

DA 18-0570

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 146N

JEFFREY HILL,

Petitioner and Appellee,

v.

MONTANA BOARD OF PLUMBERS, STATE OF MONTANA,
MONTANA DEPARTMENT OF LABOR AND INDUSTRY,

Respondent and Appellant.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DV 18-04
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Graden Hahn, Peter Bovingdon, Assistant Attorneys General, Helena,
Montana

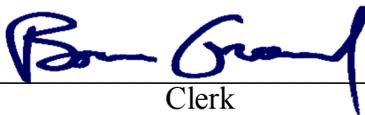
For Appellee:

Erin E. Harris, Kevin S. Brown, Paoli & Brown, Livingston, Montana

Submitted on Briefs: June 5, 2019

Decided: June 25, 2019

Filed:


Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Montana Board of Plumbers, State of Montana, Montana Department of Labor and Industry (Board) appeals from the August 8, 2018 Order Reversing Agency Decision issued by the Sixth Judicial District Court, Park County, which reversed the Board's December 7, 2017 Final Order. We affirm.

¶3 In December 2015, Murphy Brothers Battery Service, Inc. (Murphy Brothers), was hired by First Interstate Bank to perform some plumbing repair work on a residence which Nadia Grabiner and Eric Lane were purchasing in Livingston. Mark Murphy (Murphy), CEO of Murphy Brothers, hired Jeffrey Hill (Hill), as a subcontractor to perform plumbing work which included replacing a cracked toilet, as well as repairing some frozen pipes and a hose bibb. Murphy paid Hill \$500 for the ten hours of plumbing work he performed. Hill holds a Master Plumber License. In February 2016, Ms. Grabiner and Mr. Lane filed a complaint with the Board against Murphy asserting he had charged for services which he was not licensed to perform, and the extent of the work did not justify his charges. They sought assistance to dismiss and invalidate the lien Murphy had placed on the property, to compromise the amount they owed to Murphy, and sought to have the Board impose a fine on Murphy. In turn, the Board brought a complaint against Hill in August 2016, asserting

he failed to obtain a plumbing permit for the plumbing work in violation of § 50-60-505, MCA. An administrative hearing was held on June 27, 2017. In December 2017, the Final Order of the Adjudication Panel of the Board held Hill was required to obtain a permit for the work, and by failing to do so, engaged in unprofessional conduct. Sanctions were imposed, including the placement of Hill's plumbing license on probation. Hill petitioned the District Court for review of this agency decision. The District Court held a hearing on July 18, 2018, and on August 8, 2018, issued its Order Reversing Agency Decision. The Board appeals this order.

¶4 The Montana Administrative Procedure Act (MAPA) governs actions brought before the Department of Labor and Industry. A district court's review of an agency decision "must be conducted by the court without a jury and must be confined to the record[.]" Section 2-4-704(1), MCA. While the district court "may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact," the district court may "reverse or modify the [agency's] decision if the substantial rights of the appellant have been prejudiced[.]" Section 2-4-704(2), MCA. Such prejudice occurs by way of administrative findings, inferences, conclusions, or decisions which are in "violation of constitutional or statutory provisions," or which are "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 2-4-704(2)(a)(i) and (vi), MCA.

¶5 This standard of review applies to "both the District Court's review of the agency's decision and this Court's subsequent review of the District Court's decision." *Blaine County v. Stricker*, 2017 MT 80, ¶ 16, 387 Mont. 202, 394 P.3d 159 (citing *In re Transfer*

of Ownership & Location of Mont. All-Alcoholic Bevs. License No. 02-401-1287-001, 2007 MT 192, ¶ 6, 338 Mont. 363, 168 P.3d 68). This Court reviews the District Court’s conclusions of law “de novo to determine whether its interpretation of the law is correct.” *Stricker*, ¶ 17 (citing *Krutzfeldt Ranch, LLC v. Pinnacle Bank*, 2012 MT 15, ¶ 13, 363 Mont. 366, 272 P.3d 635).

¶6 The Board asserts Hill raised the issue of whether the “minor repair” exception to the requirement to obtain a plumbing permit excused him from having to obtain a permit for the first time on appeal and thus should not be considered. While we generally will not consider issues raised for the first time on appeal, the Board cannot credibly assert the District Court was not permitted to consider the statutory criteria which sets forth when obtaining a permit is required and when it is not required or to consider the agency’s application of facts to the statutory criteria. The complaint initiated by the Board against Hill asserts he engaged in unprofessional conduct by failing to obtain a plumbing permit as required by § 50-60-505, MCA. The very next statutory section, § 50-60-506, MCA, sets forth exceptions to the requirement to obtain a permit. Clearly, these statutes are meant to be considered together to determine if a licensed plumber was required to obtain a permit for his services. The District Court would be remiss in its review if it did not consider the provisions of both §§ 50-60-505 and -506, MCA, in determining whether the agency correctly applied the law in reaching its decision.

¶7 In its review, the District Court was not required to leave its common sense at the door. While the Board was no doubt disgruntled with Murphy,¹ the situation with Hill was that he performed clearly minor plumbing repairs for which he was not required to obtain a plumbing permit. The District Court did not reverse the agency decision on a factual basis, but rather based its reversal on its interpretation and application of the law concluding the agency decision was “in violation of constitutional or statutory provisions” and was “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Section 2-4-704(2), MCA. The District Court’s reversal of the agency decision for violation of applicable statutory provisions and abuse of discretion in applying the law was based on the agency findings together with the District Court’s correct application of those facts to the law. The District Court’s reversal was well-reasoned, supported by the record, and gave this minor matter the consideration it was due.

¶8 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶9 Affirmed.

/S/ INGRID GUSTAFSON

¹ The primary issues in this matter involved the work performed by Murphy and his associated billing. As Murphy is not a licensed plumber, the Board had no control or authority over him.

We concur:

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE

Justice Jim Rice, concurring.

¶10 I concur with the Court’s opinion. I do not condone Hill’s failure to participate in the administrative process, beyond his submission of a response to an investigator’s inquiry, his request for a hearing, and his appeal to the District Court. Although it was the property owners’ complaint against Murphy that originally brought this matter to the Board’s attention, Hill was nonetheless obligated to defend the Notice of Proposed Board Action filed against his Master Plumber License. Typically, such a deficiency in participation would result in a failure to carry the petitioner’s burden in the proceeding.

¶11 Fortunately for Hill, preserved by the record for the District Court’s consideration was a central issue of law discussed in the testimony and by the Hearing Officer’s findings and conclusions—whether the plumbing work for which Hill was hired required a permit. It was clear to the District Court, and I concur, that the statutory exception to the permit requirement for “minor replacement or repair work” applied here. Section 50-60-506(1), MCA. Plainly, the tasks explained in Hill’s response constituted minor work. Extending the permit requirement to this kind of work would require further legislation and/or rulemaking.

/S/ JIM RICE

Justice James Jeremiah Shea joins in the concurring Opinion of Justice Rice.

/S/ JAMES JEREMIAH SHEA