STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-AP-15-03
(consolidated with BCD-AP-17-03)

FCA US, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	**ORDER ON RULE**
	)	**80 C APPEAL**
MATTHEW DUNLAP,	)	
in his capacity as Secretary of State of	)	
the State of Maine	)	
	)	
and	)	
	)	
DARLING'S,	)	
	)	
Respondents.	)	

Petitioner FCA US, LLC ("FCA") appeals an Order of the Maine Motor Vehicle Franchise Board (the "Board") imposing a civil penalty on FCA in the amount of $40,000. Respondent Darling's opposed the appeal. After briefing, the Court heard oral argument on the appeal on July 27, 2017. Attorney Daniel L. Rosenthal appeared on behalf of FCA and Attorney Judy A.S. Metcalf appeared on behalf of Darling's.

PROCEDURAL HISTORY

This appeal brings these two parties back before the Court after years of litigation between them at the Board, in this Court, and in the Supreme Judicial Court. It is unnecessary for the Court to explicate this history here; the Court will merely summarize the most recent action to

contextualize the instant matter.

On January 20, 2013, Darling's filed a four-count Complaint against FCA with the Board. (Certified Record at 4) (hereafter R. __). The Board held a hearing and issued its Order on April 4, 2014. *Id.* Both FCA and Darling's appealed portions of the Board's decision to this Court. *Id.* Darling's subsequently withdrew its appeal; this Court then proceeded to consider FCA's appeal. (R. 5-32).

The only part of that appeal now relevant is FCA's appeal of the Board's decision that FCA violated 10 M.R.S.A. § 1176 when FCA failed to pay Darling's its average percentage markup on "exchange parts" used in performing warranty repairs. (R. 16). The Board had found thirteen violations based on a continuing violation whereby FCA declined to pay Darling's the percentage markup for thirteen sixty-day periods.[1] *Id.* The Board then imposed the minimum mandatory penalty of $1,000 for each violation, for a total penalty of $13,000. (R. 17). *See* 10 M.R.S.A. § 1171-B(3).

This Court upheld the Board's determination that FCA violated Section 1176. (R. 20). However, the Court held that the Board erred in its determination that there were thirteen violations of the statute, finding that the mandatory civil penalty for violations of Section 1176 is triggered by actual claims filed by franchisees. (R. 23-24). This reduced the number of violations for which FCA must be assessed a penalty from thirteen to four. (R. 22-25).

Although this Court winnowed the number of violations from thirteen to four, the Court held that it could not act of its own accord in assessing a new fine as urged by FCA. (R. 25). Thus, the Court remanded the case to the Board to assess a new fine. *Id.* FCA filed a motion with the Board requesting the Chair of the Board assess a new fine of $4,000. (R. 105-07). The motion was

[1] Section 1171-B of Title 10 of the Maine Revised Statutes states that "[i]f the violation involves multiple transactions within a 60-day period, these multiple transactions are deemed a single violation."

denied and the Chair re-convened the Board to set a new civil penalty. (R. 152).

The Board heard oral argument on November 28, 2016, on the issue of civil penalties. (R. 271). Darling's requested by motion that the Board's deliberations be recorded. (R. 271-72). FCA did not join this motion, which the Board denied. *Id*. In its brief "Corrected Order on Remand," the Board set the new civil penalty amount at $40,000, i.e. the statutory maximum per violation. (R. 272). The Board's order, in summary fashion, explains procedurally how the Board came to set the penalty at this amount, but fails to provide any substantive analysis or justification for why it chose to impose the maximum fines for four violations after imposing minimum fines for thirteen violations in the initial proceeding. *Id*.

STANDARD OF REVIEW

When reviewing final agency action pursuant to M.R. Civ. P. 80C, the Court reviews that decision for abuse of discretion, errors of law, or findings not supported by the evidence. *Centamore v. Dep't of Human Servs.*, 664 A.2d 369, 370 (Me. 1995). The Court's review is limited to "determining whether the agency's conclusions are unreasonable, unjust, or unlawful in light of the record." *Imagineering v. Sup't of Ins.*, 593 A.2d 1050, 1053 (Me. 1991). The focus on appeal is not whether the Court would have reached the same conclusion as the agency, but whether the record contains competent and substantial evidence that supports the result reached by the agency. *See id*. The burden of proof on appeal "clearly rests with the party seeking to overturn the decision of an administrative agency." *Seven Islands Land Co. v. Me. Land Use Regul'n Comm'n*, 450 A.2d 475, 479 (Me. 1982).

DISCUSSION

Petitioner FCA raises two issues in this appeal. First, FCA claims that it was legal error for

the Board Chair to reconvene the full Board for the hearing on remand, and that he should have instead decided to assess a civil penalty of $1,000 per violation as a matter of law, for a total penalty of $4,000. In the alternative, FCA argues that the Board's decision should still be reversed even if it were proper to reconvene the entire Board, because sufficient grounds exist for reversal under 5 M.R.S.A. § 11007. The Court addresses each issue in turn.

I. THE BOARD CHAIR ACTED PROPERLY IN RECONVENING THE BOARD

After this Court remanded this case to the Board to impose a new fine in light of the reduced number of violations, FCA filed a motion with the Board, requesting that the Board Chair assess a fine of no greater than $4,000 as a matter of law. (R. 105-07). In its motion, FCA argued "that the full Board need not and should not be reconvened to decide the proper civil penalty" and that "the appropriate remedy is clear as a matter of law and may be determined and imposed by the Chair alone[.]" (R. 105). As legal authority for its position, FCA relies on a 2005 Board Order, *Darling's v. Ford Motor Company*, No. 03-1 (Me. Motor Veh. Fran. Bd. May 20, 2005). (R.105, 110-18).

The Court is unpersuaded by this argument. At the outset, the Court notes that it is not bound by prior decisions of the Board and may consider them, when relevant, as only persuasive authority. Regardless, the Court has reviewed the Order on which FCA relies and does not read the Board's decision as advocating for granting the Chair the authority to impose civil penalties. In that case, the Board merely reiterated what is already clear in 10 M.R.S.A. § 1187(2): that the Chair has the authority to make preliminary rulings on discovery and other questions. (R. 111-12). Indeed, the order is clear that "the Board itself must . . . set and impose a civil penalty under the statute." (R. 112).

Even if the Board had claimed that the Chair had such authority in the 2005 Opinion, it would have been wrong as a matter of law. Section 1171-B(3) of Title 10 of the Maine Revised Statutes clearly states that "the *board* shall levy a civil penalty of not less than $1,000 nor more than $10,000 for each violation [it finds]." 10 M.R.S.A. § 1171-B(3) (emphasis added). Title 10 is equally explicit in detailing the duties of the Chair; in addition to making preliminary rulings on discovery and other questions, the Chair must "act as the presiding officer in all matters that come before the board . . . [p]articipate fully in board decisions . . ." and vote with the Board when necessary to break a tie. 10 M.R.S.A. § 1187(2). Absent from this list is the authority to impose a penalty.

The Court disagrees with FCA that imposing a new civil penalty on FCA on remand was a "preliminary ruling," particularly given the clear language of Section 1171-B(3) delegating the authority to levy penalties to the Board exclusively. The Court thus rules that the Board Chair acted properly in reconvening the full Board to set a new civil penalty amount on remand.

II. THE COURT LACKS SUFFICIENT INFORMATION TO DETERMINE WHETHER THE BOARD'S DECISION WAS AN ABUSE OF DISCRETION OR OTHERWISE REVERSIBLE UNDER 5 M.R.S.A. § 11007

Petitioner FCA next argues that the Board nonetheless committed reversible error when it set a new civil penalty amount of $40,000 for the four violations that this Court had found in the prior appeal. FCA's complaint is self-explanatory: the Board initially found thirteen violations and imposed the mandatory minimum fine on FCA for each violation for a total of $13,000; on appeal, FCA succeeded in having the number of violations reduced to four; on remand, FCA saw its liability increased more than three-fold when the Board imposed the statutory maximum for each violation the Court found.

Petitioner FCA now urges this Court to reverse and vacate the Board's Order on Remand, and modify the decision to reflect what it claims is the "correct calculation" of the civil penalty, that is, $4,000. FCA points to several grounds on which this Court may order the relief sought under 5 M.R.S.A. § 11007(4)(C); namely, that the Board exceeded its authority, proceeded unlawfully, demonstrated bias toward a litigant, committed clear legal error, acted arbitrarily, and abused its discretion. *See* 5 M.R.S.A. § 11007(4)(C)(2)-(6). Darling's has responded that because the Board is given exclusive statutory authority to assess a civil penalty and the $40,000 penalty is within the bounds dictated by 10 M.R.S.A.§ 1171-B(3) there is no basis for this Court to second-guess the Board's determination.

This Court has the authority, on appeal, to review the sanctions imposed by an administrative agency. 5 M.R.S.A. § 11001. By statute, an aggrieved party is entitled to judicial review except where "judicial review is specifically precluded or the issues therein limited by statute." 5 M.R.S.A. § 11001(1). Nothing in Chapter 204 of Title 10 specifically limits this Court's ability to review the imposition of a civil penalty. *See* 10 M.R.S.A. § 1189-B. Such a prohibition cannot be implied merely because the statute authorizes the Board (and not this Court) to impose civil penalties in 10 M.R.S.A. § 1171-B(3). *Cf. Zegel v. Bd. of Soc. Worker Lic.*, 2004 ME 31, ¶¶ 18-24, 843 A.2d 18 (holding by implication that courts may review awards of costs and impositions of sanctions by an administrative agency even where 10 M.R.S.A. § 8003-D specifically authorized the licensing board to award costs and 32 M.R.S.A. § 7059[2] granted the board authority to "suspend or revoke" a license pursuant to 5 M.R.S.A. § 10004).

The Court is also within its authority to remand this case to the Board again for clarification

[2] Section 7059 of Title 32, which was in force when *Zegel* was decided, was repealed in 2007 by L.D. 1842 (123d Legis. 2007). The authority of the licensing board to suspend, revoke, or refuse to reissue professional licenses, as well as the factors the board is required to consider in rendering such a decision, were preserved in 10 M.R.S.A. § 8003(5-A)(A) and 32 M.R.S.A. § 7059.

on why the Board dramatically increased FCA's civil penalty after FCA prevailed on appeal in this Court. *See* 5 M.R.S.A. § 11007(4)(B). In *Zegel*, the Law Court specifically held that review of an imposition of sanctions allows a court to remand to the agency "to require the agency to articulate its reasons for imposing the sanctions" when the agency's written decision "fails to explain why it decided to impose the sanctions it chose." *Zegel*, 2004 ME 31, ¶ 24, 843 A.2d 18.

In a concurrence entered in *Cobb v. Bd. of Counseling Prof'ls Licensure*, 2005 ME 48, ¶¶ 29-32, 896 A.2d 271, Chief Justice Saufley called attention to the fact that the sanctions imposed by the board seemed excessive, and that had the severity of the sanctions been raised by the petitioner on appeal, there would likely have been insufficient information for a court to determine whether "the sanction is proportionate to the offense." *Id.* ¶¶ 31-32. The Chief Justice went on to say that "administrative boards will be well served to detail the rationale for the type and amount of the sanction imposed." *Id.* ¶ 32. *See also id*. ¶ 29 ("The Board [of Counseling Professionals Licensure], and those who look to the Board for guidance, would benefit from an articulation of the rationale for a particular sanction."); *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶ 15, 769 A.2d 834 (explaining the importance of adequate agency findings to allow for meaningful judicial review).

The Chief Justice anticipated exactly the problem this Court now faces. The Board in this case failed to heed the Chief Justice's advice and detail the rationale for more than tripling FCA's sanction amount despite the reduction in violations on appeal, and the Court is thus left with insufficient information to determine whether the sanction is proportionate to the offense. *See Cobb*, 2005 ME 48, ¶¶ 31-32, 896 A.2d 271 (Saufley, C.J., concurring). In other words, this Court can only "determine whether the Board acted within the bounds of its discretion if [it] understand[s] the specific facts that justify the sanction imposed" and therefore must "require the

[Board] to articulate its reasons for imposing the sanctions." *Zegel*, 2004 ME 31, ¶ 24, 843 A.2d 18.

The Court is thus remanding this matter back to the Board for a new determination of FCA's civil penalty. To be clear, the Court is neither requesting that the Board consider new evidence nor is the Court suggesting that the record in this case is incomplete. *See* M.R. Civ. P. 80C(e)-(f). Neither is the Court suggesting that it was error for the Board to deny Darling's motion to record the Board's deliberation. (*See* R. 271-72). The Court is merely exercising its authority to request a clarification from the Board so that the Court can adequately review the Board's decision. 10 M.R.S.A. § 11007(4)(B). *See also Zegel*, 2004 ME 31, ¶ 24, 843 A.2d 18. In particular, on remand, if the Board again determines that FCA's civil penalty should be increased despite the reduction in violations, the Board must offer some explanation of its reasoning. In doing so, the Board should address the statutory criteria in 10 M.R.S.A. § 1171-B(3) that it relied upon in reaching its decision, as the Court directed in its previous remand order. (R. 23-25, 31-32). The Board is urged further to explain how the new maximum penalty is proportionate to the conduct given the reduction in violations and previous imposition of minimum penalties. *See Cobb*, 2005 ME 48, ¶ 32, 896 A.2d 271 (Saufley, C.J., concurring).

CONCLUSION

For the reasons discussed above, it is hereby ORDERED:

That this matter be remanded to the Maine Motor Vehicle Franchise Board for a determination of what penalty to impose against FCA under 10 M.R.S.A. § 1171-B(3) in a manner consistent with this Order.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: October 2, 2017

/S
Michaela Murphy, Justice
Business and Consumer Court