commissioner retains discretion to determine whether to approve the transfer. *Id.*

Moreover, even were we to conclude the statute is ambiguous, the legislative history of the charter-school statute demonstrates that the legislature intended that the department oversee authorizers and evaluate authorizers' capacity to authorize charter schools. Section 124D.10 was significantly amended in 2009 to increase the department's authority and responsibility over authorizers. 2009 Minn. Laws ch. 96, art. 2, § 41, at 1528-46. The legislature added criteria the commissioner is required to

consider when evaluating a prospective authorizer's application for approval, and added a provision requiring prospective authorizers to submit an affidavit describing the organization's capacity to serve as an authorizer, as well as the application and review process the authorizer will use to make decisions regarding the granting of charters. Minn. Stat. § 124D.10, subd. 3(c), (d) (2010). Further, the 2009 amendment specified authorizers' responsibilities and delineated the department's responsibility to review authorizers' performance. Minn. Stat. § 124D.10, subd. 3(g), (h) (2010). To this end, the 2009 amendment added the requirement that the commissioner "determine whether the charter school and prospective new authorizer can identify and effectively resolve those circumstances causing the previous authorizer and the charter school to mutually agree to terminate the contract" before determining whether to approve the transfer. *Id.*, subd. 23(c). Accordingly, NEO's argument that the department does not have discretionary authority when evaluating authorizer-transfer applications is contrary to the legislative intent of the charter-school statute.

Because the department has broad authority to oversee charter-school authorizers and their operations, and because section 124D.10, subdivision 23(c), requires that the commissioner determine whether to approve a transfer, we conclude that the department also has the authority to determine the factors it will consider and procedures it will follow to make these determinations. *See Koronis Manor Nursing Home v. Dep't of Pub. Welfare*, 311 Minn. 375, 380, 249 N.W.2d 448, 451 (1976) (holding that an agency has "implicit power to impose reasonable standards so as to effectuate the department's purposes"); *Young v. Jesson*, 796 N.W.2d 158, 163 (Minn. App. 2011) (holding that an

administrative agency's authority "extends broadly to govern" the administration of a specific program, when the agency is statutorily granted authority over the type of program at issue).

In evaluating whether the department's denial of NEO's applications based on organizational capacity plans and website statements was a permissible exercise of its authority, we look to the statutory scheme as a whole. *See, e.g.*, *Hubbard*, 778 N.W.2d at 320 (reviewing three sections of chapter 103F to determine whether agency had statutory authority to approve local government variance decisions); *In re Admin. Order Issued to Wright Cnty.*, 784 N.W.2d 398, 402 (Minn. App. 2010) (reviewing several sections of chapter 326B to determine whether agency had statutory authority to issue cease-and-desist order). The commissioner of education "exercise[s] general supervision over public schools," including charter schools. Minn. Stat. § 127A.05, subd. 3 (2010); *see* Minn. Stat. § 124D.10, subd. 7 (2010) ("A charter school is a public school and is part of the state's system of public education.").

In addition, the charter-school statute sets forth criteria the commissioner must consider when determining whether to initially approve an authorizer, including: "(1) capacity and infrastructure; (2) application criteria and process; (3) contracting process; (4) ongoing oversight and evaluation processes; and (5) renewal criteria and processes." Minn. Stat. § 124D.10, subd. 3(c). Moreover, the department retains express authority to review authorizers' performance and may take corrective action or terminate an authorizer's ability to charter a school at any time if the authorizer fails to demonstrate

the criteria under which it was approved, including "capacity and infrastructure," or otherwise performs unsatisfactorily. Minn. Stat. § 124D.10, subd. 3(c), (g), (h).

Because the legislature determined that an authorizer's organizational capacity is essential to its approval as an authorizer, and because the legislature empowered the department to review authorizers and take corrective action if the authorizer fails to demonstrate capacity, we conclude that it was a reasonable exercise of authority for the department to consider NEO's organizational capacity plans and unsatisfactory performance as an authorizer when evaluating its authorizer-transfer applications.

II.

NEO also argues that the department's denial of its authorizer-transfer applications is procedurally defective because the department followed a document it issued in February 2011, titled "Process for Change of a Charter School Authorizer," which NEO argues is an unpromulgated rule. We disagree.

The Minnesota Administrative Procedure Act (MAPA) provides that agencies "shall adopt, amend, suspend, or repeal . . . rules in accordance with the procedures specified in [Minnesota Statutes] sections 14.001 to 14.69, and only pursuant to authority delegated by law and in full compliance with its duties and obligations." Minn. Stat. § 14.05, subd. 1 (2010). "Rule" is defined as: "every agency statement of general applicability and future effect, . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4 (2010).

The "Process for Change of a Charter School Authorizer" document conveys the information authorizers seeking transfer approval must submit to the agency, and lists the criteria and factors the agency will consider when evaluating an authorizer-transfer application. Therefore, the document is generally applicable to charter-school authorizers, is intended to have future effect and thus, likely meets the definition of a rule.

But even if the department should have promulgated the document as a rule under MAPA, "the agency action may still be upheld if the agency action was otherwise proper." *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. App. 1995). In *St. Otto's Home v. Minnesota Department of Human Services*, the supreme court explained:

> The issue, however, is not whether [the agency] followed proper rulemaking procedures in issuing its policy statement but whether it correctly interpreted and applied the statutory provisions in this case. That [the agency] may have articulated its construction of a statute in a rule improperly promulgated does not render a correct interpretation incorrect.

437 N.W.2d 35, 43 (Minn. 1989) (quotation omitted). Any defect in adopting rules does not require reversal if the department reasonably exercised its statutory authority. *See Phillippe v. Comm'r of Pub. Safety*, 374 N.W.2d 293, 296-97 (Minn. App. 1985) (holding that when the commissioner acts pursuant to internal office policy and not promulgated rules, this court determines whether the decision was reasonable).

Here, because the department applied the charter-school statute in a reasonable manner consistent with its authority, we conclude that even if the department relied on

unpromulgated rules, such reliance does not invalidate the department's actions. *See Benson v. Comm'r of Pub. Safety*, 356 N.W.2d 799, 801 (Minn. App. 1984) (holding that an agency decision relying on improperly adopted guidelines remains a presumptively valid exercise of discretion).

III.

NEO contends that the findings on which the department relied to deny its applications are unsupported by substantial evidence. This court will not reverse an agency's determination if it is supported by substantial evidence. *Carter*, 574 N.W.2d at 729. 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." *Wilhite v. Scott Cnty. Hous. & Redev. Auth.*, 759 N.W.2d 252, 255 (Minn. App. 2009) (quoting *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002)). The substantial-evidence test "is met when we find such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Request of Interstate Power Co.*, 574 N.W.2d 408, 415 (Minn. 1998) (quotation omitted).

Ineffective organizational capacity plans

NEO describes the department's ineffective-organizational-capacity-plan finding as an incorrect determination that NEO is "contractually limited" by its five-year financial plan to authorize only the number of schools listed in the plan. NEO argues that the finding is not supported by substantial evidence because the evidence demonstrates

that: (1) the plan is not a binding contract; and (2) the plan provides that NEO's growth will be dictated by need and demand. We disagree.

The record indicates that the department's finding of "[i]neffective [o]rganizational [c]apacity [p]lans" is based on NEO's deviation from its "growth plan approved by the commissioner" and NEO's failure to amend the plan or otherwise submit a new plan to demonstrate that it could effectively manage the additional schools. In its denial letters, the department explained that NEO was initially approved as an authorizer based on its five-year plan, which set forth plans to authorize 6 schools during the 2010-2011 school year and 12 schools during the 2011-2012 school year. NEO's approval in 2010 was based on the department's judgment that NEO's staffing and organization were sufficient for this number of schools. The department concluded that NEO's transfer applications did not include "a formalized, planful proposal representing their capacity to accommodate this growth." Thus the record demonstrates that the department did not view NEO's plan as a binding contract, but instead looked to NEO's five-year plan to determine whether NEO had sufficiently planned for the proposed number of schools.

NEO argues that it has sufficiently planned to authorize up to 24 schools, relying on the 2013-2014 projection in its five-year plan. But NEO's 2013-2014 projection is based on assumptions as to NEO's capacity expansion between 2010 and 2013, and the department's approval of NEO's 2013-2014 projection was based on the measured growth and increased experience NEO would obtain between 2010 and 2013. Although NEO contends that it planned to amend staffing and organizational plans in July 2011, this only demonstrates that, at the time it submitted the eight applications, NEO had not

yet adopted the necessary organizational plans. We thus conclude that the department's finding that NEO's organizational-capacity plans were insufficient to support the additional eight schools is supported by substantial evidence.

Misrepresentation

NEO also argues that the department's finding that NEO misrepresented itself on its website is unsupported. But the record establishes that, on July 23, 2011, NEO's website listed 25 schools as "NEO Schools." The website referenced NEO's "authorized schools" and referred to the schools as NEO's "'family' of schools." NEO does not dispute that only 12 of the 25 schools were, at that time, authorized by NEO. Therefore, the department's finding that NEO's website contained false and misleading statements is supported by substantial evidence.

IV.

Finally, NEO contends that the department's denial of the authorizer-transfer applications was arbitrary and capricious. An agency's determination is arbitrary and capricious if

> the agency relied on factors the legislature never intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

In re Block, 727 N.W.2d 166, 178 (Minn. App. 2007) (quotation omitted). An agency's conclusion is not arbitrary or capricious when a "rational connection between the facts

found and the choice made has been articulated." *Blue Cross*, 624 N.W.2d at 277 (quotation omitted).

NEO argues that the department's denial is arbitrary and capricious because NEO's five-year plan describes the number of schools to be authorized in future years as "conservative . . . targets," and states that "if there is sufficient demand NEO may accelerate the projected timeline and budget/capacity plan." But here, NEO did not submit organizational, budget, or capacity plans reflecting an accelerated timeline, and so the department's consideration of the 2011-2012 projection was appropriate. Because we conclude that organizational plans are a factor the department was permitted to consider, and there is a rational connection between the facts in the record and the department's decision to deny NEO's eight authorizer-transfer applications, the department's denial was not arbitrary and capricious.

Affirmed.