

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 3, 2010**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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**Appeal No. 2009AP2460**

**Cir. Ct. No. 2008CV8239**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**JOHN L. HAMMER,**

**PETITIONER-APPELLANT,**

**V.**

**COMMISSIONER OF INSURANCE  
FOR THE STATE OF WISCONSIN,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
MAXINE A. WHITE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. John L. Hammer appeals from an order of the circuit court affirming the determination by the Commissioner of Insurance for the

State of Wisconsin (Commissioner) that Hammer violated WIS. ADMIN. CODE § INS. 2.16(6)<sup>1</sup> (Sept. 2009) and WIS. STAT. § 628.34(1)(a) (2007-08)<sup>2</sup> on multiple occasions, that Hammer's license to sell insurance in Wisconsin should be revoked, and that he should pay restitution and forfeitures. Hammer challenges the Commissioner's decision on the following three bases: (1) Hammer claims he did not receive a fair hearing before the administrative law judge (ALJ); (2) Hammer claims the Commissioner's decision was not supported by credible

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<sup>1</sup> WISCONSIN ADMIN. CODE § INS. 2.16(6) provides:

**(6) SUITABILITY OF POLICIES.** No insurer or intermediary may recommend to a prospective buyer the purchase or replacement of any individual life insurance policy or annuity contract without reasonable grounds to believe that the recommendation is not unsuitable to the applicant. The insurer or intermediary shall make all necessary inquiries under the circumstances to determine that the purchase of insurance is not unsuitable for the prospective buyer. This subsection does not apply to an individual policy issued on a group basis.

<sup>2</sup> WISCONSIN STAT. § 628.34(1)(a) provides:

**(1) MISREPRESENTATION.** (a) *Conduct forbidden.* No person who is or should be licensed under chs. 600 to 646, no employee or agent of any such person, no person whose primary interest is as a competitor of a person licensed under chs. 600 to 646, and no person on behalf of any of the foregoing persons may make or cause to be made any communication relating to an insurance contract, the insurance business, any insurer or any intermediary which contains false or misleading information, including information misleading because of incompleteness. Filing a report and, with intent to deceive a person examining it, making a false entry in a record or willfully refraining from making a proper entry, are "communications" within the meaning of this paragraph. No intermediary or insurer may use any business name, slogan, emblem or related device that is misleading or likely to cause the intermediary or insurer to be mistaken for another insurer or intermediary already in business.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

and substantial evidence; and (3) Hammer claims the penalties imposed by the Commissioner were arbitrary and capricious. We affirm.

### **I. BACKGROUND.**

¶2 Hammer is a former insurance agent licensed by the State of Wisconsin. He worked for Pennsylvania Life Insurance Company (Penn Life) and specialized in the sale of accident, health, and life insurance products to senior citizens. In response to complaints filed against Hammer by Wayne Waldmann, age 63, Ann Wrobbel, age 81, Germaine Zimbal, age 77, and Josephine Twist, age 78, the Office of the Commissioner of Insurance (OCI) on November 16, 2006, served Hammer with a notice of hearing charging Hammer with multiple violations of WIS. STAT. § 628.34, and WIS. ADMIN. CODE. § INS. 2.16(6). An administrative hearing before an ALJ was held on the matter.

¶3 Based on evidence taken at the hearing, which was held over three days, the ALJ found that there was substantial evidence regarding those allegations relating to what the ALJ characterized as the “two core theories of misconduct: violations of the unfair marketing statute, specifically the subsection on misrepresentation, and violations of the suitability rule,” which center around Hammer’s transactions with Waldmann, Wrobbel, Zimbal, and Twist.

¶4 The ALJ concluded that with respect to Waldmann, Wrobbel, Zimbal, and Twist, Hammer recommended Penn Life products that were unsuitable for those individuals in light of their particular circumstances. The ALJ further concluded that Hammer made misrepresentations as to the ramifications each of those individuals faced by cancelling their previous insurance products to purchase the Penn Life products recommended by Hammer. The ALJ recommended that Hammer’s insurance intermediary license be revoked. The

ALJ also recommended that Hammer pay restitution to Waldmann, Wrobbel, and Zimbal in varying amounts totaling \$20,775.46, and that he be subjected to a forfeiture in the amount of \$20,000.

¶5 The Commissioner adopted the ALJ's proposed decision and recommendations in their totality, finding the record supported both the findings of facts and conclusions of law set forth in the proposed decision. Hammer sought review of the Commissioner's decision from the circuit court, which affirmed. Hammer appeals. Additional facts will be discussed as necessary below.

## II. ANALYSIS.

¶6 Hammer challenges the Commissioner's decision on the following bases: (1) he claims he did not receive a fair hearing from the ALJ; (2) he claims the Commissioner's decision is not supported by credible and substantial evidence; and (3) he claims the penalties imposed by the Commissioner were arbitrary and capricious.

¶7 "In deciding an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the decision of the agency, not that of the circuit court." *Bunker v. LIRC*, 2002 WI App 216, ¶13, 257 Wis. 2d 255, 650 N.W.2d 864.

### A. Fair Hearing

¶8 To satisfy the fundamental requirement of procedural due process, an adjudicator in an administrative proceeding must be fair and impartial. *Id.*, ¶19. We presume that those serving as adjudicators in state administrative proceedings do so with honesty and integrity. *Id.* However, when the adjudicator in an administrative proceeding exhibits bias in fact or when the risk of bias is

impermissibly high, the administrative decision can violate due process. *Nu-Roc Nursing Home, Inc. v. DHSS*, 200 Wis. 2d 405, 415-16, 546 N.W.2d 562 (Ct. App. 1996). Hammer contends that he did not receive a fair hearing before the ALJ because the ALJ was biased against agents employed by Penn Life and because the risk of bias was high in light of the fact that the ALJ, the prosecuting attorney, and the Commissioner all work for the same agency—the OCI.<sup>3</sup>

¶9 Hammer argues that the ALJ had a demonstrated bias against him because the ALJ had overseen hearings against five other Penn Life agents, whom Hammer fails to identify, and had recommended that each of those agents have their license to sell insurance revoked and have imposed upon them a financial forfeiture.

¶10 We reject Hammer’s assertion that an ALJ is biased against an individual or an employee of a particular entity merely because the ALJ has issued five similarly unfavorable decisions. Hammer’s assertion ignores the context of the ALJ’s recommendations and fails to put those proposed decisions in perspective to the total number of recommendations issued by the ALJ. Furthermore, to determine whether the ALJ was biased against Hammer and other Penn Life agents we would need to review evidence relating to Hammer’s hearing and the hearings of the five other unidentified Penn Life agents Hammer alludes to. The record, however, lacks any evidence relating to those agents. We are therefore unable to determine if any bias on the part of the ALJ against Hammer existed.

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<sup>3</sup> The OCI argues that Hammer has forfeited any objection to the fairness of the hearing because he failed to raise that objection below. For purposes of our analysis, however, we assume without deciding that Hammer has not forfeited his objection.

¶11 Hammer also suggests that the ALJ was biased because the ALJ denied Hammer's request to strike untimely claims filed by OCI against him and failed to "admonish the OCI for its willingness to violate its own rules." However, Hammer's disagreement with the ALJ's ruling is not sufficient to establish a bias against him on the ALJ's part.<sup>4</sup>

¶12 In addition to situations where an ALJ has demonstrated bias in fact, an administrative decision may violate due process when the *risk* of bias is impermissibly high. *See Nu-Roc*, 200 Wis. 2d at 415-16. Hammer argues that the risk of bias at his hearing was impermissibly high because the ALJ, the prosecuting attorney, and the Commissioner operated as an "insulated trinity" which "adjudicated and prosecuted all the actions." He claims that the "risk of bias was impermissibly high" and the result of the hearing was "pre[-]ordained" in light of the fact that the ALJ and the prosecuting attorney "both directly or indirectly report to the [Commissioner]" and the fact that "as an attorney on the [Commissioner's] staff, the ALJ served as counsel to the Commissioner [] and as the adjudicator of cases ultimately approved by the Commissioner."

¶13 Hammer fails to refer this court to any legal authority supporting his contention that the operational structure of the OCI creates an impermissibly high risk of bias. Arguments unsupported by legal authority need not be addressed by

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<sup>4</sup> Hammer argues that additional evidence of bias can be found in a letter from OCI's general counsel to the chief executive officer of Penn Life encouraging Penn Life to terminate the office which Hammer managed. The Commissioner asserts that this argument was not raised below. Instead of replying to this assertion, Hammer simply references the letter again in his reply brief. The failure to reply, however, results in a concession to the Commissioner's position. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession the failure to refute a proposition asserted in a response brief in a reply brief). Arguments raised for the first time on appeal are deemed forfeited. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

this court. *See Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 (Ct. App. 2004).

*B. Commissioner's Decision*

¶14 Hammer contends that there was not “credible and substantial evidence in the record” to support the Commissioner’s determination that he violated WIS. ADMIN. CODE § INS. 2.16(6) and WIS. STAT. § 628.34(1)(a).

¶15 The question of whether Hammer’s conduct violated WIS. ADMIN. CODE § INS. 2.16(6) and WIS. STAT. § 628.34(1)(a) presents a mixed question of fact and law. Pursuant to WIS. STAT. § 227.57(6), the factual findings of the Commissioner will be upheld if they are supported by substantial evidence. *See Clean Wisconsin, Inc. v. PSC*, 2005 WI 93, ¶46, 282 Wis. 2d 250, 700 N.W.2d 768. “An agency’s [factual] findings are supported by substantial evidence if a reasonable person could arrive at the same conclusion as the agency, taking into account all the evidence in the record.” *Id.* An agency’s interpretation and application of regulations and statutes present questions of law, generally subject to *de novo* review. *See Milwaukee Symphony Orchestra, Inc. v. Wisconsin DOR*, 2010 WI 33, ¶32, 324 Wis. 2d 68, 781 N.W.2d 674; *Wisconsin Power & Light Co. v. PSC*, 2009 WI App 164, ¶18, 322 Wis. 2d 501, 777 N.W.2d 106. “A reviewing court may, however, give deference to an agency’s interpretation of a statute.” *Milwaukee Symphony Orchestra*, 324 Wis. 2d 68, ¶32; *see also Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477 (“A reviewing court accords an interpretation of a statute by an administrative agency one of three levels of deference—great weight, due weight or no deference—based on the agency’s expertise in the area of law at issue.”).

We do not need to decide the appropriate level of deference here because we would affirm even under *de novo* review.

¶16 Hammer challenges both the factual and legal findings made by the ALJ and adopted by the Commissioner.

1. Factual Findings

¶17 Hammer suggests that the factual findings made by the ALJ are erroneous because the ALJ “disregard[ed] [his] testimony and [gave] full credit to the testimony of the complainants called to testify.”

¶18 We review the factual findings of an agency pursuant to WIS. STAT. § 227.57(6) and will set aside the decision of an agency or remand the case to the agency only if “the agency’s action depends on any finding of fact that is not supported by substantial evidence in the record.” *Wisconsin Prof’l Police Ass’n v. PSC*, 205 Wis. 2d 60, 67, 555 N.W.2d 179 (Ct. App. 1996) (citation omitted). “[T]he substantial evidence test is satisfied when reasonable minds could arrive at the same conclusion ... when taking into account all evidence in the record.” *Id.*

¶19 The finder of fact is the ultimate arbiter of a witness’s credibility. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). It is well settled that a reviewing court will rarely, if ever, second guess a fact finder’s assessment of witness credibility, *see, e.g., Wisconsin Prof’l Police Ass’n*, 205 Wis. 2d at 67, and a reviewing court will search the record for evidence that supports the findings made by the fact finder, *State v. Young*, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736 (Ct. App. 2008).

¶20 The ALJ found that Hammer’s testimony at the hearing was not credible. The ALJ stated that Hammer’s testimony was “filled with attempts to



mislead and deceive” and that “[t]he inconsistencies within [Hammer’s] [] testimony create[d] an inference of pretext and show[ed] that [Hammer] had no compunction about changing his testimony under oath to justify his actions at the time of sale.” The ALJ noted multiple instances in which Hammer’s testimony was inconsistent with other statements and testimony given by him.

¶21 We have reviewed the record and the ALJ’s rejection of Hammer’s testimony is well supported. As was observed by the ALJ in the proposed decision, Hammer’s testimony at the hearing contains numerous inconsistencies, supporting the ALJ’s finding that Hammer had a “habit of fabrication and [a] lack of candor.”

¶22 Hammer also takes issue with the ALJ’s factual findings because he claims the ALJ “either ignored, misconstrued, or mishandled key testimony and evidence in the record.” Hammer sets forth in detail in his brief on appeal those findings, or lack thereof, that he takes issue with. Although Hammer holds one view of the evidence, the ALJ clearly held another view of it. We will set aside the findings of an administrative agency “only if a reasonable person could not have made the findings from the evidence.” *Wisconsin Prof’l Police Ass’n*, 205 Wis. 2d at 67. Taking into account all the evidence in the record, we cannot say that no reasonable person could have reached the factual conclusions reached by the ALJ and adopted by the Commissioner.

## 2. Legal Determinations

### *a. WISCONSIN ADMIN. CODE § INS. 2.16(6).*

¶23 Hammer contends that the Commissioner’s determination that he violated WIS. ADMIN. CODE § INS. 2.16(6) was not supported by credible and

substantial evidence because the OCI failed to present expert testimony at the hearing addressing the issue of “suitability.” Hammer asserts that there is a lack of clarity regarding the standard of suitability under § INS. 2.16(6). He maintains that because “suitability determinations go beyond the realm of the ordinary experience of humankind and require special training, study or experience” and can be interpreted differently by different individuals, it was necessary for the OCI to offer expert testimony at his administrative hearing.

¶24 Expert testimony is necessary only when the subject matter involved entails “special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience.” *Cramer v. Theda Clark Mem’l Hosp.*, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969). Hammer fails to provide citation to any legal authority to support his suggestion that determining whether a particular insurance policy or annuity contract is suitable for a customer requires “special learning, study, or experience” and, therefore, expert testimony. *See id.* We will not consider arguments unsupported by legal authority. *See Kruczek*, 278 Wis. 2d 563, ¶32.

*b. WISCONSIN STAT. § 628.34(1)(a).*

¶25 Hammer contends that the Commissioner wrongly determined that he made representations in violation of WIS. STAT. § 628.34(1)(a), which prohibits an individual licensed to sell insurance products in Wisconsin from making “any communication relating to an insurance contract, the insurance business, any insurer or any intermediary which contains false or misleading information, including information misleading because of incompleteness.” Hammer disputes the factual findings either relied upon or disregarded by the ALJ and the

Commissioner in determining that he violated § 628.34(1)(a). Hammer takes particular issue with the fact that the ALJ “disregarded [his] testimony.” However, as we discussed above in ¶¶17-22, *supra*, the credibility determinations and factual findings made by the ALJ and adopted by the Commissioner are supported by substantial evidence.

### *C. Penalties*

¶26 Hammer argues that the penalties imposed by the Commissioner—revocation of his license to sell insurance in Wisconsin and the requirement that he pay restitution and forfeitures—were arbitrary and so harsh as to shock the conscience of the court. Penalties so harsh as to shock the conscience of the court are deemed arbitrary. *Lewis Realty v. Wisconsin Real Estate Brokers’ Bd.*, 6 Wis. 2d 99, 125, 94 N.W.2d 238 (1959).

#### 1. License Revocation

¶27 Whether to revoke, suspend, or limit an insurance intermediary’s license lies within the discretion of the Commissioner. *See* WIS. STAT. § 628.10(2)(b). Section 628.10(2)(b) provides in relevant part:

[A]fter a hearing, the [C]ommissioner may revoke, suspend or limit in whole or in part the license of any intermediary if the [C]ommissioner finds that the licensee is unqualified as an intermediary, is not of good character or has repeatedly or knowingly violated an insurance statute or rule or a valid order of the [C]ommissioner under s. 601.41(4), or if the intermediary’s methods and practices in the conduct of business endanger ... the legitimate interests of customers and the public.

¶28 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 (Ct. App. 1992); WIS. STAT. § 227.57(8).

¶29 The OCI adopted the ALJ's recommendation that Hammer's insurance license be revoked. The ALJ explained its recommendation as follows:

[Hammer] challenges OCI's assertion that revocation is appropriate and suggests "corrective remedial action." If [Hammer's] actions were clearly a function of lack of understanding, such an approach might be appropriate. However, the most egregious aspect of [Hammer's] violations is his repeated use of deception. In addition, his managerial status and the fact that the company uses him to provide continuing education to its intermediaries suggest that his transgressions are not the transgressions of inexperience.

In his unrelenting attempt to cast himself as the victim, [Hammer] fails to recognize that he chose to engage in unprincipled conduct not only during his sales transactions but when he failed to be forthright under oath. [Hammer's] transgressions cover a period of years and four different individuals. He approached individuals in their homes and represented that the product he recommended was what they needed. All the consumers in this case relied on [Hammer] to varying degrees and all based their decisions on [Hammer's] representations.

Occupational licensing and regulatory procedures are based upon a legislative determination that public health, safety and consumer protection[] is necessary. *Laufenberg v. Cosmetology Examining Bd.*, 87 Wis. 2d 175[,] 184[, 274 N.W.2d 618] (197[9]). By licensing an intermediary[,] OCI bestows a mantle of trustworthiness. Intermediaries who betray that trust by using deceptive sales practices impose costs on the consumer, the industry and the public. Revocation protects the public by preventing an intermediary's bad conduct, deterring his repetition of his conduct and deterring similar conduct by other intermediaries.

[Hammer's] violations are significant. His repeated misrepresentations and his actions endangered the legitimate interests of his customers. He committed the violations deliberately, or at least recklessly, and on

repeated occasions. When intermediaries repeatedly engage in unfair marketing practices, revocation punishes their inappropriate conduct and protects the public by deterring the intermediary being revoked and other intermediaries from engaging in similar misconduct. License revocation may bar an intermediary from selling insurance; however, license revocation does not stop him from earning a livelihood any other way. When a licensee poses a danger to consumers, the protection of the public is paramount.

¶30 Hammer asserts that revocation was inappropriate because he did not engage in “any illegal activities,” because he “did not profit from his recommendations or interactions with the complainants,” because there was no evidence that he committed violations “knowingly or intentionally,” and because if revocation was merited, the OCI should have done so summarily. Revocation pursuant to WIS. STAT. § 628.10(2)(b) does not require that an intermediary have engaged in illegal activity, have profited from his or her recommendations or interactions with clients, or have committed the charged violations knowingly or intentionally to warrant revocation of the intermediary’s license by the Commissioner if the Commissioner determines that the intermediary’s character, skills, or other conduct is such so as to endanger his or her customers or the public. Furthermore, § 628.10(2)(b) authorizes the OCI to revoke an intermediary’s license either summarily or after a hearing.

¶31 Hammer asserts in conclusory fashion that revocation of his insurance license was inappropriate because the OCI failed to prove that he is unqualified; is not of good character; repeatedly or knowingly violated an insurance statute or rule; or that his methods and practices endangered the legitimate interests of the customers and the public as is required under WIS. STAT. § 628.10(2)(b). Generally, this court does not consider conclusory assertions and undeveloped arguments. *See Associates Fin. Servs. Co. of Wis., Inc. v. Brown,*

2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56. That being said, as we explained above in ¶¶23-25, *supra*, the record supports the Commissioner's determination that Hammer violated WIS. ADMIN. CODE § INS. 2.16(6) and WIS. STAT. § 628.34(1)(a) on multiple occasions, which constitutes a basis for revocation under § 628.10(2)(b).

¶32 Finally, Hammer asserts that the revocation of his insurance license was arbitrary in nature because the OCI failed to penalize other insurance intermediaries in the same manner in which he was penalized. However, as observed by the OCI, this case is not about the actions of other intermediaries, but instead about the actions of Hammer. Even if Hammer's claim is true, WIS. STAT. § 628.10 contains no exception to revocation because others have behaved in a similar manner but have not yet been disciplined.

## 2. Restitution

¶33 Hammer contends that the Commissioner had no basis to order him to pay restitution because restitution is dependent upon the earning of a profit and the evidence failed to establish that he earned a profit. Hammer relies upon WIS. STAT. § 601.64(3)(a), which is entitled "*Restitutionary forfeiture*" and provides that "[w]hoever violates ... any insurance statute or rule ... shall forfeit to the state twice the amount of any profit gained from the violation." While Hammer may very well be correct that a restitution penalty under § 601.64(3)(a) requires that a profit have been earned, the Commissioner did not impose a restitution penalty against Hammer under that statute. The Commissioner ordered restitution pursuant to WIS. STAT. § 601.41(4)(a), which authorizes the Commissioner to order restitution under WIS. STAT. § 628.347(5). Section 628.347(5)(c) in turn authorizes the Commissioner to order an insurance intermediary "to take

reasonably appropriate corrective action for any consumer harmed by a violation of this section by the insurance intermediary.” Neither § 601.41(4)(a) nor § 628.347(5)(c) limit the Commissioner’s authority to order restitution only in those situations where the intermediary has earned a profit. Hammer’s contention is therefore without merit.

### 3. Forfeiture

¶34 Hammer contends that the forfeiture imposed upon him in the amount of \$20,000 was excessive in that it exceeded the amount allowed under WIS. STAT. § 601.64(3)(c). Section 601.64(3)(c) authorizes a forfeiture not to exceed \$1000 per violation. Hammer asserts that the Commissioner adopted the ALJ’s determination that he committed nine violations—four violations of WIS. ADMIN. CODE § INS. 2.16(6) (one each with respect to Waldmann, Wrobbel, Zimbal, and Twist) and five violations of WIS. STAT. § 628.34(1)(a) (one each with respect to Waldmann, Wrobbel, Zimbal, Twist, and the OCI). He argues that because the Commissioner enumerated only nine violations, the \$20,000 forfeiture is excessive. Hammer overlooks the Commissioner’s determination that Hammer committed multiple separate violations of § INS. 2.16(6) and § 628.34(1)—the record substantiated a finding that twenty violations occurred—enough to support a forfeiture totaling \$20,000, with each violation entailing a \$1000 forfeiture. Consequently, we do not further address Hammer’s contention that the forfeiture was excessive.

¶35 For all of the reasons discussed above, we affirm the order of the circuit court which affirmed the Commissioner’s decision.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.



