2019 IL App (1st) 181441-U

No. 1-18-1441

Order filed April 17, 2019

Third Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

---

| | | |
|---|---|---|
| GUNBROKER.COM, LLC, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | |
| | ) | |
| ILLINOIS DEPARTMENT OF FINANCIAL | ) | |
| AND PROFESSIONAL REGULATION; BRYAN | ) | No. 16 CH 2351 |
| A. SCHNEIDER, SECRETARY, ILLINOIS | ) | |
| DEPARTMENT OF FINANCIAL AND | ) | |
| PROFESSIONAL REGULATION; AND | ) | |
| AUCTIONEER ADVISORY BOARD | ) | Honorable |
| | ) | Kathleen M. Pantle, |
| Defendants-Appellees. | ) | Judge, presiding. |

---

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirm the decision of the Secretary of the Illinois Department of Financial and Professional Regulation imposing a $10,000 penalty against plaintiff for a violation of the Auction License Act as the imposition of the penalty was not an abuse of discretion.

¶ 2 Plaintiff Gunbroker.com LLC appeals from an order of the circuit court affirming a $10,000 penalty imposed by defendant Secretary of the Illinois Department of Financial and Professional Regulation based upon plaintiff's failure to register as an internet auction listing service pursuant to section 10-27 of the Auction License Act (Act) (225 ILCS 407/10-27 (repealed by P.A. 100-534, §20, eff. Sept. 22, 2017)). On appeal, plaintiff contends that the imposition of $10,000, the maximum penalty possible, was an abuse of discretion. We affirm.

¶ 3 The record reveals that plaintiff operates the website www.gunbroker.com, which is an online market or listing service for people who want to buy and sell hunting and fishing equipment. It does not have a physical store in Illinois and is not registered to do business in Illinois.

¶ 4 In October 2014, defendant, the Illinois Department of Financial and Professional Regulation (the Department), filed a three-count complaint against plaintiff. The complaint alleged that plaintiff was an "Internet Auction Listing Service," as that term was defined in section 10-27(a)(1) of the Act (see 225 ILCS 407/10-27(a)(1) (West 2014)). Specifically, the complaint alleged that plaintiff violated section 10-27(b) of the Act when it failed to register as an internet auction listing service but listed items for sale when the prospective seller, the prospective buyer, or the property was located in Illinois. See 225 ILCS 407/10-27(b) (West 2014). The complaint noted that, under section 10-27(d) of the Act, "[t]he Department may impose a civil penalty not to exceed $10,000 upon any Internet auction listing service that intentionally fails to register as required by this Section." 225 ILCS 407/10-27(d) (West 2014). The complaint sought the cessation of plaintiff's "unlicensed activities" in Illinois and a penalty no greater than $10,000.

¶ 5 Plaintiff filed a motion to dismiss the complaint or, in the alternative, to stay the administrative proceeding because it had filed a complaint for declaratory and injunctive relief in federal court. The motion was denied.

¶ 6 On November 3, 2015, a hearing was held before an administrative law judge (ALJ). The parties proceeded on stipulated facts, and no witnesses testified. The stipulated facts established, in pertinent part, that: (1) plaintiff is a limited liability company registered in Delaware with its principal place of business in Georgia; (2) plaintiff has no stores in Illinois and is not registered to do business in Illinois; (3) plaintiff provides an "internet auction listing service for compensation that is generally accessible to all internet users in the United States;" (4) items have been listed for sale on plaintiff's site where either the item, the prospective buyer, or the prospective seller was represented to be in Illinois; and (5) plaintiff is not registered with the Illinois Department of Financial and Professional Regulation as an internet listing service pursuant to the Act. The parties stipulated that, from 2013 through 2015, plaintiff listed in excess of 1.9 million items for sale where the sellers represented that they were located in Illinois, and facilitated the sale of more than 132,000 items to buyers representing that they were located Illinois.

¶ 7 The ALJ found that plaintiff never "registered as an internet auction listing service in the State of Illinois pursuant to statute." The ALJ therefore recommended that plaintiff be ordered to cease and desist its operations in Illinois and be assessed a $10,000 penalty. Ultimately, the Secretary of the Illinois Department of Financial and Professional Regulation Department adopted the ALJ's recommendations, imposed a $10,000 penalty against plaintiff, and ordered it to cease and desist operations in Illinois.

¶ 8 Plaintiff then filed a complaint for administrative review, declaratory judgment, and *mandamus* in the circuit court seeking, in pertinent part, the vacation of the $10,000 penalty. The complaint also alleged that section 10-27 of the Act was unconstitutional as applied to plaintiff. Ultimately, the trial court dismissed plaintiff's claims for a declaratory judgment and for *mandamus* relief. Plaintiff filed an interlocutory appeal from that dismissal, and proceedings were stayed in the circuit court.

¶ 9 On September 22, 2017, Public Act 100-534, which repealed section 10-27 of the Act, became effective. This court later granted the parties' joint motion to dismiss plaintiff's appeal. See *Gunbroker.com v. Illinois Department of Financial and Professional Regulation, et al.*, No. 1-17-1757 (Oct. 13, 2017).

¶ 10 Proceedings then resumed in the circuit court on the sole remaining issue, that is, whether the Secretary of the Illinois Department of Financial and Professional Regulation abused his discretion or acted in an arbitrary and capricious manner by imposing the maximum penalty permitted by the Act. On June 8, 2018, the trial court entered an order affirming the imposition of the $10,000 penalty. This appeal followed.

¶ 11 On appeal, plaintiff does not dispute that it violated the Act by failing to register; rather, it contends that the imposition of a $10,000 penalty is an abuse of discretion when there was no explanation for the amount or explicit consideration of the mitigating evidence.

¶ 12 In an administrative review proceeding such as this one, it is the function of this court to review the decision and reasoning of the administrative agency, rather than that of the circuit court. See, *e.g.*, *Board of Education of Waukegan Community Unit School District 60 v. Illinois State Charter School Commission*, 2018 IL App (1st) 162084, ¶ 80.

¶ 13 Here, plaintiff challenges only the Department's disciplinary decision. Even when the administrative decision is determined to be correct, the discipline imposed by an agency may still be reversed if it is found to constitute an abuse of discretion. *Kazmi v. Department of Financial & Professional Regulation*, 2014 IL App (1st) 130959, ¶ 21. A "reviewing court defers to the administrative agency's expertise and experience in determining what sanction is appropriate to protect the public interest." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 99 (1992).

¶ 14 A sanction will be found to be an abuse of discretion if it is arbitrary and capricious, or if the sanction is overly harsh in view of the mitigating circumstances. *Kazmi*, 2014 IL App (1st) 130959, ¶ 21 (citing *Southern Illinois Asphalt Co. v. Pollution Control Board*, 60 Ill. 2d 204, 207 (1975)). "The arbitrary and capricious standard is one of rationality, and the reviewing court will not substitute its own reasoning in the absence of a clear error of judgment on the part of the agency." *1212 Restaurant Group, LLC v. Alexander*, 2011 IL App (1st) 100797, ¶ 59.

¶ 15 In the case at bar, we cannot say that the imposition of a $10,000 penalty constituted an abuse of discretion. Pursuant to section 10-27(d) of the Act, "[t]the Department may impose a civil penalty not to exceed $10,000 upon any Internet auction listing service that intentionally fails to register as required by this Section." 225 ILCS 407/10-27(d) (West 2014). Here, it was undisputed that plaintiff did not register in accordance with the Act, and plaintiff makes no argument on appeal that it was not required to register. Thus, the Secretary of the Illinois Department of Financial and Professional Regulation acted within his discretion when imposing the $10,000 penalty.

¶ 16 Although plaintiff is correct that the record does not contain an explanation for the formulation of a $10,000 penalty as opposed to a different amount, we are unpersuaded by plaintiff's argument that the failure to provide such an explanation, in and of itself, constitutes an abuse of discretion. Here, the stipulated facts indicate that despite listing more than 1.9 million items from sellers represented to be in Illinois and facilitating the sale of more than 132,000 items to Illinois buyers, plaintiff did not register pursuant to the Act. Therefore, plaintiff was subject to a penalty of up to $10,000. In other words, the "justification" for the "severity of the sanction" was plaintiff's admitted failure to register under the Act. Plaintiff further contends that the Secretary of the Illinois Department of Financial and Professional Regulation "apparently failed to consider the mitigating evidence," but points to nothing in the record that was not considered. Moreover, although the record indicates that plaintiff could have presented a motion for rehearing, no such a motion is contained in the record and in its reply brief, plaintiff does not contest defendants' contention that it did not file one. Instead, plaintiff argues that nothing in the Act permits mitigating evidence to be produced in a motion for rehearing.

¶ 17 We are unpersuaded by plaintiff's reliance on *Sender v. Department of Professional Regulation*, 262 Ill. App. 3d 918 (1994), for the proposition that an agency abuses its discretion when it does not explain how it arrived at a penalty. In that case, a hearing officer recommended that a pharmacist be disciplined by suspending his license for a minimum of 30 months. *Id.* at 920. When the board received the hearing officer's recommendation, it adopted the findings of fact and conclusions of law, but recommended to the director that the pharmacist's license be suspended for a minimum of five years and that he be fined $2000. *Id*. at 920-21. The director of

the Department adopted the board's recommendation, and the circuit court affirmed the decision of the director. *Id*. at 921.

¶ 18 On appeal, the pharmacist argued, in pertinent part, that the discipline was an abuse of discretion. The court noted that, although the department doubled the sanction and added a monetary fine without explanation, it "did not dispute the hearing officer's findings, nor did it make additional findings of fact to support its increase in the penalty imposed." *Id.* at 923. The court also noted that the pharmacist had admitted the cause of the violation and testified, in mitigation, as to the steps he had taken to correct it, as well as the fact that he had not previously been disciplined. The court therefore concluded that "the penalty imposed is overly harsh and arbitrary." *Id*. Accordingly, the court reversed the fine and suspension and remanded the cause for reconsideration of the hearing officer's recommendation.

¶ 19 Contrary to plaintiff's argument, *Sender* does not stand for the proposition that an agency abuses its discretion when it does not explain how it formulates a penalty. Rather, the holding in that case was based on the particular facts of that case, and there is nothing in the language of the decision to suggest that the court's observation that no explanation was given for the increase in discipline was an independent basis upon which the court determined the outcome of the appeal.

¶ 20 We are similarly unpersuaded by defendant's reliance on *Cartwright v. Civil Service Commission*, 80 Ill. App. 3d 787 (1980). In that case, the plaintiff, the chief of security at a correctional facility, was discharged for failing to reprimand a guard who had placed a choke hold on an unruly prisoner. In reversing the agency's disciplinary decision, the court found that the agency "abused its discretion by imposing a sanction that was overly harsh in view of the mitigating circumstances." *Id.* at 793. The court emphasized that the plaintiff's only shortcoming

was "failing to reprimand a subordinate for a questionable act," and that three of plaintiff's superiors also witnessed the incident and did nothing. *Id.* at 793-94.

¶ 21 In the case at bar, however, plaintiff does not argue on appeal that it was not subject to the Act, or that its failure to register did not violate the Act. Unlike *Cartwright*, the discipline imposed on plaintiff in this case was based upon the undisputed fact that plaintiff failed to register under the Act. Consequently, plaintiff is subject to a penalty of up to $10,000.

¶ 22 For the forgoing reasons, we affirm the decision of the Secretary of the Illinois Department of Financial and Professional Regulation.

¶ 23 Affirmed.