

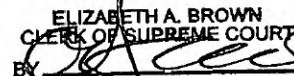
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA
DEPARTMENT OF BUSINESS AND
INDUSTRY, REAL ESTATE DIVISION,
Appellant/Cross-Respondent,
vs.
ALVIN MANSOUR; KEVIN MANSOUR;
NENAD ZIVKOVIC; GORDON ROBERT
ALLRED; PERRY WHITE; TODD
MANNING; ANTHONY D'AMBROSIA;
JOHN GLASS; GLEN KUNOFSY;
EDWARD OTOCKA; GUARAB REJA;
AND JAMES VENTURA,
Respondents/Cross-Appellants.

No. 85521

FILED

JAN 08 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from a district court order granting a petition for judicial review, setting aside the real estate commission's decision, and dismissing with prejudice the administrative proceedings against respondents. First Judicial District Court, Carson City; James Todd Russell, Judge.

Several years ago, appellant Nevada Real Estate Division (NRED) began disciplinary proceedings against respondents, who are real estate professionals affiliated with non-party Marcus & Millichap, a real estate firm with offices in multiple states. Some of the respondents held Nevada licenses, and some were licensed in other states. NRED alleged that respondents violated NRS 645.230 and/or NRS 645.235 by engaging in unlicensed real estate activities in Nevada or assisting in the same. The cases were heard before the Nevada Real Estate Commission (Commission).

During the hearings, the Commission did not permit respondents to present evidence related to their defenses, concluding that its role was limited to deciding whether the complaints' factual allegations were true. The Commission ultimately concluded that respondents had violated NRS 645.230 and/or NRS 645.235, or related statutes governing real estate professionals. As discipline for the violations, the Commission assessed costs and imposed fines, as well as continuing education requirements for the Nevada-licensed respondents. Respondents filed petitions for judicial review, which were consolidated. The district court granted the petitions, set aside the Commission's decisions, and remanded, concluding that the Commission erred by depriving respondents of the opportunity to present arguments and evidence related to their contention that the administrative code provision was unconstitutional or otherwise invalid because the Commission incorrectly determined these arguments were irrelevant to the disciplinary proceedings.

On remand, the Commission concluded that the regulatory framework was valid and upheld the discipline imposed in its original decisions, including the fines. Respondents again petitioned for judicial review, and the district court granted the petition, ordering the Commission to dismiss the proceedings with prejudice. NRED appealed, and respondents cross appealed.

NRED's Appeal

NRED raises several arguments on appeal. It first argues that the district court lacked subject matter jurisdiction over several of the petitions for judicial review. Next, it argues that the district court abused its discretion by granting the petitions for judicial review and setting aside the Commission's decision because the Commission acted within its statutory authority and no procedural violations occurred in the underlying

administrative investigations and proceedings. It also argues that respondents never attempted to obtain the requisite licenses or certificates for their transactions, and they clearly violated the applicable statutes and regulations by engaging in unauthorized real estate brokerage activities.

The district court had jurisdiction over post-remand petition for judicial review

NRED argues that the district court did not have jurisdiction over the petitions for judicial review filed by respondents A. Mansour, K. Mansour, Allred, White, and Zivkovic because their initial petitions did not name the Commission as a respondent. However, respondents contend that their subsequent petition, which followed the district court's order setting aside the discipline and the Commission's decision on remand reimposing discipline, sufficiently invoked the district court's jurisdiction. We agree. We construe the subsequent petition on behalf of all respondents to be a new petition for judicial review because the Commission's previous decisions which formed the basis for the initial petitions were set aside by the district court's earlier ruling. As the subsequent petition properly named the Commission, the Division, and the Division Administrator in the caption, we conclude the district court's jurisdiction was sufficiently invoked. NRS 233B.130(2)(a) ("Petitions for judicial review must . . . [n]ame as respondents the agency and all parties of record to the administrative proceeding."); *Washoe Cnty. v. Otto*, 128 Nev. 424, 432-33, 282 P.3d 719, 725 (2012).

The Commission properly disciplined Respondents for established violations of Nevada real estate law

NRED argues that the district court abused its discretion by granting the petitions for judicial review and setting aside the Commission's decision. In particular, it argues that the respondents violated Nevada law

by engaging in real estate transactions involving Nevada properties without obtaining the required authorization to conduct real estate business in Nevada.

“We review an agency’s decision under the same standard as the district court, without deference to the district court’s decision, and ‘determine, based on the administrative record, whether substantial evidence supports the administrative decision.’” *Bombardier Transp. (Holdings) USA, Inc. v. Nev. Lab. Comm’r*, 135 Nev. 15, 18, 433 P.3d 248, 252 (2019) (quoting *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006)). While we defer to the agency’s findings of fact, we review its legal conclusions de novo. *State Dep’t of Tax’n v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 735, 265 P.3d 666, 669 (2011).

The district court may set aside a final agency decision where the decision prejudices a petitioner’s substantial rights. NRS 233B.135. Such rights may be prejudiced when, among other reasons, the final decision (1) exceeds the agency’s statutory authority, (2) is based upon unlawful procedure, or (3) is arbitrary or capricious or characterized by abuse of discretion. *Id.*

NRS 645 was enacted “to restrict the vocation of acting as a real estate broker or real estate salesman to persons bearing a good reputation for honesty, truthfulness, fair dealing, and competency.” *Whiddett v. Mack*, 50 Nev. 289, 295, 258 P. 233, 233-34 (1927). NRS 645.230(1)(a) provides that

It is unlawful for any person, limited-liability company, partnership, association or corporation to engage in the business of, act in the capacity of, advertise or assume to act as, a . . . [r]eal estate broker, real estate broker-salesperson or real estate salesperson within the State of Nevada without

first obtaining the appropriate license from [NRED] as provided for in this chapter.

NRS 645.235(1)(a) permits the Commission to impose

an administrative fine against any person who knowingly . . . [e]ngages or offers to engage in any activity for which a license, permit, certificate or registration or any type of authorization is required pursuant to this chapter, or any regulation adopted pursuant thereto, if the person does not hold the required license, permit, certificate or registration or has not been given the required authorization.

The Commission may also impose an administrative fine against anyone who “[a]ssists or offers to assist another person to commit a violation” of NRS 645.235(1)(a). NRS 645.235(1)(b). NRS 645.605 permits NRED Administrator to issue cooperative certificates “authorizing out-of-state licensed brokers to cooperate with Nevada brokers” and the Commission “to promulgate rules and regulations establishing the conditions under which such certificates shall be issued and cancelled, all subject to the provisions and penalties of [NRS Chapter 645].” One such rule promulgated by the Commission limits the use of the cooperative certificate by providing that “an out-of-state broker may not use a cooperating broker’s certificate as authority to sell or attempt to sell real estate in Nevada on behalf of the owner of that real estate.” NAC 645.185.

Respondents Allred, A. Mansour, K. Mansour, D’Ambrosia, Ventura, Reja, Otocka, Kunofsky, and Glass are out-of-state licensed real estate brokers who appeared on advertisements and acted in the capacity as real estate brokers for the sellers of properties located in Nevada without first obtaining Nevada licensure. While respondents contend their appearance on the advertisements was a mistake, this does not negate the fact that they were knowingly acting in the capacity of representing sellers

of properties located in Nevada. For example, Allred appeared in advertisements as a listing agent for a property in Pahrump, as a procuring and listing agent for a Battle Mountain property, and as the contact for a property on Tropicana Avenue in Las Vegas. As a listing agent for the Pahrump property, Allred was entitled to a commission according to an agreement between Allred and White. Indeed, Allred received a three percent fee from the sale of each of the properties, which the fines imposed by the Commission reflect. White and Manning similarly had agreements with the other out-of-state licensed real estate professionals where those individuals earned commissions for the sale of Nevada property. None of these individuals had obtained a general Nevada Real Estate License or a cooperative certificate from NRED at the time they were selling or attempting to sell Nevada real estate on behalf of the owners. Therefore, we conclude that substantial evidence supports the Commission's determination that these respondents were knowingly engaged in unauthorized real estate practice in violation of NRS 645.230(1)(a). NAC 645.185; *Bombardier Transp. (Holdings) USA*, 135 Nev. at 18, 433 P.3d at 252; *Masco Builder Cabinet Grp.*, 127 Nev. at 735, 265 P.3d at 669. Accordingly, these respondents were properly subject to administrative fines and costs. NRS 645.235(1)(a) (authorizing the Commission to impose administrative fines in "addition to any other remedy or penalty" against "any person who knowingly" engages in activities that by statute or regulation require a license or certificate without having obtained such license or certificate).

Similarly, we conclude that the Commission appropriately levied fines and other penalties against respondents White, Zivkovic, and Manning, who are Nevada-licensed brokers. These respondents assisted

the out-of-state brokers in the unauthorized real estate practice and were therefore subject to discipline. NRS 645.235(1)(b) (authorizing the Commission to impose administrative fines and other remedies or penalties against any person who knowingly “[a]ssists or offers to assist another person to commit a violation” described in NRS 645.235(1)(a)). The Nevada-licensed respondents all entered into agreements with certain of the out-of-state brokers, which provided that no out-of-state brokers’ information would appear on any marketing or advertising. However, while respondents asserted in the Commission proceedings that the out-of-state brokers’ names were listed in the advertisements by mistake, the out-of-state brokers not only were included as listing agents for various Nevada properties, along with brokers who were licensed by NRED, but they also received communications from prospective buyers of the properties and prepared counteroffers. Indeed, the very purpose of entering the agreements was to have the Nevada and out-of-state brokers work together on the sale of Nevada property. Therefore, we conclude the Commission properly disciplined the Nevada-licensed respondents for assisting the out-of-state brokers in selling Nevada properties, despite those brokers not being licensed in Nevada.

Having violated NRS 645.230, NRS 645.235(1)(a), and NRS 645.235(1)(b) respondents cannot challenge the validity of NAC 645.185

NRED argues that the Commission was well within its statutory authority to limit cooperative certificates by precluding out-of-state brokers from using them to sell or attempt to sell real estate in Nevada on behalf of the owner of that real estate. It further argues that respondents’ failure to seek or obtain a Nevada license or certificate subjects them to discipline. Respondents instead argue the Nevada Legislature

intended for cooperative certificates to apply to all types of real estate transactions and as such the Commission had no authority to discipline brokers for engaging in interstate cooperative brokering to represent sellers. They also argue that the restrictions on the use of cooperative certificates violate the Dormant Commerce Clause. The district court found that applying for a cooperative certificate would have been futile, as NAC 645.185 prohibits the use of cooperative certificates for the purpose of selling property, which is the conduct for which respondents were disciplined. It therefore held that respondents did not need to apply for cooperative certificates to challenge the regulation's limitation on their use in this case.

“[T]o establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy.” *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012); *see also United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997) (“failure to apply for a permit precludes challenge to the manner in which [an] Act is administered.”); *Nat’l Ass’n of Mut. Ins. Cos. v. State, Div. of Bus. & Indus.*, 139 Nev., Adv. Op. 3, 524 P.3d 470, 476 (2023) (acknowledging that the robust separation of powers clause in the Nevada constitution supports the general requirement that parties must make the same showing of injury-in-fact as required by Article III standing in federal cases); *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (acknowledging that the Article III limitation of judicial powers to cases and controversies is meant to “prevent the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes traditionally thought to be capable of resolution through the judicial process.” (internal quotation marks and citation omitted)); NRS 233B.040 (“To the extent

authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions.”). Respondents never applied for the appropriate licensure with NRED before engaging in the conduct at issue. Nor did respondents obtain declaratory relief as to the validity of the regulation before engaging in the conduct. Therefore, respondents lack standing to challenge the real estate licensing administrative code provision. See *Diamond S.J. Enter., Inc. v. City of San Jose*, 100 F.4th 1059, 1066 (9th Cir. 2024) (concluding that plaintiff failed to satisfy the injury-in-fact requirement for federal standing to challenge a public entertainment licensing provision because it had already obtained the license before the lawsuit and it did not allege that it plans to apply for another such license in the future); *State v. Ortiz*, 317 A.3d 737, 744 (R.I. 2024) (concluding defendant lacked standing where “he did not apply for a permit to carry a handgun, nor would he have qualified for one had he applied”); *State v. Wilson*, 543 P.3d 440, 445 (Haw. 2024) (holding an appellant lacked standing to challenge a licensing requirement to carry a pistol or revolver because he failed to apply for the license); *Decastro*, 682 F.3d at 164 (holding that a plaintiff lacked standing to challenge firearm licensing laws where he failed to apply for the license); *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220 (9th Cir. 1992) (acknowledging “a long line of cases” holding that “a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit”); *I.C.C. v. Appleyard*, 513 F.2d 575, 577 (4th Cir. 1975) (determining respondent did not suffer a legally cognizable injury because he could not show he had ever

been refused a permit under the existing regulations or even applied for one).

Respondents cannot establish standing based on the futility of their applications because while it would be futile to apply for a cooperative certificate to sell real estate in Nevada, respondents chose not to apply for other licenses available to them. *See Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 57 (D.C. Cir. 1991) (concluding appellant lacked standing because he failed to apply for the position and the chilling effect of an alleged discriminatory practice was not sufficient to confer standing). Specifically, although respondents could not obtain cooperative certificates for their sales activity under NAC 645.185, this does not make their potential application for a general real estate broker license futile. Respondents could have sought licensure through NRS 645.332, which permits applicants licensed in other jurisdictions to apply for a license without first having to pass the national real estate examination required by NRS 645.330 and 645.460. Respondents very well could have sought licensure in this capacity, despite not being able to obtain a cooperative certificate to sell property in Nevada. However, they failed to do so.

Moreover, they could have applied for cooperative certificates and, after being turned down, sought review in the courts based on their challenge to the legitimacy of the regulation limiting the use of such certificates. NRS 645.440 (providing that an individual can appeal to the Commission after their application is denied and the Commission is required to render a written decision after the final hearing); NRS 233B.130 (permitting any party that is aggrieved by a final decision in an administrative proceeding to seek judicial review of that decision). Or they could have brought a legal challenge to the adoption of the regulation in the

courts based on their intention to engage in cooperative transactions involving the sale of Nevada property. NRS 233B.110 (“The validity or applicability of any regulation may be determined in a proceeding for a declaratory judgment in the district court in and for Carson City, or in and for the county where the plaintiff resides, when it is alleged that the regulation, or its proposed application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.”). Instead, they simply proceeded forward to conduct Nevada real estate sale transactions without any license or certificate authorizing them to do so. In such circumstances, and having blatantly engaged in unauthorized real estate practice, they cannot in this case challenge the legitimacy of the regulation as a defense to their violations of Nevada’s licensing scheme.

The Commission complied with administrative procedures and the fines imposed were not arbitrary and capricious

NRED argues that the district court abused its discretion in reversing the Commission’s determinations because no procedural violations occurred to warrant reversal. The district court noted two procedural deficiencies with the Commission’s decisions: (1) the Commission’s failure to make findings of fact and conclusions of law on essential factual issues; and (2) the Commission resolving an investigation initiated by NRED on its own without a citizen complaint. Upon an independent review of the record, we perceive no error in the Commission’s procedures. With respect to the first alleged deficiency, while the Commission’s final decisions are sparse of factual findings in that they simply incorporate the factual findings from the decisions prior to the district court’s initial judicial review, substantial evidence supports the Commission’s limited findings and its ultimate decisions. In addition to the

out-of-state brokers appearing on advertising as the sellers for Nevada property, the out-of-state brokers entered agreements with Nevada brokers to cooperate in selling Nevada properties, received letters of intent to purchase Nevada properties, prepared counteroffers, and were also entitled to and received commissions for the sales of the properties. Moreover, given that the district court's order had remanded to the Commission for the purpose of evaluating respondents' challenges to the regulatory framework after considering their proposed evidence in that regard and applying that determination to its prior decisions, it was appropriate for the Commission to address the regulatory challenges and incorporate its prior findings and conclusions on the other issues.

With respect to the argument that NAC 645.680(1) requires that a citizen's complaint be filed before NRED may initiate an investigation, we disagree. Under NAC 645.680(2), NRED must appoint an investigator if "a complaint is made or if the [NRED Administrator] requests an investigation of a licensee." Therefore, under a plain reading of the regulation, a citizen's complaint is not required to start an investigation. *Bisch v. Las Vegas Metro. Police Dept.*, 129 Nev. 328, 336, 302 P.3d 1108, 1114 (2013) (applying the plain meaning of a statute and giving the words their ordinary meaning where the statute is plain and unambiguous).

The other alleged procedural deficiencies similarly do not warrant reversal. Respondents allege their due process rights were violated because: (1) NRED either failed to prepare reports related to these investigations or prepared reports and withheld them; (2) NRED failed to provide respondents with all the relevant documents in their files, it only provided the ones that it was relying on; and (3) the Administrator failed to review the reports or determine whether there was exculpatory evidence

before authorizing charges. We conclude the respondents fail to identify how these alleged procedural deficiencies deprived them of notice or the opportunity to be heard, nor have they identified how these alleged procedural deficiencies prejudiced them. *Southwest Gas Corp. v. Pub. Util. Comm'n of Nev.*, 138 Nev. 37, 46, 504 P.3d 503, 511 (2022) (“Procedural due process requires notice and an opportunity to be heard.” (citation omitted)); *see also Eureka Cnty. v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 280, 417 P.3d 1121, 1125 (2018) (holding notice must provide parties with “meaningful input in the adjudication of their rights.”). Accordingly, respondents fail to cogently argue they were deprived of due process. *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating it is a party’s responsibility to provide cogent arguments supported by salient authority). Respondents also argue the fines imposed were arbitrary and capricious. We disagree, as the record supports that the fines imposed in each case were based on substantial evidence demonstrating the amount of economic gain related to each act of unauthorized real estate practice, as permitted by statute. NRS 645.235(2) (permitting the Commission to impose administrative fines “not exceed[ing] the amount of any gain or economic benefit that the person derived from the violation or \$5,000, whichever amount is greater.”); *Nev. Pub. Emps. Ret. v. Smith*, 129 Nev. 618, 623-24, 310 P.3d 560, 564 (2013) (this court is limited to determining whether an agency acted arbitrarily or capriciously where “the factual findings of the administrative agency are supported by substantial evidence” (internal quotation marks and citation omitted)); *State ex rel. Dep’t of Transp. v. Pub. Emps. Ret. Sys.*, 120 Nev. 19, 23, 83 P.3d 815, 817

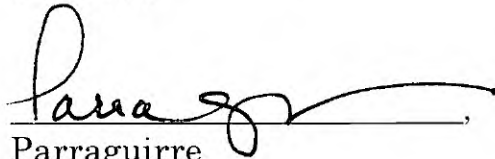
(2004) (“This court will not ‘substitute its judgment of the evidence for that of the administrative agency.’” (citation omitted)).¹

Accordingly, based on the foregoing we conclude that the district court erred in granting judicial review and we therefore

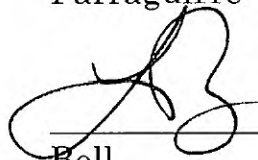
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



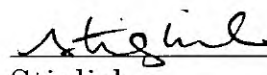
_____, C.J.
Herndon



_____, J.
Parraguirre



_____, J.
Bell



_____, J.
Stiglich



_____, J.
Cadish

¹We have carefully considered the parties’ other arguments not specifically addressed herein and conclude they either lack merit or would not warrant a different outcome.

PICKERING, J., with whom LEE, J., agrees, dissenting:

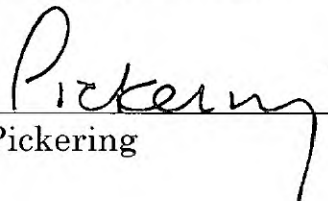
I would affirm because the district court correctly resolved the issues presented on the petitions for judicial review. Following remand, the Commission, without deliberation—despite three of the commissioners being new to the case, incorporated by reference its prior problematic findings and concluded, without analysis, that the respondents' defenses were meritless. *See* NRS 233B.125 (addressing the contents of an adverse decision). In addition, the record is devoid of evidence showing that the Commission and/or the Division Administrator fulfilled regulatory prerequisites to fining the respondents, such as obtaining a citizen's complaint under NAC 645.680(1) before pursuing disciplinary action, reviewing the investigative reports as required by NAC 645.680(5), or addressing (much less making findings on) each NRS 645.235(3) factor when issuing the fines. The district court properly concluded that these failures violated applicable statutory law and deprived respondents of due process.

Nor has the Commission satisfactorily answered the respondents' challenges to the validity of NAC 645.185(11). The majority bypasses this issue on standing grounds, but these proceedings are tethered to NAC 645.185(11) and its invalidity seems plain. NRS 645.605 allows the Commission to establish conditions for the issuance and cancellation of certificates authorizing an out-of-state licensed broker to work with a Nevada broker. It does not authorize the Commission to control the transactions in which an out-of-state broker may use that certificate. Yet NAC 645.185(11) limits the use to which a certificate can be put: it only allows cooperative certificates to be used by out-of-state brokers/salespersons who wish to represent a nonresident in a Nevada real

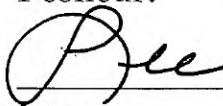
estate purchase. This provision exceeds the agency's statutory authority. Moreover, by furthering a discriminatory purpose—to protect in-state commerce by keeping real estate commissions in Nevada—NAC 645.185(11) violates the dormant commerce clause. *Cf. Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (addressing the dormant commerce clause); *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 561-64, 170 P.3d 508, 514-17 (2007) (same). Finally, NAC 645.185(11) was substantively amended without adherence to the Administrative Procedure Act's notice and hearing requirements. *See* NRS 233B.060-.061; *Lab. Comm'r of State of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28-29 (2007) (addressing the APA's minimum procedural requirements); *State Farm Mut. Auto Ins. Co. v. Comm'r of Ins.*, 114 Nev. 535, 543, 958 P.2d 733, 738 (1998) (APA compliance is essential to a regulation's validity, and not a "mere technicalit[y]").

To bookend these errors, the Division omits key documents from the appellate record, hindering appellate review. But it is the Division's responsibility, as appellant, to provide the records necessary to gain relief on appeal. *See Thomas v. Hardwick*, 126 Nev. 142, 147-48, 231 P.3d 1111, 1115 (2010).

For these reasons, I respectfully dissent.


_____, J.
Pickering

I concur:


_____, J.
Lee

cc: Hon. James Todd Russell, District Judge
Melissa Mangiaracina, Settlement Judge
Attorney General/Carson City
Attorney General/Las Vegas
Dickinson Wright PLLC
Venable LLP/San Francisco
Carson City Clerk