STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0953

State of Minnesota,
by its Minnesota Pollution Control Agency,
Respondent,

vs.

Daniel Nosbush,
Appellant.

Filed December 17, 2012
Affirmed
Cleary, Judge

Ramsey County District Court
File No. 62-C5-04-007258

Ann E. Cohen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Lawrence H. Crosby, Jay D. Olson, Crosby & Associates, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Cleary, Judge.

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

CLEARY, Judge

Appellant challenges the district court's order and judgment enjoining him from working in animal agriculture unless supervised and imposing a civil penalty, arguing that the injunction is overbroad and the penalty excessive in relation to his financial

situation. Because the injunction issued neither goes beyond the requirements of this case nor imposes unnecessary hardship on appellant and because the penalty imposed was well within the district court's discretion, we affirm.

FACTS

In September 2002, before this enforcement matter commenced, respondent Minnesota Pollution Control Agency (MPCA) inspected appellant Daniel Nosbush's swine feedlot[1] (facility) in Stearns County. Inspectors found appellant's unpermitted,[2] noncertified[3] earthen manure basin, which has a capacity exceeding 1.5 million gallons, full to the top of its berms. The inspectors also observed manure discharging from the facility's swine barn to the nearby wetland and field-tile inlet. The tile inlet discharged to a ditch that outlets into the North Fork Crow River, which flows into Rice Lake and eventually reaches Lake Koronis.

In early January 2003, MPCA received a complaint regarding unauthorized manure discharges, this time from appellant's manure basin, and another inspection followed. The inspector observed that there was evidence of manure discharges from the

[1] Minnesota's feedlot rules are found at Minn. R. ch. 7020 (2010). The rules define animal feedlot as "a lot or building or combination of lots and buildings intended for the confined feeding, breeding, raising, or holding of animals and specifically designed as a confinement area in which manure may accumulate, or where the concentration of animals is such that a vegetative cover cannot be maintained within the enclosure." Minn. R. 7020.0300, subp. 3.

[2] Permits are not required where a facility (1) is a feedlot or manure storage area with fewer than 300 animal units, (2) has not been designated a concentrated animal feeding operation (CAFO), and (3) does not have a pollution hazard, which means, in part, that it does not present a potential or immediate source of pollution to waters of the state. Minn. R. 7020.0405, subp. 3, .0300, subp. 19a.

[3] Liquid manure storage areas must be certified as meeting certain standards. Minn. R. 7020.2100.

basin, that manure was discharging from an opening in the swine barn, and that an open valve on the 500,000 gallon capacity glass-lined slurry tank had resulted in the pooling of manure around the tank's base.

On January 16, 2003, MPCA issued a letter of warning (LOW) to appellant regarding the unauthorized manure discharges at his facility and arranged a meeting with the U.S. Department of Agriculture Natural Resources Conservation Service, the Stearns County Soil and Water Conservation District, the Minnesota Department of Natural Resources (DNR), and appellant, to explore cost-sharing options to implement corrective and protective measures at the facility so as to prevent future unauthorized discharges. Less than a week following that meeting and the issuance of the LOW, the DNR responded to a call complaining that manure was again overflowing from appellant's manure basin. As a result, MPCA issued a notice of violation (NOV) requesting that appellant implement specific corrective actions to stop current, and to prevent future, unauthorized manure discharges.

Appellant failed to implement or otherwise complete the corrective actions listed in the NOV, and MPCA entered into negotiations with him to set a schedule of compliance (SOC). The SOC was executed in August 2003 and required appellant to remove and land-apply all manure from the basin and slurry tank within certain deadlines. Appellant failed to comply. After resolving an imminent-discharge situation in December 2003, appellant requested an extension and MPCA extended other deadlines within the SOC. Again, appellant failed to meet the deadlines.

Respondent State of Minnesota, on behalf of MPCA, filed a complaint with the district court on July 21, 2004, based on appellant's failure to comply with the SOC. MPCA sought, among other things, an order enjoining appellant from further polluting the natural resources of Minnesota, an order directing appellant to comply with all terms of the SOC, an order requiring appellant to pay the penalties stipulated in the SOC, and civil penalties pursuant to Minn. Stat. § 115.071, subd. 3 (2010). Thereafter, the parties agreed to settle. In March 2005, the parties entered a consent decree wherein appellant agreed to pay certain penalties if he failed to properly manage his manure or upgrade his facilities by certain deadlines.

Again, appellant failed to fulfill his agreements with the MPCA and did not meet the deadlines in the consent decree. In June 2006, the district court issued an order (2006 order) requiring appellant to complete various requirements consistent with the consent decree. Appellant failed to comply. In an order issued in July 2007 (2007 order), the district court found that (1) appellant had failed to properly manage his facility in accordance with the consent decree and 2006 order; (2) he was not capable of managing his swine operations in a safe and reliable manner; and (3) cessation of his swine operation was necessary to achieve compliance with MPCA rules, the consent decree, the 2006 order, and to protect water resources and public health. The 2007 order, among other things, required appellant to remove all swine from the facility; to complete the removal and land application of all manure at the facility; and to close and remove the manure basin, fix the slurry-tank valve, and plug the tile and related tile inlets located near the base of the slurry tank in accordance with the consent decree. The 2007 order

contained specific deadlines and also provided that the consent decree's requirements, terms, and conditions remained in full force and effect.

Appellant failed to comply with the 2007 order. In September 2008, the district court found him in constructive civil contempt. Purge conditions were set, among which were the requirements that appellant remove all swine from his facility and remove and land-apply all manure in accordance with the consent decree. Appellant failed to meet the purge conditions and, starting in March 2009, was ordered incarcerated on weekends.

It was not until August 2011 that appellant finally came into compliance.[4]

In November 2011, MPCA submitted to the district court a memorandum and request for a final order disposing of this matter. MPCA requested that the district court, pursuant to Minn. Stat. ch. 115 (2010) and Minn. R. ch. 7020, "impose a civil penalty on [appellant] that reflects the seriousness of the violations" in the case and "which will deter others from engaging in similar defiant behavior." Specifically, MPCA noted that the $150-per-day civil penalty appellant agreed to pay in the consent decree justified a penalty of at least $328,500. The MPCA also requested that the district court permanently enjoin appellant from operating any feedlot facility and that he pay MPCA's litigation expenses pursuant to Minn. Stat. § 115.072. MPCA submitted an affidavit regarding its costs, which included $61,212.10 in attorney fees owed to the attorney general's office and the costs of inspections and other litigation-related expenses.

[4] According to MPCA, appellant is required by Minn. R. 7020.2025 to maintain a vegetative cover of perennial forage over the knocked-down basin for five years. Although this requirement had not yet been met, MPCA, "rather than hold this case open," agreed that "substantial compliance" had occurred.

Appellant submitted an affidavit regarding the value of his assets. The parties waived oral argument on the matter, and the district court took the matter under advisement.

In April 2012, the district court entered an order and judgment (2012 order and judgment) enjoining and penalizing appellant. The district court noted that MPCA had requested costs and disbursements of $66,191.27, and it found that MPCA was "entitled to recover this amount as reasonable fees, given the court's determination and review of the economic circumstances of [appellant]" under Minn. Stat. § 115.072. The district court also noted that MPCA had requested a civil penalty in the amount of $328,500 based on the consent decree, various previous orders of the district court, and Minn. Stat. § 115.071.

In the 2012 order and judgment, the district court explained that, when it was "determining the amount of any appropriate penalty," it considered and weighed various factors. Those factors included the deterrent effect of the penalty on others, agreed-upon penalty amounts incorporated in previous orders, other penalties imposed in the course of litigation, appellant's ability to pay, appellant's ability to comply with court orders during certain weather conditions, the hardship that a penalty would impose on appellant, and the amount of attorney fees and other costs assessed. The district court found that "the attorney costs and fees assessed by the terms of this order are approximately three times the amount of money that would have been required for [appellant] to hire a third party to do the work necessary to bring the property into compliance," and determined that a total "penalty" in that amount would be "sufficient to meet all of the deterrent effect" desired in this case. "Given all of the factors," the district court determined "that to assess

additional amounts would be overly punitive, unnecessary, and inappropriate." The district court concluded by finding that "payment of the attorney fees and other costs assessed in this [o]rder are a sufficient penalty, and accordingly [the district court] will not order any further penalties in this matter."

The 2012 order and judgment also permanently enjoined appellant from engaging in "the practice of animal agriculture" except "(1) as a direct employee of another producer or (2) under the direct supervision of another producer who is acceptable to and approved by the MPCA, and only after and so long as [appellant] obtains and maintains all permits, certifications, or other requirements imposed by statute or rule."

On May 3, 2012, appellant moved for amended findings of fact, conclusions of law, and order for judgment. In his motion, appellant sought amendments reflecting that (1) his noncompliance was not willful; (2) his assets are not adequate to pay the penalty imposed; (3) he had no warning that MPCA was accruing or was going to request attorney fees and that MPCA did not adequately prove their fees; (4) MPCA has not proved that he is unable or unwilling to operate a feedlot facility in compliance with applicable statutes and rules and that therefore an injunction is inappropriate; (5) MPCA's request for civil penalties was "an ambush"; and (6) the penalty imposed was overly punitive, unnecessary, and inappropriate considering his limited resources and should be limited to no more than $10,000. He also requested that the injunction be deleted as "overbearing" and "not supported by law."

On May 8, 2012, the district court held a hearing on appellant's motion. At the hearing, the district court explained how it "tried to balance some of the equities here in

terms of what was involved" as it arrived at the penalty amount. Initially, the district court explained how it considered the deterrent effect of the penalty and acknowledged that, while the time appellant spent incarcerated was a deterrent, MPCA did not request that punishment. Instead, appellant "incarcerated himself. It was a civil contempt proceeding."

The district court also commented numerous times that appellant's financial condition was considered when calculating the penalty. Specifically, the district court acknowledged that, while appellant did not have substantial liquid assets available to pay a large penalty, he did have substantial land resources and close to one million dollars in equity. Moreover, the district court noted that "[w]hether the agency tries to pursue enforcing that judgment immediately or simply files it as a lien against that property to be paid at the time the property is transferred . . . is up to the agency."

The district court also noted the impact of appellant's actions on the state and emphasized that the state "is out substantial resources." The district court indicated that "plain fairness" requires such a large impact on the state to be considered because the total cost to the state "goes well beyond those attorney's fees."

Finally, after first acknowledging that the attorney general's office had requirements and recordkeeping systems in place for tracking hours worked and that the documentation submitted by MPCA was sufficient to support the amount of attorney's fees requested, the district court explained the "intertwined" relationship between the penalty amount and the amount of attorney's fees requested by MPCA:

> In looking at this from the perspective of a penalty and the deterrent effect of a penalty, I came to the conclusion that somewhere in that area of the 60 to $70,000 range was probably an appropriate penalty. But given [appellant's] financial condition and all the other considerations, if I had him pay within that range . . . it was not necessary nor appropriate to add another 65 or 70,000 on as a penalty so that the total became unreasonable. . . . [T]he . . . attorney's fees were . . . a reasonable approximation of what I thought was [an] appropriate penalty, given all the other considerations. So in my mind and in my analysis, the two were linked. If I did one, then I didn't do the other.

The district court denied appellant's motion for amended findings.

This appeal of the district court's 2012 order and judgment and subsequent order denying appellant's motion for amended findings of fact, conclusions of law, and order for judgment follows.

D E C I S I O N

I.

Appellant challenges the $66,191.27 judgment against him on two grounds. First, he argues that the district court failed to properly consider his financial situation and the statutory factors of Minn. Stat. §§ 115.071, .072, when determining the amount of the judgment. Second, he argues that the district court did not receive the "evidence required to prove up" MPCA's "claim for attorney's fees" it was seeking pursuant to Minn. Stat. § 115.072.

As a threshold matter, we conclude that, although MPCA requested both civil penalties under Minn. Stat. § 115.071, subd. 3, and recovery of litigation costs and expenses under Minn. Stat. § 115.072, the judgment against appellant was a civil penalty

under Minn. Stat. § 115.071. The record shows that the district court *considered* MPCA's legal expenses when it was determining and justifying the penalty amount. As the district court explained, it had a penalty amount in mind, and when MPCA submitted the affidavit addressing its costs, the amounts happened to be similar. "It seemed to me," the district court stated, "that the amount of attorney's fees requested were, independent of the attorney's fees themselves, also a reasonable amount in terms of a penalty here for what had occurred." The district court repeatedly referred to the judgment as a penalty, and we will treat it as such in this opinion. Therefore, appellant's arguments that the district court erroneously failed to consider the statutory factors contained at Minn. Stat. § 115.072 and that MPCA failed to properly "prove up" its attorney fees need not be addressed.

The remaining issue is whether the district court abused its discretion when it imposed the penalty in the amount it did. *See* Minn. Stat. § 115.071, subd. 3 ("Any person who violates any provision of this chapter . . . shall forfeit and pay to the state a penalty, in an amount to be determined by the court, of not more than $10,000 per day of violation"). No Minnesota appellate court has reviewed a penalty imposed pursuant to Minn. Stat. § 115.071, subd. 3, or identified particular factors for a district court to consider when imposing such a penalty. The consent decree between appellant and MPCA provided only that (1) appellant would pay, as a stipulated penalty, $150 per requirement per day for failure to comply, (2) MPCA had "the right to seek civil penalties for any other violations of applicable statutes and rules in accordance with Minn. Stat. § 115.071 and any other applicable penalty authorities," and (3) the district court may

enforce the decree "by any combination of the remedies available under Minn. Stat. § 115.071, including additional civil penalties in an amount to be established by the [c]ourt, contempt remedies and any other means available to the [c]ourt."

In briefing and at oral argument, the parties encouraged this court to adopt or otherwise delineate specific factors for district courts to consider when imposing penalties under Minn. Stat. § 115.071, subd. 3. MPCA urged the court to reference the statutory factors that it must consider when setting administrative penalties:

> (1) the willfulness of the violation;
> (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
> (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 as justice may require, if the commissioner or county board specifically identifies the additional factors in the commissioner's or county board's order.

Minn. Stat. § 116.072, subd. 2(b) (2010). Appellant urged us to adopt the factors identified in *State v. Alpine Air Products, Inc.*, 490 N.W.2d 888 (Minn. App. 1992), *aff'd on other grounds*, 500 N.W.2d 788 (Minn. 1993). *Alpine Air* was an action brought by the state against a manufacturer for violations of state consumer-protection and antitrust statutes. *Id.* at 890. The district court had imposed a civil penalty against the appellant, and on review, this court said that the following factors should be considered in determining the amount of a civil penalty: "(1) the good or bad faith of the defendant;

(2) the injury to the public; (3) the defendant's ability to pay; and (4) the desire to eliminate the benefits derived by the violation." *Id*. at 897.

Given that Minn. Stat. § 115.071, subd. 3, does not specify factors to be considered in imposing a penalty pursuant to that provision, we decline to adopt any particular factors at this time. The record shows that the district court made an effort to "balance some of the equities" at issue in this case—including costs to the state, the deterrent effect of the penalty, and appellant's ability to pay—in support of the penalty imposed. Appellant never denied that his slurry tank, basin, and underground storage areas were discharging or otherwise releasing manure into or nearby waters of the state. Appellant *agreed,* in the consent decree, to pay a much larger penalty than what was ultimately imposed. The district court considered the costs to the public that resulted from this matter, and it noted that the costs of the entire proceeding far exceeded the attorney's fees and that "taxpayers deserve to be reimbursed for that." In the end, nothing in the record refutes the district court's findings and conclusions that appellant's noncompliance with MPCA requirements was willful; that although appellant does not have many liquid assets, he does have a large amount of equity in farmland; that MPCA's request for recovery of costs and disbursements in the amount of $66,191.27 represented a reasonable request; and that appellant had failed to pay "virtually all" of the minimal penalties assessed during the six-year course of the litigation.

In sum, we conclude that the district court acted within its discretion when it imposed this penalty.

II.

At oral argument, appellant conceded that the district court did not err by imposing the injunction. But he argued that the injunction is unnecessarily broad because it enjoins appellant from "animal agriculture" and not simply from operating an animal feedlot. The 2012 order and judgment provides that

> [Appellant] is permanently enjoined and restrained from the practice of animal agriculture and shall neither own nor custom raise animals for market, except: (1) as a direct employee of another producer or (2) under the direct supervision of another producer who is acceptable to and approved by the MPCA, and only after and so long as defendant obtains and maintains all permits, certifications, or other requirements imposed by statute or rule.

Whether to grant an injunction is discretionary with the district court and its decision will not be altered on appeal unless the record shows that the district court abused its discretion. *Nadeau v. Ramsey Cnty.*, 277 N.W.2d 520, 524 (Minn. 1979). Injunctions should not go beyond the requirements of a particular case. *Channel 10, Inc. v. Indep. Sch. Dist. No. 709*, 298 Minn. 306, 326 n.10, 215 N.W.2d 814, 828 n.10 (1974). Injunctions should "provide[] an adequate remedy without imposing unnecessary hardship on the enjoined party." *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 93 n.6 (Minn. 1979).

The extensive record in this case leads us to conclude the injunction was appropriate. Appellant had failed to comply with various state statutes and rules since at least 2003. The noncompliance was willful. The district court found that "[appellant] does not possess sufficient expertise, competence, ability, or willingness to operate a

feedlot facility in compliance with state statutes and rules, except with the assistance or supervision of others." Appellant has repeatedly disregarded the authority of MPCA and the district courts, and it appears that he does not think it is necessary to follow rules and regulations placed by the state on his chosen profession. Moreover, this entire matter was protracted, a fact that was noted by and concerning to the district court: "what [appellant] was required to do is what every hog producer is required to do constantly . . . to monitor and keep their operations within the law. It took nine years for him to do what they're doing annually."

The injunction is not overbroad. The injunction against appellant's participation in "the practice of animal agriculture" contains an important exception: appellant can engage in animal agriculture, whether or not it involves feedlot facilities, so long as another agricultural producer is willing to supervise him or otherwise ensure he is in compliance with all applicable rules and regulations. Appellant's long pattern of misconduct makes it easy to conclude that, without supervision, he will very likely be in noncompliance again in the future.

Finally, appellant's assertion that the injunction leaves him with "no possible reprieve" is without merit. Appellant wants to "be permitted to work toward" showing he can capably raise animals in feedlot conditions. There is nothing in the injunction prohibiting him from doing so. "It is well established that courts have the inherent power to amend, modify, or vacate an injunction where the circumstances have changed and it is just and equitable to do so." *Jacobson v. Cnty. of Goodhue*, 539 N.W.2d 623, 625 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Jan. 12, 1996).

Affirmed.