

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAMIAN ROLAND FALCONE, AN  
INDIVIDUAL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
DEPARTMENT OF BUSINESS AND  
INDUSTRY, DIVISION OF MORTGAGE  
LENDING,  
Respondent.

No. 76423-COA

**FILED**

FEB 27 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

**ORDER OF AFFIRMANCE**

Damian Roland Falcone appeals from a district court order denying a petition for judicial review. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Falcone was a licensed covered service provider pursuant to NRS Chapter 645F and owns Falcon Credit Management, LLC d/b/a Damian Falcone & Company, a company offering debt management and loan modification services under the jurisdiction of respondent Department of Business and Industry, Division of Mortgage Lending (the Division). As part of his services, Falcone sold a software membership to his clients which allegedly assisted the clients in organizing their finances and served as a case-management software, providing the clients with the ability to check the status of their matter with Falcone's office.

In 2015, the Division conducted an annual examination of Falcone. In its Final Report of Examination, the Division set forth four alleged violations and commenced an administrative action against Falcone. After a hearing, the administrative law judge concluded that

Falcone committed three of the violations.<sup>1</sup> Specifically, the ALJ concluded that Falcone violated NAC 645F.475 by failing to keep and maintain sufficient records to clearly reflect the company's financial condition; violated NRS 645F.405 by collecting advanced compensation disguised as a "software membership fee" from clients; and violated NAC 645F.835(3)(c) by collecting the advanced compensation in violation of a prior order of the Commissioner of Mortgage Lending. Accordingly, the ALJ ordered Falcone to pay restitution to 87 clients in the amount of \$276,635, plus fines and costs. Falcone filed a petition for judicial review, which the district court denied, and this appeal followed.

On appeal, Falcone challenges the denial of his petition, asserting that the ALJ erred in: (1) finding that he failed to maintain complete and suitable records in violation of NAC 645F.475, (2) finding that he collected advanced compensation in violation of NRS 645F.405, (3) finding that he violated the prior order of the Commissioner pursuant to NAC 645F.835(3)(c) by collecting advanced compensation, and (4) ordering \$276,635 in restitution.

Like the district court, we review an administrative agency's decision to determine whether it was affected by an error of law, or was arbitrary or capricious, and thus, an abuse of discretion. NRS 233B.135(3)(d), (f); *State Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385-86, 254 P.3d 601, 603 (2011). We review the agency's factual findings for clear error or an abuse of discretion, and will only overturn those findings if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686,

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<sup>1</sup>The ALJ concluded that Falcone did not commit the fourth violation, an alleged violation of NAC 645F.600(2), regarding advertising.

262 P.3d 715, 718 (2011). Substantial evidence is that “which a reasonable mind might accept as adequate to support a conclusion.” NRS 233B.135(4); *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013).

First, Falcone asserts that the ALJ abused her discretion in concluding he failed to maintain complete and suitable records because there is no prohibition against comingling funds and he provided sufficient records for the Division to determine his financial condition. Pursuant to NAC 645F.475(1), an NRS Chapter 645F licensee like Falcone must maintain complete and suitable records “clearly reflecting the financial condition of the business of the licensee.”

Based on the testimony of the Division’s investigators and the financial records admitted at the hearing, the ALJ determined that Falcone’s QuickBooks records did not clearly identify which transactions related to which clients and some of the deposits recorded in his ledgers did not match the deposits recorded in the QuickBooks records. Additionally, the records demonstrated that one of his bank accounts was used for numerous activities, including covered services and non-covered services, such that it was impossible for the Division to ensure the accuracy of Falcone’s accounting and ascertain his true financial condition. Because these findings are supported by substantial evidence in the record, we cannot conclude that the ALJ abused her discretion in concluding Falcone failed to maintain complete and suitable records clearly reflecting his

financial condition pursuant to NAC 645F.475(1).<sup>2</sup> See NRS 233B.135(3)(d), (f); *Am. Home Shield of Nev., Inc.*, 127 Nev. at 385-86, 254 P.3d at 603.

Next, Falcone challenges the conclusion that he collected advanced compensation, resulting in a violation of NRS 645F.405 and of a prior order of the Commissioner pursuant to NAC 645F.835(3)(c). NRS 645F.405 provides that a person who performs loan modification or other covered services pursuant to NRS Chapter 645F, like Falcone, "shall not claim, demand, charge, collect or receive any compensation before a homeowner has executed a written agreement with the lender or servicer incorporating the offer of mortgage assistance obtained from the lender or servicer by the person who performs any covered service for compensation."

Here, Falcone agrees that he provides covered services pursuant to NRS Chapter 645F and is subject to NRS 645F.405, but asserts that his selling the software membership to clients, without first obtaining the executed written agreement with the lender, is not prohibited by NRS 645F.405 because he was receiving compensation for a product, rather than compensation for covered services. Based on the records admitted at the hearing and the testimony of the witnesses, including three of Falcone's former clients, the ALJ concluded the software was solely used to assist Falcone in providing covered services and the clients were required to purchase the software membership to obtain the covered services from Falcone. Accordingly, the ALJ concluded that Falcone's characterizing the

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<sup>2</sup>To the extent Falcone challenges the weight of the evidence provided as to this issue, this court does not reweigh the evidence presented to the ALJ or witness credibility on appeal. *City Plan Dev., Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005); *Local Gov't Emp.-Mgmt. Relations Bd. v. Gen. Sales Drivers*, 98 Nev. 94, 98, 641 P.2d 478, 480-81 (1982).

software as a product to sell it in advance of obtaining the written agreement was merely an attempt to evade NRS 645F.405, as the practical use of the software (to document potential legal violations committed by the lender or servicer to obtain leverage in negotiations) was a form of forensic accounting, which is a covered service and subject to NRS 645F.405.

Because substantial evidence in the record supports the ALJ's conclusions, we discern no abuse of discretion in her conclusion that Falcone's selling the software membership constituted receiving advanced compensation in violation of NRS 645F.405.<sup>3</sup> See NRS 233B.135(3)(d), (f); *Am. Home Shield of Nev., Inc.*, 127 Nev. at 385-86, 254 P.3d at 603; see also *Taylor v. Dep't of Health and Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) ("[T]his court defers to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." (internal alteration and quotation marks omitted)). Having concluded that the ALJ did not abuse her discretion in determining Falcone's conduct constituted impermissibly receiving advanced compensation, we likewise discern no abuse of discretion in the ALJ's determination that Falcone violated a prior order of the Commissioner precluding the collection of advanced compensation. See NAC 645F.835(3)(c) (providing that a licensee may be fined for a violation of any order of the Commissioner).

Finally, as to Falcone's challenge to the amount of restitution ordered based on his improperly selling the software, he asserts that the

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<sup>3</sup>Again, to the extent Falcone challenges the weight of the evidence provided on this point, this court does not reweigh the evidence presented to the ALJ or witness credibility on appeal. *City Plan Dev., Inc.*, 121 Nev. at 426, 117 P.3d at 187; *Local Gov't Emp.-Mgmt. Relations Bd.*, 98 Nev. at 98, 641 P.2d at 480-81.

Division failed to provide evidence that all of his former clients did not understand how to use the software or that they complained about the software. Thus, Falcone asserts it is only reasonable to order restitution as to those clients who testified or otherwise registered complaints. An NRS Chapter 645F licensee, like Falcone, may be required to pay restitution "to any person who has suffered an economic loss as a result of a violation of [NAC Chapter 645F or NRS Chapter 645F]." NAC 645F.835(2). As noted above, Falcone violated NAC Chapter 645F by charging all of his clients for the software membership prior to obtaining the executed written agreement as required by NAC 645F.405. And nothing in the rules require the client to misunderstand the services provided or complain about the services received for a violation to occur. Thus, because Falcone violated NAC Chapter 645F, the ordered restitution was permissible and we discern no abuse of discretion in the ALJ's requiring Falcone to pay the same. See NRS 233B.135(3)(d), (f); *Am. Home Shield of Nev., Inc.*, 127 Nev. at 385-86, 254 P.3d at 603.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Richard Scotti, District Judge  
Damian Roland Falcone  
Attorney General/Las Vegas  
Eighth District Court Clerk