Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2018-000101-001 DT 06/10/2019

HONORABLE SIGMUND POPKO

CLERK OF THE COURT
C. Avena
Deputy

RICHARD C HARKINS

RICHARD C HARKINS
4422 E LUPINE AVE
PHOENIX AZ 85028

v.

ARIZONA CORPORATION COMMISSION, THE (001)
MATTHEW J NEUBERT (001)

PAUL SEHMAN KITCHIN

COMM. POPKO
OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL – ADMINISTRATIVE DECISION AFFIRMED

Appellant, RICHARD C. HARKINS, seeks judicial review of Decision Number 76529, docketed 01/03/2018, ("Decision") of the Arizona Corporation Commission. This Court has jurisdiction pursuant to Ariz. Const. art. 6, § 14, A.R.S. §§ 12-124(A), -905(A), and 44-1981. For the following reasons, this Court affirms.

FACTS AND PROCEDURAL BACKGROUND[1]

The Commission's Securities Division instituted this action on or about August 26, 2015. The matter was assigned to an administrative law judge for hearing. After various pre-hearing procedures, the hearing was held over a seven-day period during May 2016. The administrative law judge issued his recommended opinion and order on October 10, 2017. After the parties

[1] Because the parties are familiar with the factual and procedural history of this case, it is not recounted in detail here.

filed exceptions, the Commission issued its unanimous 171-page Decision on January 3, 2018. Appellant timely sought judicial review.

In this securities enforcement action, the Commission found and concluded that Appellant was a member-manager and president of an Arizona limited liability company called USA Barcelona Realty Advisors, LLC ("Barcelona"). Another individual involved with Barcelona was Robert J. Kerrigan, another manager. During the times stated in the Decision and through the use of private placement offering memoranda, Appellant caused Barcelona to offer for sale, and sold, certain promissory notes, investment contracts, and units in the Barcelona. The Commission determined that these instruments were non-exempt securities under the Act.

The Commission further found and concluded that Barcelona and Harkins violated several sections of the Arizona Securities Act, A.R.S. §§ 44-1801 through 44-2126 (the "Act"), including the sale of unregistered and non-exempt securities in violation of A.R.S. § 44-1841, the offer and sale of securities while not being registered as dealers or salesman in violation of A.R.S. § 44-1842, and fraud in violation of A.R.S. § 44-1991.[2] Based on these findings and conclusions, Appellant was found jointly and severally liable for restitution to the defrauded investors in the amount of $1,318,124. In addition, Appellant was administratively fined $130,000.[3]

STANDARDS OF REVIEW

This Court will "defer to an agency's factual findings unless they are "arbitrary, capricious, or . . . an abuse of discretion." *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553 ¶ 9 (2018) (internal quotations omitted) (citing *J. W. Hancock Enterprises, Inc. v. Registrar of Contractors*, 126 Ariz. 511, 513 (1980)). *See also Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398 (1973); *Arizona Bd. of Osteopathic Examiners in Med. & Surgery v. Ferris*, 20 Ariz. App. 535, 536 (1973) (where applicable statutes do not mandate *de novo* judicial review, the "Superior Court can only decide whether the administrative action was erroneous in that it was arbitrary, capricious or involved an abuse of discretion"). *Cf.* A.R.S. § 12-910(E).[4]

[2] Appellant was also held liable as a control person for Barcelona's fraud violation. Decision, Conclusion of Law # 9. *See also* A.R.S. § 44-1999(B).

[3] Appellant has not challenged the computation of either the restitution amount or the administrative fine.

[4] A.R.S. § 12-910 was recently amended to exclude Arizona Corporation Commission cases from its operation. *See* A.R.S. § 12-910(G) (eff. 8/3/18). Arizona case law, however, provides substantially the same standard of review as

Accordingly, this Court's review determines whether the evidence supports the Commission's findings. If the evidence is conflicting but still supports the Commission's findings, this Court will not re-weigh the evidence. Instead, this Court must affirm the Commission's findings. *See DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984) ("A trial court may not function as a "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved."). *See also Arizona Board of Regents v. Superior Court*, 106 Ariz. 430 (1970) (citing *Jaffe v. State Dep't of Health*, 64 A.2d 330 (Conn. 1949)); *Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 409–10 ¶ 35 (App. 2003) ("*Vanguard*").

This Court, however, reviews issues of statutory interpretation *de novo*. *Arizona Water Co. v. Arizona Dept. of Water Res.*, 208 Ariz. 147, 151 ¶ 16 (2004). *Cf.* A.R.S. § 12-910(E) (eff. 8/3/18). After review, this Court may "modify, affirm or reverse the [D]ecision in whole or in part." A.R.S. § 12-911(A)(5).

ISSUES ON APPEAL

Appellant is self-represented in this matter. His opening brief[5] does not challenge the Decision's findings and conclusions that the instruments at issue here were non-exempt securities within the meaning of A.R.S. § 44-1801 and that neither he nor Barcelona were required to be registered as dealers or salesman as required by A.R.S. §§ 44-1841, 44-1842. Nor does he appear to contest the Decision's finding that he was responsible for "thirty sales of unregistered securities" and "sixteen offers for the sale of unregistered securities."[6] He argues, instead, that the Commission violated his right to procedural and substantive due process during its hearing procedures, that he was entitled to a jury trial, that the Commission erred when it did not find "loss causation," and Appellant also challenges the sufficiency of the evidence concerning the fraud violation. This ruling addresses these issues in turn and then reviews the sufficiency of the evidence supporting the Commission's findings of securities fraud.

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subsection (E). *See Shaffer v. Arizona State Liquor Bd.*, 197 Ariz. 405, 409 ¶ 16 (App. 2000). Thus, it is not necessary to consider Appellant's arguments with respect to the retroactivity of subsection (G).

[5] Appellant did not file a reply brief.

[6] Decision, Findings of Fact, # 18.

DISCUSSION

DUE PROCESS

Appellant claims that due process violations make the Decision invalid. First, he appears to make a general attack against the administrative adjudication process itself. Second, he raises three arguments concerning the Commission's open meeting held on December 18, 2017 ("Open Meeting") and where it unanimously accepted the administrative law judge's ("ALJ") Recommended Order and Opinion ("ROO"). Specifically, he contends (a) the Commission's unanimous vote at the Open Meeting despite the absence of the ALJ somehow violated due process, (b) that he should have been given more time at the Open Meeting to articulate his views to the Commission, and (c) that the Commission abdicated its role as evidenced by one commissioner indicating he supported the ROO because the Commission's staff's work reflected "due diligence."

(1) — With respect to Appellant's due process attack on the general administrative adjudication process, Appellant received all the process he was due. The fact that the Commission was the final decision maker in a matter that its own staff investigated does not result in a due process violation. *Rouse v. Scottsdale Unified Sch. Dist. No. 48,* 156 Ariz. 369, 373 (App. 1987); *DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 340–41(App. 1984). No sitting commissioner was charged with advocating the case against Appellant. *Cf. Horne v. Polk,* 242 Ariz. 226, 231 ¶ 16 (2017) ("Due process will be satisfied if the agency head who serves as the ultimate adjudicator does not also serve in an advocacy role in the agency proceedings."). Moreover, other than to complain about the overall result, Appellant has not "overcome a presumption of honesty and integrity in those serving as adjudicators" in their respective role as the ALJ or commissioners. *Withrow v. Larkin,* 421 U.S. 35, 47 (1975).

At its core, due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation omitted). *See also Hart v. Industrial Comm'n of Arizona*, 180 Ariz. 307, 311 (App. 1994) (due process requires notice and an opportunity to be heard). The record in this case patently demonstrates Appellant was given this full opportunity. Prior to the administrative hearing before the ALJ, Appellant filed a formal request for a hearing, his list of witnesses and exhibits, an answer to the amended temporary cease and desist order, he personally participated in the multi-day hearing by giving his own extensive testimony and cross-examining witnesses, he admitted exhibits at that hearing and gave a closing argument, he filed a 108-page post-hearing

brief, he filed 36 pages of "exceptions," to the ROO which were addressed directly to the commissioners. He then was given an opportunity to address the Commission orally at its Open Meeting.

Appellant does not claim that he was not given notice of the allegations against him. He had ample opportunity to be heard on his response to those allegations. There is no evidence that either the ALJ or any of the commissioners were dishonest "adjudicators." His general due process attack thus fails.

(2)(a) — Appellant argues, without any citation of authority, that the ALJ's absence from the Open Meeting somehow deprived him of due process. First, Appellant did not raise this issue at the Open Meeting when he first learned the ALJ would be absent due to medical reasons. The failure to raise the issue with the administrative agency in the first instance results in a waiver of the issue on appeal. *DeGroot*, 141 Ariz. at 340 ("The general rule is that failure to raise an issue before an administrative tribunal precludes judicial review of that issue on appeal unless the issue is jurisdictional in nature.").[7] *Accord Neal v. City of Kingman*, 169 Ariz. 133, 136–37 (1991); *Rouse v. Scottsdale Unified School Dist.*, 156 Ariz. 369, 371 (App. 1987); *Calixto v. Industrial Comm'n*, 126 Ariz. 400, 402 (App. 1980).

Even absent such a waiver, however, this issue offers no relief to Appellant. The ALJ was not a "witness" required to attend the Open Meeting. The ALJ's presence was for the benefit of the commissioners in the event they had questions for the ALJ. Appellant points to no statute, case, or rule that would have given him the right to ask the ALJ any questions at the Open Meeting. Had the Commission believed that the ALJ's presence was necessary for it to render an appropriate decision on the ROO, the Commission certainly had the discretion to continue the matter and place it on a subsequent agenda. There was no due process violation on this point.

(2)(b) — Appellant argues, again without citation to authority, that he should have been given more time to make oral remarks at the Open Meeting. Oral argument to the ultimate decision maker is not always a necessary component of due process. *Federal Communications Comm'n v. WJR, The Goodwill Station*, 337 U.S. 265, 276 (1949). *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1969) (requiring oral presentations before welfare recipients' benefits could be terminated without prior hearing because written presentations by the affected population were

[7] There is no argument that the ALJ's absence from the Open Meeting divested the Commission of jurisdiction.

not a "realistic option"). Moreover, there is no authority for Appellant's proposition that he should have been given as much time as he wanted when oral argument was granted.

Instead, due process requires only that Appellant be given a meaningful opportunity to rebut the allegations against him and present his case. As described above, Appellant's participation in the ALJ proceedings was extensive. He then made written arguments directly to the Commission via his filed "exceptions" to the ROO. The Commission then allotted Appellant and counsel for another party several minutes to make oral presentations to the Commission. There is no doubt that Appellant was given a "meaningful opportunity" to be heard throughout the administrative proceedings. The Commission did not violate due process by limiting Appellant's time to address the Commission to approximately six minutes.[8]

(2)(c) — As the commissioners were voting whether to accept the ROO, one commissioner explained his vote by commenting that he wished the ALJ was able to be present at the Open Meeting, but his review of the ROO indicated that the staff had employed "due diligence" and that the commissioner was satisfied that the evidence proved "fraud." The same commissioner also told one of the hearing participants that he could "see" some of the points the participant raised during the oral presentation. Appellant suggests, without legal support, that this commentary explaining a single commissioner's vote resulted in a violation of his due process rights because it demonstrates that the Commission "abdicated its responsibility." The lone commissioner's comments do not reflect any such thing.

Nothing in the commissioner's comments suggests an "abdication" of responsibility. Instead, it reflects that the commissioner heard and considered the participant's points, but was ultimately persuaded by the evidence produced at the multi-day administrative hearing that there was a violation. There was no due process violation.

JURY TRIAL

In passing, Appellant suggests that he had the right to a jury trial on the administrative securities fraud allegations. First, Appellant never raised this issue with the ALJ or the Commission. Thus it is waived. *DeGroot*, 141 Ariz. at 340. Moreover, it does not succeed on the merits. The federal and state constitutional guarantees to a jury trial apply to suits known at

[8] Perhaps more importantly, commissioners were able to ask questions of any party to the proceeding. Appellant has not shown nor even alleged that the commissioners were somehow restricted in their individual ability to probe the nuances of the case.

common law at the time the respective guarantees were enacted. *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 459 (1977); *State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245 ¶ 36 (App. 2014). The Commission's securities enforcement authority was created as the result of the legislature's adoption of the Arizona Securities Act in 1951. See *Vanguard*, 206 Ariz. at 410 ¶¶ 36–38 (discussing history of securities regulation and enforcement in the U.S. and Arizona). The common law did not provide for securities regulatory enforcement prior to the enactment of either jury trial guarantee. *See id.* There is no constitutional right to a jury trial in this instance.

LOSS CAUSATION

Appellant seems to argue on appeal that the Commission needed to prove "loss causation" before it could find him liable for a securities violation.[9] Again, Appellant did not raise this issue with the ALJ or the Commission, so it is waived on appeal. *DeGroot*, 141 Ariz. at 340. Likewise, it also fails on the merits. Proof of loss causation is only required in private actions to enforce Arizona securities law. Such proof is not required when the Commission brings its own enforcement action. *Hirsch v. Arizona Corp. Comm'n*, 237 Ariz. 456, 463 ¶ 24 (App. 2015) ("Accordingly, the Commission did not err in concluding Appellants violated the registration and anti-fraud provisions of the [Arizona Securities Act] even absent evidence of loss causation.").

SUFFICIENCY OF THE EVIDENCE OF FRAUD

Appellant's argument with respect to the fraud violation is simple. He asserts there was no fraud. Arizona law prohibits the making of untrue or misleading material omissions to potential securities investors. A.R.S. § 44-1991(A)(2). The statute "not only removes the burden of investigation from an investor, but places a heavy burden upon the offeror not to mislead potential investors in any way." *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553 (App. 1986). The Commission need not prove that the speaker knew of a statement's falsity. *Aaron v. Fromkin*, 196 Ariz. 224, 227 ¶ 15 (App. 2000). "The standard of materiality of omitted facts under the securities laws contemplates a 'showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable (buyer).'" *Rose v. Dobras*, 128 Ariz. 209, 214 (App. 1981) (quoting *T.S.C.*

[9] "Loss causation is nothing more than proximate cause— the allegedly unlawful conduct caused the economic harm." *Hirsch v. Arizona Corp. Comm'n*, 237 Ariz. 456, 462 ¶ 20 (App. 2015) (internal quotation omitted).

Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). Thus, the test is an objective one, and the Commission need not prove that an actual investor in the case at hand deemed an omitted fact as material. *Aaron v. Fromkin*, 196 Ariz. 224, 227 ¶ 14 (App. 2000).

The evidence produced at the hearing supported the Commission's conclusion that Appellant was liable for fraud.[10] Appellee's brief details witnesses' testimony and the exhibits the Decision relies on to find evidence of fraud. Appellee's Answering Brief, filed 3/27/2019, at pp. 4–5, 11–14. Appellant, however, has a different take on the same evidence. Appellant's Opening Brief, filed 02/05/2019, at pp. 13–19. Nonetheless, where the evidentiary record may support "either of two inconsistent factual conclusions," this Court cannot re-weigh the evidence and reach a conclusion different from the Commission. Instead, it must affirm the Decision. *Vanguard*, 206 Ariz. at 409 ¶ 35.

Upon reviewing the record and the citations in Appellee's brief, this Court concludes that "substantial evidence" supports the Commission's Decision. Thus, the Commission could reasonably conclude that Appellant and Barcelona failed to tell investors or potential investors that (a) Appellant was involved in a prior real estate venture that failed, (b) Appellant and Barcelona were assisted by a convicted felon, (c) another Barcelona executive member-manager (Kerrigan) had owed unpaid taxes and had been sued over a bank loan, (d) Barcelona silently went to "Plan B" for its business plan because its primary plan had not succeeded, (e) Barcelona was behind in payments on certain promissory notes to Kerrigan, (f) Appellant planned to use some of his investment funds to repay Kerrigan and make interest payments to earlier investors, (g) Barcelona was behind on certain payments to earlier investors, and (h) Barcelona misrepresented to an investor that the investment would be "low-risk." The Commission also could reasonably conclude that all of these omissions and mis-statements could be considered material and misleading to the reasonable investor.

DISPOSITION AND ORDERS

Appellant has not shown cause to reverse or modify the Decision. That Decision was supported by sufficient evidence and was not arbitrary, capricious, or an abuse of discretion. The Commission did not misapprehend or misapply the governing law. Accordingly,

[10] Appellant was found liable for securities fraud both based on his own conduct and secondarily liable for Barcelona's conduct as a "control person" within the meaning of A.R.S. § 44-1999. Decision, Conclusions of Law, ¶¶ 8–9. Appellant has not challenged that he was a "control person" of Barcelona.

IT IS THEREFORE ORDERED affirming Decision Number 76529 of the Arizona Corporation Commission.

IT IS ALSO ORDERED that, because no further matters remain pending between the parties in this case, this ruling is signed as the final decision of the Court for purposes of appeal pursuant to Rule 13, Rules of Procedure for Judicial Review of Administrative Decisions.

/s/Sigmund Popko
The Hon. Sigmund G. Popko
Judicial Officer of the Superior Court

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