

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 25-0695

VICTORY INSURANCE CO.,

Plaintiff/ Appellant

vs.

OFFICE OF THE MONTANA STATE AUDITOR,

Defendant / Appellee.

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY, HON. MIKE MENAHAN PRESIDING
CASE No. ADV-25-2025-0000004-JR

APPELLANT OPENING BRIEF

APPEARANCES

Linda M. Deola
Scott L. Peterson
MORRISON SHERWOOD WILSON & DEOLA, PLLP
P.O. Box 557
Helena, MT 59624
(406) 442-3261 Phone
(406) 443-7294 Fax
lideola@mswdlaw.com
speterson@mswdlaw.com

Attorneys for Plaintiff/Appellant

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INTRODUCTION

This appeal presents fundamental questions of administrative law. First, this appeal concerns whether a regulatory agency may penalize a regulated entity for failing to comply with an order that exceeds the agency's statutory authority. And second, this appeal asks whether the agency may impose the maximum statutory fine without offering any explanation for its exercise of discretion.

More specifically, the Montana Commissioner of Securities and Insurance fined Victory Insurance Company \$25,000 based on an order that even the Hearing Officer concluded could not lawfully be issued. And the Commissioner issued a discretionary fine without articulating a single reason for selecting the maximum penalty. Montana law does not permit such arbitrary enforcement. Because the Commissioner's order was unlawful and the penalty was unexplained, the agency decision cannot stand.

ISSUES PRESENTED

1. The Hearing Officer found that the Commissioner could not lawfully order Victory to supplement its annual statement to include notice of a settlement that occurred outside the time period covered by the annual statement. Yet, the Hearing Officer concluded that Victory disobeyed an

order from the Commissioner (an order which required Victory adding a settlement). Can Victory be liable for disobeying an order that is unlawful?

2. This Court has held that the Administrative Procedures Act “requires that an agency cogently explain why it has exercised its discretion in a given manner.” *DeBuff v. Mont. Dep’t of Nat. Res. & Conservation*, 2021 MT 68, ¶ 1, 403 Mont. 403, 482 P.3d 1183. But the District Court held that the Commissioner did not have to explain why he issued a discretionary, \$25,000 fine. Did the District Court’s decision violate the principle that an agency must explain its actions?

STATEMENT OF THE CASE

This case arises from an administrative enforcement action brought by the Montana Commissioner of Securities and Insurance against Victory Insurance Company, a Montana-domiciled workers’ compensation insurer regulated under Title 33, MCA. The Commissioner alleged that Victory violated the insurance code by failing to follow the Commissioner’s order to amend its 2021 annual statement to disclose litigation and a settlement that occurred in 2022, after the close of the reporting period. (CSI Admin R. 4).

The Commissioner initiated the proceeding through a Notice of Proposed Agency Action issued on December 27, 2022. *Id.* The Notice sought an order authorizing the Commissioner to amend Victory’s annual

statement. Victory timely requested a contested case hearing, after which the Commissioner moved for summary judgment. (CSI Admin R. 27; 46).

On March 5, 2024, the Hearing Officer issued a recommended decision granting summary judgment. (CSI Admin. R. 605). Although the Hearing Officer concluded that the Commissioner lacked authority to require amendment of the 2021 annual statement to include a 2022 settlement, he nonetheless concluded that Victory violated the insurance code and that the Commissioner possessed unfettered discretion to impose a penalty without explanation. (CSI Admin R. 624). The Commissioner's designee adopted that recommendation and imposed a \$25,000 fine. (CSI Admin. R. 788).

Victory sought judicial review under § 2-4-702, MCA. The District Court affirmed, concluding that the Commissioner acted within his discretion and was not required to explain the basis for the fine. Or., P. 9. Victory now appeals.

STATEMENT OF FACTS

Victory Insurance Company is a Montana-domiciled workers' compensation insurer. In 2019, Victory entered into a business relationship with Clear Spring Property and Casualty Company pursuant to which Clear Spring issued an unconditional promissory note to Victory in connection with Clear Spring's purchase of Victory's book of workers' compensation business. (CSI Admin R. 606). Disputes later arose concerning that

promissory note. In March 2021, Clear Spring filed a federal lawsuit against Victory, and Victory filed a counterclaim. The litigation remained pending through December 31, 2021. (CSI Admin. R. 000607.)

Every year, Victory is required to file an annual financial statement with the Commissioner. This financial statement is due by March 31, 2022, and it reflects its financial condition for the preceding year as of December 31. Victory timely filed its 2021 annual statement on March 31, 2022, covering its financial condition as of December 31, 2021. (CSI Admin. R. 000607.)

As is standard, Victory's financial statements were audited by an independent certified public accountant. The audited financial statements expressly disclosed the existence of the Clear Spring litigation and identified the resolution of that litigation as a subsequent event. (CSI Admin. R. 000424.) The audited financial statements were filed with and in the possession of the Commissioner, making the litigation a matter of public record. (*Id.*)

Despite having the audited financials disclosing the litigation, the Commissioner demanded that Victory amend its 2021 annual statement. (*Id.*) Importantly, the Commissioner did not merely demand disclosure of the lawsuit itself. Instead, on June 10, 2022, the Commissioner specifically directed Victory to amend its 2021 annual statement to disclose both the

existence of the Clear Spring litigation and the settlement of that litigation. (CSI Admin. R. 424; 430.)

The Clear Spring litigation settled on or about April 21, 2022—after the close of the 2021 reporting period. (CSI Admin. R. 000608.) Victory objected to the Commissioner’s demand, explaining that amendment of the 2021 annual statement was neither required nor permitted under Montana law or statutory accounting principles. Victory further explained that the settlement did not reflect its financial condition as of December 31, 2021, and therefore could not properly be included in the 2021 annual statement. Instead, the settlement was appropriately addressed as a subsequent event and in Victory’s 2022 annual statement. (CSI Admin. R. 000427–28.)

The Commissioner nevertheless initiated an administrative enforcement action through a Notice of Proposed Agency Action, seeking two forms of relief: (1) permission for the Commissioner’s staff to amend Victory’s 2021 annual statement to disclose the litigation and the settlement itself, and (2) the imposition of a monetary fine for Victory’s refusal to amend. (CSI Admin. R. 000705–06.)

A Hearing Officer was appointed. The Hearing Officer concluded that the Commissioner had issued a lawful order and that Victory violated the insurance code by failing to comply. (CSI Admin. R. 000619.) At the same time, however, the Hearing Officer expressly held that the Commissioner

lacked authority to amend Victory's 2021 annual statement to disclose the settlement because the settlement occurred in 2022 and did not reflect Victory's financial condition as of December 31, 2021. (CSI Admin. R. 000622.)

The Hearing Officer's recommended decision was reviewed and adopted by the Commissioner's designee. (CSI Admin. R. 782). That designee also imposed the maximum statutory penalty of \$25,000 without holding an evidentiary hearing, without making any findings regarding aggravating factors, and without any explanation for the fine, let alone one explaining why the maximum penalty was warranted. (CSI Admin. R. 000788.)

Victory timely sought a petition for judicial review. The District Court denied Victory's petition. In particular, regarding the fine, the District Court held that the Commissioner could issue any fine amount he chooses "without explanation." Or., p. 9.

STANDARD OF REVIEW

This Court reviews agency decisions under Mont. Code Ann. § 2-4-704(2), determining if the decision violates constitutional or statutory provisions, exceeds authority, involves unlawful procedure, contains errors of law, or is clearly erroneous. *KB Enters., LLC v. Mont. Human Rights Comm'n*, 2019 MT 131, ¶ 6, 396 Mont. 134, 136, 443 P.3d 498. Most

importantly here, Courts review whether the agency action is “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” § 2-4-704(2), MCA.

Conclusions of law are reviewed de novo. *City of Great Falls v. Bd. of Comm’rs*, 2024 MT 118, ¶ 9, 416 Mont. 494, 549 P.3d 1158. Notably, whether an agency properly granted summary judgment raises a question of law. As this Court has noted, “Whether a lower court correctly granted or denied summary judgment as a matter of law under M. R. Civ. P. 56(c)(3) is a conclusion of law subject to de novo review for correctness.” *Id.* This Court has routinely reviewed agency summary judgment decisions under de novo review. *Missoula Elec. Coop. v. Jon Cruson, Inc.*, 2016 MT 267, ¶ 15, 385 Mont. 200, 203-04, 383 P.3d 210, 213; *Shepherd v. State ex rel. Dep’t of Corr.*, 2021 MT 70, ¶ 9, 403 Mont. 425, 428, 483 P.3d 518, 520 (noting that, when a hearing officer granted summary judgment, “This Court reviews orders granting summary judgment de novo” and then citing and repeating the summary judgment standards); *Strable v. Carisch, Inc.*, 2024 MT 186, 418 Mont. 18, 555 P.3d 241 (same).

SUMMARY OF THE ARGUMENT

The agency decision must be reversed for two independent reasons. First, Victory cannot be penalized for failing to comply with an unlawful order. The Commissioner demanded amendment of a 2021 annual statement

to include a settlement that occurred in 2022—conduct the Hearing Officer correctly recognized exceeded the Commissioner’s statutory authority. An entity cannot violate an order the agency had no power to issue.

Second, even if a violation could be found, the Commissioner’s unexplained imposition of the maximum \$25,000 fine is arbitrary and capricious. Montana law requires agencies to explain how and why discretionary decisions are made. Here, the Commissioner provided no findings, no rationale, and no reasoned explanation for selecting the maximum penalty. Without such an explanation, meaningful judicial review is impossible.

Because the order was unlawful and the penalty determination was arbitrary, the decision must be reversed and the agency action dismissed.

ARGUMENT

I. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED BECAUSE THE COMMISSIONER’S ORDER WAS NOT LAWFUL.

As an initial matter, Victory should not have been fined at all because the Commissioner’s underlying order was unlawful. The Commissioner may issue a violation only upon determining that a lawful order has been violated. Here, however, the Commissioner’s own Notice of Proposed Agency Action (“NOPAA”) establishes that the Commissioner demanded conduct that exceeded his statutory authority and violated Montana law.

The NOPAA does not merely state that Victory was required to “supplement” its annual statement in some general sense. It specifies *exactly* what the Commissioner demanded. According to the NOPAA, on May 4, 2022, the Commissioner required Victory to supplement its 2021 annual statement to disclose “the ... lawsuit be disclosed in the Note, adding that the lawsuit has been settled.” NOPAA ¶ 36 (CSI Admin R. 15). The proposed disclosure was set forth verbatim:

The Company is subject to potential litigation in the normal course of business. The Company was a Defendant in United States District Court for the Northern District of Illinois—Eastern Division Case Number 21-CV-1162, Clear Spring Property and Casualty Company v. Victory Insurance Company; however, *this lawsuit has been settled.*

(CSI Admin R. 16). The NOPAA further states that the Commissioner, through CSI, “reiterated that making the foregoing amendment or a similar amendment fairly appraising the reader of the mere fact of the lawsuit and its outcome” was required. *Id.*

That demand was unlawful, as the Hearing Officer himself confirmed. The financial statement at issue was Victory’s 2021 Annual Statement. The settlement occurred on April 21, 2022—several months beyond 2021 and beyond the filing deadline. As the Hearing Officer expressly found, “annual statements are required to be filed on or before March 1, and cover the authorized insurer’s financial condition, transactions, and affairs *as of the preceding December 31.*” Hearing Officer Decision at 18 (emphasis in original).

The Hearing Officer further concluded that it would be improper to “supplement Victory’s 2021 Annual Statement to include the settlement of *Clear Spring v. Victory* because the settlement took place outside the time period covered by Victory’s 2021 Annual Statement.” (CSI Admin. R. 622).

In other words, the Commissioner lacked authority to order Victory to supplement its 2021 Annual Statement in the manner demanded—i.e., by disclosing both the lawsuit *and* its April 2022 settlement. The settlement did not reflect Victory’s financial condition as of December 31, 2021, and therefore could not lawfully be required to be disclosed in the 2021 statement.

This creates a fatal flaw in the agency’s decision. The Hearing Officer’s finding of a violation rests entirely on the premise that “[t]he Commissioner has the power to order Victory to supplement its annual statement” and that the order at issue was “valid and within the Commissioner’s power.” (CSI Admin R. 619).

But the Hearing Officer’s own analysis demonstrates the opposite. Because the Commissioner ordered Victory to supplement its annual statement in a specific and unlawful way (i.e., to disclose the settlement), the order exceeded the Commissioner’s authority.

If the Commissioner's order was unlawful, Victory could not have violated it. And if there was no violation, there was no lawful basis for imposing any fine.

Accordingly, the District Court erred in affirming the Hearing Officer's decision on summary judgment. This Court should reverse and remand.

II. AT A MINIMUM, REVERSAL IS WARRANTED BECAUSE THE COMMISSIONER PROVIDED NO EXPLANATION FOR THE \$25,000 FINE.

Alternatively, this Court should reverse concerning the fine. Contrary to established administrative law principles, the Commissioner provided no explanation for his \$25,000 fine determination. Failure to provide this explanation is arbitrary and capricious and an abuse of discretion. § 2-4-704(2), MCA. The remedy for this failure is not remand but instead, for the Commissioner to start the action anew.

A. The District Court Erred In Concluding The Commissioner Did Not Need to Explain The Reasons For Choosing a \$25,000 Fine.

Victory filed a petition for judicial review arguing, among other things, that the Commissioner's \$25,000 fine was unlawful because the Commissioner provided no explanation for the amount imposed.

The District Court rejected that argument. The court did not dispute that the Commissioner offered no rationale for selecting the \$25,000 amount. Instead, it concluded that no explanation was required because "[t]he statute

provides that a Commissioner may issue a fine ‘up to \$25,000.’” Or., p. 9. From that premise, the District Court reasoned that the Commissioner may impose a \$25,000 fine, a \$2,500 fine, a \$250 fine, or any amount in between— “without explanation.” *Id.*

That conclusion is wrong. While the statute grants the Commissioner discretion regarding the amount of a fine, it does not render that discretion unreviewable. Nor does it permit the Commissioner to act arbitrarily or capriciously. Montana law expressly authorizes courts to reverse agency decisions that are “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” § 2-4-704(2), MCA. Put differently, *all* administrative, discretionary actions are subject to review to ensure they are not an abuse of discretion.

What is more, discretion—whether exercised by a court or an agency— must be explained to ensure adequate judicial review. This Court has made clear that a discretionary decision rendered “without rationale” is “not an exercise of discretion, but is an abuse of that discretion.” *Shockley v. Cascade County*, 2016 MT 34, ¶ 8, 382 Mont. 209, 367 P.3d 336. Likewise, although district courts have discretion to grant or deny leave to amend, an “outright refusal to grant the leave without a justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion.” *Gursky v. Parkside Prof'l Vill.*, 258 Mont. 148, 152, 852 P.2d 569, 571 (1993).

The reason for this rule is straightforward: without an explanation of how discretion was exercised, a reviewing court cannot determine whether that discretion was abused. Federal courts apply the same principle, holding that a decision constitutes an abuse of discretion when neither the “decision nor the record provide sufficient explanation to enable meaningful appellate review.” *Cox Enters., Inc. v. News-Journal Corp.*, 510 F.3d 1350, 1360 (11th Cir. 2007).

This requirement applies with particular force in the administrative context. Under the APA, courts reviewing agency action must ensure that the agency has engaged in reasoned decision-making. As the United States Supreme Court has explained, the arbitrary-and-capricious standard requires that agency action be both reasonable and reasonably explained. *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423, 141 S. Ct. 1150, 1158 (2021). To satisfy that standard, an agency must “articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Accordingly, this Court will “defer only to consistent, rational, and well-supported agency decision-making,” which “requires that an agency cogently explain why it has exercised its discretion in a given manner.”

DeBuff v. Mont. Dep't of Nat. Res. & Conservation, 2021 MT 68, ¶ 1, 403 Mont. 403, 482 P.3d 1183 (emphasis added).

This is not a case where the Commissioner offered an explanation that was merely inadequate or poorly reasoned. He offered no explanation at all. The Commissioner made no findings identifying aggravating factors, articulated no basis for selecting the maximum penalty, and provided no rationale explaining why a lesser fine would have been insufficient. Where a statute authorizes a range of penalties, the unexplained selection of the maximum penalty is the paradigmatic example of arbitrary decision-making.

Compounding the problem, this Court is limited to reviewing the reasons actually given by the agency. An “agency decision must be judged on the grounds and reasons set forth in the challenged order(s); no other grounds should be considered.” *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 238, ¶ 51, 401 Mont. 324, 472 P.3d 1154. This rule follows binding United States Supreme Court precedent holding that judicial review of agency action is “limited to the grounds that the agency invoked when it took the action,” and that courts “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20, 140 S. Ct. 1891, 1907 (2020); *State Farm*, 463 U.S. at 43.

There is no dispute that the Commissioner's decision imposing a \$25,000 fine was agency action, nor is there any dispute that the Commissioner offered no explanation for that decision. Because the Commissioner articulated no contemporaneous rationale for imposing the maximum fine, there is no exercise of discretion for this Court to review. As the D.C. Circuit has held, an agency's failure to explain "its reason for decision . . . constitutes arbitrary and capricious agency action." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014). So too here: the Commissioner's unexplained decision to impose the maximum fine is arbitrary, capricious, and an abuse of discretion.

The District Court erred by concluding otherwise. By treating the Commissioner's penalty determination as effectively unreviewable, the District Court misapplied Montana law and excused precisely the kind of arbitrary agency action the judicial review statute is designed to prevent.

B. The Remedy Here Is The Commissioner Must Start The Agency Action Anew.

Because the Commissioner failed to make any findings or provide any contemporaneous explanation supporting the \$25,000 fine, remand for further explanation is not an appropriate remedy. Instead, the Commissioner must commence a new agency action.

The United States Supreme Court has explained that when an agency's explanation is deficient, a reviewing court may remand for one of two limited purposes. First, the agency may "offer a fuller explanation of the agency's reasoning at the time of the agency action." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20, 140 S. Ct. 1891, 1907 (2020) (emphasis in original). That option, however, is available only where the agency's original decision reveals the determinative basis for the action taken. In such cases, the agency may elaborate on its original rationale, but it may not supply new justifications. *Id.*

Here, the Commissioner's decision does not reveal any rationale for selecting the maximum fine. The decision contains no findings identifying aggravating factors, no explanation for why a lesser fine would have been inadequate, and no articulation of how the Commissioner exercised his discretion. Because the Commissioner provided no explanation at all, there is no original rationale to elaborate upon. Any attempt to justify the fine on remand would therefore constitute impermissible post hoc rationalization.

Where an agency's action is unsupported by any contemporaneous explanation, the Supreme Court has made clear that the proper course is for the agency to "deal with the problem afresh by taking new agency action." *Id.* (emphasis in original). That is the situation here. Because the

Commissioner's penalty determination lacks any stated reasoning, the decision cannot be salvaged through remand for explanation.

Accordingly, this Court should reverse and remand with instructions to dismiss the agency action, leaving it to the Commissioner to decide whether to initiate a new proceeding consistent with the requirements of Montana law and basic principles of administrative due process.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's order affirming the Final Agency Decision, vacate the \$25,000 penalty, and remand with instructions to dismiss the administrative enforcement action.

DATED this 22nd day of December, 2025.

MORRISON SHERWOOD WILSON & DEOLA, PLLP

By: _____


Linda M. Deola

Scott L. Peterson

Attorneys for Plaintiffs / Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionally spaced Palatino text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word 2008 for Mac is 3,480, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

MORRISON SHERWOOD WILSON & DEOLA, PLLP

By: 

Linda M. Deola

Scott L. Peterson

Attorneys for Plaintiffs / Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of December 2025, a true and correct copy of the foregoing was served as follows:

By the Court's Electronic Filing System:

Rune VanderWey
Commissioner of Securities & Insurance,
Office of the Montana State Auditor
rune.vanderwey@mt.gov
Counsel for Commissioner of Securities & Insurance

Austin Knudsen, Attorney General
Christian Corrigan, Solicitor General
Department of Justice
302 N. Roberts
Helena, MT 59620
dojsupremecourtefilings@mt.gov
Christian.Corrigan@mt.gov

By email:

CSI.LegalService@mt.gov

By: 

Amy Kirscher

CERTIFICATE OF SERVICE

I, Scott Louis Peterson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-22-2025:

Rune Haze Vander Wey (Govt Attorney)
840 HELENA AVE
HELENA MT 59601-3423
Representing: Office of the Montana State Auditor
Service Method: eService

Linda Deola (Attorney)
401 N. Last Chance Gulch
Helena MT 59601
Representing: Victory Insurance Co.
Service Method: eService

Bowen Greenwood (Clerk of Supreme Court)
215 N Sanders
Helena MT 59620
Service Method: eService
E-mail Address: Bowen.Greenwood@mt.gov

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Service Method: eService
E-mail Address: dojsupremecourtefilings@mt.gov

Christian Brian Corrigan (Govt Attorney)
215 North Sanders
Helena MT 59601
Service Method: eService
E-mail Address: Christian.Corrigan@mt.gov

Electronically signed by Amy Kirscher on behalf of Scott Louis Peterson
Dated: 12-22-2025