COURT OF APPEALS
DECISION
DATED AND RELEASED

June 8, 1995

No. 94-0852

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DONALD A. MARKWALDER,

Petitioner-Appellant,

v.

OFFICE OF THE COMMISSIONER OF INSURANCE OF WISCONSIN,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Donald A. Markwalder appeals from a circuit court order affirming a decision of the Office of the Commissioner of Insurance (OCI) revoking his insurance intermediary's license and prohibiting him from reapplying for a new license for two years. An examiner found that Markwalder violated § 628.34, STATS., which prohibits unfair marketing

practices, including misrepresentation respecting insurance contracts. For the reasons set forth below, we affirm.

BACKGROUND

In 1992, Markwalder held an insurance intermediary's license which permitted him to sell insurance to the public. For several months in 1992, Markwalder accepted premiums from clients for insurance policies never issued, misled clients as to whether they were insured, provided false insurance documents to clients, refused to return client calls, and made promises and excuses to clients in lieu of providing service.[1] Consumer complaints led to an OCI investigation.

OCI issued a notice of hearing, Markwalder responded to the allegations in the notice, and a prehearing conference was conducted, followed in January 1993 by a hearing before a hearing examiner. The hearing was continued to February 1993, and the matter was resolved by a Final Decision and Order which revoked Markwalder's license and prohibited him from reapplying for a period of two years. Markwalder sought ch. 227, STATS., review before the circuit court, which affirmed. He then appealed to this court.

STANDARD OF REVIEW

In reviewing administrative decisions, we are confined to the record. Section 227.57(1), STATS. We affirm the agency unless we find that the agency erroneously interpreted the law, and a correct interpretation compels a different result. Section 227.57(5). OCI is charged with administering insurance intermediary licenses, and has been for many years. Thus, its experience, competency and knowledge in enforcing the relevant statutes entitle its

[1] Markwalder and OCI stipulated to the facts underlying this appeal.

decisions to "great weight." ***Sauk County v. WERC***, 165 Wis.2d 406, 413, 477 N.W.2d 267, 270 (1991).

ANALYSIS

Markwalder makes three arguments. He claims that § 628.34, STATS., does not apply to his acts. If the statute does apply, he argues that § 628.34 requires "intent," and he claims the evidence does not support a finding that he intended to make misrepresentations as to insurance matters. He also argues that the OCI hearing examiner acted capriciously in refusing to consider evidence that OCI had imposed lesser penalties on others whose behavior was as bad as, or worse than, his own. We consider each of these arguments in turn.

1) Whether § 628.34, STATS. applies.

Section 628.34, STATS., is captioned "Unfair marketing practices." Subsection (1)(a) is titled "Misrepresentation ... Conduct forbidden," and reads as follows:

> No person who is or should be licensed under chs. 600 to 646, no employe 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 wilfully 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.

Markwalder argues that he was not engaged in "marketing" because his alleged wrongdoing occurred after clients had already retained him. However, Markwalder ignores § 990.001(6), STATS. That section provides:

> The titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes.

Thus, the title of the statute is irrelevant. Section 628.34(1)(a) is clear and unambiguous; it prohibits a person licensed under chs. 600 to 646, STATS., from

making misrepresentations as to insurance contracts, the insurance business or an insurer or intermediary.

2) Whether § 628.34(1)(a), STATS., requires "intent."

Markwalder argues that § 628.34(1)(a), STATS., requires "intent" to do the prohibited acts. He claims that because of his depression and alcohol dependency, he could not form the requisite "intent." We disagree.

The first sentence of § 628.34(1)(a), STATS., sets forth what is prohibited: "No person ... licensed under chs. 600 to 646 ... may make ... any communication relating to an insurance contract, the insurance business, any insurer or any intermediary which contains false or misleading information ...." The second sentence makes clear that "[f]iling a report and, with intent to deceive a person examining it, making a false entry in a record or wilfully refraining from making a proper entry, are `communications' within the meaning of this paragraph." However, the fact that intentional deceptions are included in the term "communications" does not mean that *only* intentional deceptions are "communications." Markwalder erroneously reasons from the specific to the general. Further, this interpretation renders the phrase "with intent to deceive" superfluous. If intent were necessary to the first sentence, there would be no reason to specify "intent" in the second. Because superfluity is to be avoided whenever possible, ***Kollasch v. Adamany***, 104 Wis.2d 552, 563, 313 N.W.2d 47, 52 (1981), we reject this interpretation.[2]

3) Whether the disposition was "arbitrary and capricious."

Markwalder argues that the hearing examiner erred when she refused to consider his evidence that the punishment imposed was disproportionate to punishment imposed in other cases. He contends that this

[2] *See also* § 628.10(2)(b), STATS., quoted in the last paragraph of this opinion. That statute permits OCI to revoke an intermediary's license for an intermediary's "repeated[] *or* knowing[]" violations. (Emphasis added.) If only intentional (i.e., "knowing") violations counted, there would be no reason to distinguish between "repeated" and "knowing."

failure violates § 227.57(8), STATS., which provides that reversal is required where OCI's disposition is "inconsistent with ... prior agency practice." Markwalder concludes that the hearing examiner's decision was "arbitrary and capricious." We reject this argument.

The record discloses that, although the hearing was continued by one month, Markwalder first sought to present the comparative punishment information after the hearing was closed. OCI argues that we should not consider this evidence because it did not have an opportunity to respond at the hearing. However, OCI also presented evidence to the hearing examiner that the other cases were distinguishable. We do not reach that issue because we agree that Markwalder's presentation was untimely.

Further, the disposition was not "arbitrary and capricious." Markwalder's therapist testified that although Markwalder's depression was lifting, he had still failed to control his drinking problem. The therapist testified that it was "just as well that ... [Markwalder] refrain from that [insurance] business" at the present time.

CONCLUSION

OCI has an obligation to protect the people of Wisconsin from insurance agents who engage in unlawful practices. From the point of view of public safety, it is irrelevant whether the agent's wrongdoing stems from personal problems, or whether the agent lacked volitional "intent" to commit bad acts. The legislature has made clear that

> the commissioner may revoke, suspend or limit in whole or in part the license of any intermediary if the commissioner finds that the licensee is unqualified as an intermediary ... or has repeatedly or knowingly violated an insurance statute ... or if the intermediary's methods and practices in the conduct of business endanger ... the legitimate interests of customers and the public....

Section 628.10(2)(b), STATS. Markwalder admits to business practices which "endanger" customers and the public, and admits to "repeated" violations of behavior prohibited under § 628.34, STATS. (i.e., he admits to making repeated false and misleading communications). OCI acted correctly.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.