

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRY NELSON,
Appellant,
vs.
SHARATH CHANDRA,
ADMINISTRATOR, THE STATE OF
NEVADA DEPARTMENT OF
BUSINESS AND INDUSTRY, REAL
ESTATE DIVISION; AND THE
NEVADA REAL ESTATE
COMMISSION,
Respondents.

No. 81019-COA

FILED

NOV 15 2021

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

ORDER OF AFFIRMANCE

Terry Nelson appeals from a district court order denying a petition for judicial review. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Nelson was a licensed real estate broker, subject to the jurisdiction of the Nevada Real Estate Division (Division) and the provisions of NRS Chapter 645 and NAC Chapter 645. In response to a complaint filed by another Nevada licensed real estate agent, the Division opened an investigation and ultimately commenced disciplinary proceedings against Nelson before the Nevada Real Estate Commission (Commission) for violating NRS Chapter 645 and NAC Chapter 645 in numerous transactions representing sellers. As relevant here, after conducting an evidentiary hearing, the Commission concluded that Nelson violated: (1) NRS 645.633(1)(h) and/or NAC 645.605(6) on 21 occasions by obstructing the fair market and limiting prospective buyers by offering an undesirable buyer's broker's commission, thereby not representing her clients with absolute fidelity; (2) NRS 645.252 and/or NRS 645.630(1)(k) on

18 occasions by failing to exercise reasonable skill and care to ensure that the buyers' earnest money was timely deposited; and (3) NRS 645.630(1)(f) and/or NRS 645.252(2) on 3 occasions by failing to exercise reasonable skill and care to ensure that the buyers' earnest money was accounted for and remitted to the title company within a reasonable time. As a result, the Commission revoked Nelson's real estate broker's license and fined her \$222,489.22 (representing a \$5,000 penalty per violation plus the Division's investigation and hearing costs). The district court denied Nelson's petition for judicial review, finding that substantial evidence supported the Commission's order, such that the Commission did not abuse its discretion. This appeal followed.

On appeal, Nelson challenges the district court's denial of her petition for judicial review, asserting that evidence did not support the Commission's ruling and that she did not violate any of the rules governing licensed real estate brokers. 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, 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).

As to the first violation—that Nelson obstructed the fair market and limited prospective buyers by offering an undesirable buyer's broker's commission—Nelson contends that she is not required to offer a specific buyer's broker's commission and, therefore, she did not violate any rule by offering a low commission. NRS 645.633(1)(h) provides that the Commission may discipline a licensee, like Nelson, if the broker is grossly negligent or incompetent in performing his or her duties. And NAC 645.605 provides certain factors for the Commission to consider when determining whether a licensee was grossly negligent or incompetent pursuant to NRS 645.633(1)(h).

Based on our review of the record, the Commission did not conclude that Nelson violated NRS 645.633(1)(h) or NAC 645.605(6) simply because she offered a low buyer's broker's commission. Rather, the Commission concluded that Nelson initially offering a low buyer's broker's commission, along with failing to include what the commission would be in the exclusive right to sell contract signed by her client and subsequently changing the buyer's broker's commission on the property listings numerous times and the timing of those changes, together, indicated that Nelson was attempting to discourage buyers' brokers from making offers to ensure that her husband, another licensed realtor, could find a buyer for her listings. The Commission concluded that this conduct violated Nelson's duty of absolute fidelity to her clients, pursuant to NAC 645.605(6), because it limited the market to which her clients' properties were exposed, as other buyer's brokers were discouraged from contacting her regarding the properties she listed. While Nelson contends that she was not engaging in such conduct to discourage any buyer's broker and that other buyers had the ability to view her listings, and that she testified to the same during the

hearing, we do not reweigh the evidence or witness credibility on appeal. *State Dep't of Commerce v. Soeller*, 98 Nev. 579, 587, 656 P.2d 224, 229 (1982). Thus, we cannot conclude that the Commission abused its discretion in concluding that Nelson's conduct, taken together, constituted a violation of NRS 645.633 or NAC 645.605. See NRS 233B.135(3)(d), (f); *Am. Home Shield of Nev., Inc.*, 127 Nev. at 385-86, 254 P.3d at 603.

Next, Nelson challenges the Commission's conclusion that she violated NRS 645.252(2) and/or NRS 645.630(1)(k) by failing to exercise reasonable skill and care to ensure that buyers' earnest monies were timely deposited. NRS 645.252 provides duties that a licensee owes when acting as an agent in a real estate transaction, including the duty to "exercise reasonable skill and care with respect to all parties to the real estate transaction." NRS 645.252(2). NRS 645.630(1)(k) provides that the Commission may discipline a licensed broker who fails "to deposit any check or cash received as earnest money before the end of the next banking day unless otherwise provided in the purchase agreement."

Here, the Commission concluded that Nelson failed to exercise reasonable skill and care to ensure that the earnest monies were deposited within one banking day, and Nelson concedes the earnest monies were not deposited within one banking day. Nelson contends, however, that the Commission abused its discretion in concluding she violated any rules because she never received the earnest monies and the buyers took responsibility for depositing their earnest monies with the title companies themselves. But NRS 645.630(1)(k) requires a licensed broker, such as Nelson, to ensure deposit of monies received as earnest money by the next banking day, while NRS 645.252(2) requires licensees to exercise reasonable skill and care, and Nelson conceded that the earnest monies

were not timely deposited. Although we agree that NRS 645.630(1)(k) does not specifically provide for a situation such as this, where the buyers purportedly took on the responsibility to deposit the funds themselves, the statute contemplates a licensee's duty to ensure the money is timely deposited. And we cannot say that the Commission abused its discretion in interpreting the statute to require Nelson to ensure the earnest monies were timely deposited in the transactions at issue here. *See Taylor v. Dep't of Health and Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) ("Although statutory construction is generally a question of law reviewed de novo, this court defers to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." (internal quotations and alterations omitted)).

As to the last violation, the Commission concluded that Nelson violated NRS 645.630(1)(f) and/or NRS 645.252(2) on three occasions by failing to exercise reasonable skill and care to ensure that the buyers' earnest money was accounted for and remitted to the title company within a reasonable time. NRS 645.630(1)(f) provides that the Commission may discipline a licensee for "[f]ailing, within a reasonable time, to account for or to remit any money which comes into his or her possession and which belongs to others." Nelson again argues that she could not have violated any statutes because she did not physically receive any funds. But based on our review of the record, as to the transactions at issue in this violation, the Division presented evidence that the earnest money checks were made payable to Nelson's company; that at least one of the earnest money checks was indorsed by Nelson, such that it was in Nelson's possession at some point; and that the offer and acceptance agreements—signed by Nelson—specified that the earnest money checks were received and made payable to

Nelson's company, and that they would be deposited within one business day of acceptance. Based on these facts, substantial evidence supports the Commission's conclusion and we cannot conclude that it abused its discretion. *See Warburton*, 127 Nev. at 686, 262 P.3d at 718.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Barry L. Breslow, District Judge
Terry Nelson
Attorney General/Carson City
Attorney General/Las Vegas
Karissa D. Neff
Washoe District Court Clerk