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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1334**

In re the Commercial Dog or Cat Breeder License
Issued to Deborah Rowell for
Country Pride Kennel

**Filed May 7, 2018
Affirmed
Smith, Tracy M., Judge**

Minnesota Board of Animal Health
File No. MN829895

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Considered and decided by Smith, Tracy M., Presiding Judge; Bjorkman, Judge;
and Rodenberg, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this certiorari appeal, relator Animal Humane Society (AHS) challenges the
decision by respondent Minnesota Board of Animal Health (the board) to renew respondent
Deborah Rowell's commercial dog or cat breeder license. AHS argues that Rowell was
convicted of animal cruelty in 2013 and that the board therefore (1) should never have

granted Rowell an initial license and (2) should not have renewed, and must revoke, Rowell's license. Because AHS's challenge to Rowell's initial licensure is time-barred, and because AHS forfeited its argument that Rowell was convicted of animal cruelty, we affirm.

FACTS

In 2013, Rowell, who ran a dog-breeding business in Northern Minnesota, entered an *Alford* plea¹ to a misdemeanor charge of failing to provide adequate shade for a dog or cat shelter, in violation of Minn. Stat. § 346.39, subd. 4 (2012), following the seizure of 133 dogs, who were taken in and found new homes by AHS. The following year, Rowell applied to the board for a commercial dog or cat breeder license under the newly enacted Minnesota Commercial Breeders Licensing and Enforcement Act, Minn Stat. §§ 347.57-.64 (2016). The application form requires applicants to agree that they "have never been convicted, other than a petty misdemeanor conviction, of animal cruelty in a court of law." Rowell left this portion of the application blank on her initial application.

As part of the application process, the board inspected Rowell's facility. During the inspection, the board's inspector discussed the certification statements with Rowell. Rowell indicated she was unsure whether her conviction was considered animal cruelty. The board's inspector contacted the county attorney's office that had prosecuted Rowell, and was in turn directed to the county court administration for copies of the complaint and

¹ An *Alford* plea is a guilty plea in which the defendant maintains his or her innocence but "reasonably believes, and the record establishes, the state has sufficient evidence to obtain a conviction." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994) (citing *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970)).

conviction, and to the county sheriff's office "[f]or copies of the investigative files, including photos of the conditions in which the animals were kept." The board obtained copies of the 2013 criminal complaint and conviction, but there is no indication that it reviewed or attempted to obtain the sheriff's office's investigative files. The board also received input from Rowell's attorney, who contended that Rowell "was not charged with animal cruelty." Based on this information, the board decided not to "go any further with this" and concluded that Rowell's conviction was not an impediment to licensure. Rowell submitted a revised application indicating she had not been convicted of animal cruelty, the board issued a license, and that issuance was publicized in January of 2015.

In February and March of 2015, the board received correspondence from several entities that objected to Rowell's licensure, arguing that Rowell's 2013 conviction precluded her licensure. One such entity was AHS. However, AHS did not seek certiorari review of the board's initial licensing decision.

In 2016, the board renewed Rowell's license. Again, AHS did not petition for certiorari review.

In 2017, the board again renewed Rowell's license. This time, AHS petitioned this court for a writ of certiorari.

D E C I S I O N

"It is a misdemeanor for a commercial breeder to operate without a license." Minn. Stat. § 347.62(d). Licenses are issued by the board. Minn. Stat. § 347.58, subd. 1(a). When a breeder initially applies for a license, the board must determine, among other things, whether the applicant "has been convicted, other than a petty misdemeanor

conviction, of cruelty to animals under Minnesota law or a substantially similar animal cruelty law of another jurisdiction.” *Id.*, subd. 1(o)(4). If so, the board “must refuse to issue an initial license.” *Id.*, subd. 1(o). Once a breeder has received a license, he or she must renew it annually. *Id.*, subd. 1(i). “[I]f a commercial breeder has been convicted of cruelty to animals,” then “[t]he board must revoke [the breeder’s] license.” Minn. Stat. § 347.61, subd. 5(b).

AHS argues that Rowell’s 2013 conviction of violating Minn. Stat. § 346.39, subd. 4, was a conviction of cruelty to animals. AHS asks this court to reverse the board’s initial-licensure decision on the ground that Rowell should never have been granted a license pursuant to Minn. Stat. § 347.58, subd. 1(o), and to reverse Rowell’s license renewal and direct the board to revoke Rowell’s license pursuant to Minn. Stat. § 347.61, subd. 5(b), again on the basis of Rowell’s 2013 conviction. We address each issue in turn.

I. AHS’s objection to Rowell’s initial licensure is time-barred.

AHS first argues that this court should order the board to nullify Rowell’s license because it was erroneously granted in 2015. The board responds that this court is without subject-matter jurisdiction to review the 2015 initial-licensure decision because AHS failed to timely petition for certiorari review of that decision. We decide questions of subject-matter jurisdiction de novo. *See Zweber v. Credit River Twp.*, 882 N.W.2d 605, 608 (Minn. 2016).

“No writ of certiorari shall be issued, to correct any proceeding, unless such writ shall be issued within 60 days after the party applying for such writ shall have received due notice of the proceeding sought to be reviewed thereby.” Minn. Stat. § 606.01 (2016). Due

notice is satisfied by notice “reasonably calculated to reach” the affected party. See *Flaherty v. Indep. Sch. Dist. No. 2144*, 577 N.W.2d 229, 233 (Minn. App. 1998), review denied (Minn. June 17, 1998). “A party’s failure to meet the time requirements of Minn.Stat. § 606.01 is a jurisdictional defect.” *Christopher v. Windom Area Sch. Bd.*, 781 N.W.2d 904, 908 (Minn. App. 2010), review denied (Minn. June 29, 2010).

Minn. Stat. § 606.01 straightforwardly applies to this case. AHS sent a letter to the board on March 25, 2015, challenging Rowell’s licensure as prohibited by Minn. Stat. § 347.58, subd. 1(o), based on Rowell’s 2013 conviction. The board provided a written response to AHS on April 13, 2015, in support of its licensure decision. On April 21, 2015, AHS again wrote to the board, arguing that Minnesota statutes required denial of the license because of the conviction. This correspondence demonstrates knowledge of the licensure and the basis for objecting to it. And regardless of which of these dates is used to measure AHS’s 60-day deadline for challenging the initial-licensure decision, that deadline expired long before AHS petitioned for certiorari review.²

AHS contends that its challenge to the initial licensure is not time-barred because the 2017 renewal was based on the 2015 initial-licensure determination that Rowell had

² Despite being neither the licensor nor the licensee, AHS has standing to seek review of the board’s licensing decision under *In re Block*, 727 N.W.2d 166 (Minn. App. 2007). In that case, we held that the Minnesota Federated Humane Societies (MFHS), which was created by statute for the purpose of assisting “in the enforcement of the laws for the prevention of wrongs to animals,” had statutory standing to contest a conditional-use permit authorizing a breeder to keep 600 adult breeding dogs at his kennel. *Id.* at 174. In this case, this court’s special-term panel held that, because AHS is a member of MFHS and appoints agents for the purpose of assisting law-enforcement officials in the prosecution of people charged with cruelty to animals, and because an AHS senior investigator acts as the Minnesota State Humane Agent on behalf of MFHS, AHS likewise has standing.

not been convicted of animal cruelty and because “[i]t is in the interest of justice not to immunize the Board from its initial decision to grant Rowell a license, especially where the Breeder Licensing Law requires the Board to continuously ensure that commercial breeders in Minnesota have not been convicted of animal cruelty.” We are unpersuaded. Regarding AHS’s first argument, the fact that the board’s 2015 determination may have continuing relevance to a later license-renewal decision does not render inapplicable the statutory 60-day deadline for challenging the initial-licensure decision. Regarding AHS’s second argument, contrary to AHS’s position, the board is not immunized from review of its initial-licensure decisions. Rather, parties, assuming they have standing, may challenge those decisions in a timely manner. AHS’s decision not to do so here does not make the board immune to review of its initial licensure decisions.

II. AHS forfeited its argument that Rowell was convicted of animal cruelty because AHS failed to assert that argument in a timely certiorari challenge to Rowell’s initial licensure, despite having knowledge of the argument.

AHS next argues that the board erred in renewing Rowell’s license because she was convicted of animal cruelty in 2013.³ The board makes several replies, including that

³ In its petition for writ of certiorari and statement of the case, AHS identified the issue for review as the board’s July 1, 2017 decision to reissue Rowell’s license. That reissue decision is a quasi-judicial decision subject to certiorari review. In its brief, however, AHS characterizes as a quasi-judicial decision the board’s continuous failure to revoke Rowell’s license. “[Q]uasi-judicial decisions share three characteristics: (1) an investigation into a disputed claim and the weighing of evidentiary facts; (2) the application of those facts to a prescribed standard; and (3) a binding decision regarding a disputed claim.” *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 662 (Minn. 2015). The failure to meet any of the three characteristics is “fatal” to a claim that proceedings were quasi-judicial. *Minn. Ctr. for Envtl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 844 (Minn. 1999). Because there is not “a binding decision regarding a disputed claim” being made each moment the board fails to revoke Rowell’s license, the board’s nonrevocation is not

Rowell’s 2013 conviction was not a conviction of animal cruelty under Minnesota statutes. We need not resolve this question, however, because we conclude that AHS’s argument is barred on another ground: forfeiture.⁴

The Minnesota Supreme Court has sometimes used the word “waiver” when referring to a party’s failure to make a timely assertion of a right. *See State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015); *see also Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 631 n.3 (Minn. 2017) (applying *Beaulieu* in the context of civil litigation). However, in *Beaulieu*, the court explained that “forfeiture is the failure to make the timely assertion of a right,” whereas “waiver is the intentional relinquishment or abandonment of a known right.” 859 N.W.2d at 278 n.3 (quotation omitted). Thus, older cases nominally discussing waiver may nevertheless provide guidance on issues of forfeiture, provided that those cases concern “the failure to make the timely assertion of a known right” as opposed to “the intentional relinquishment” of such a right. *Id.*

A case with a strikingly similar timeline provides such guidance here. In *Evenrud v. Park & Recreation Bd. of Minneapolis*, city employees challenged their reclassification (resulting in a salary reduction) from “park patrolmen” to “park patrol agents.” 310 Minn. 234, 235-36, 245 N.W.2d 609, 610 (1976). The reclassification occurred in 1972, but,

a quasi-judicial decision. Our certiorari review is therefore limited to the quasi-judicial decision of the board’s 2017 license renewal.

⁴ Although neither party raises the issue of forfeiture, “we may properly decide a case based on arguments not raised by the parties when our reasoning is neither novel nor questionable.” *First Nat’l Bank of the N. v. Miller Schroeder Fin., Inc.*, 709 N.W.2d 295, 299 (Minn. App. 2006), *review denied* (Minn. Apr. 26, 2006).

rather than challenging the reclassification at that time, the park patrol agents,⁵ like AHS, waited two years before seeking formal review. *Id.* at 237-38, 245 N.W.2d at 611. In 1974, when the park patrol agents sought formal review, the Minneapolis Civil Service Commission retroactively reclassified them as “Patrolmen Parks, Permanent Seasonal, Uncertified Peace Officer[s]” and declared the classification effective as of 1972. *Id.* The commission set the salary for that position to be identical to the salary the park patrol agents had been receiving for the previous two years, and also made that salary decision retroactive to 1972. *Id.* at 238, 245 N.W.2d at 611.

The park patrol agents then sought certiorari review of the reclassification in district court. *Id.* After the district court affirmed the retroactive reclassification and retroactive salary reduction, the park patrol agents appealed to the supreme court. *See id.* The supreme court affirmed, holding that “the record indicates a waiver by appellants of their rights.”⁶ *Id.* at 239, 245 N.W.2d at 612. In so holding, the court noted that the park patrol agents were “sent a notice of the proposed reclassification” and “orally briefed on the implications thereof” in 1972. *Id.* Despite this knowledge, the park patrol agents “did not file a protest at the time that the changes were made effective in 1972. A formal objection was not filed

⁵ The employees were reclassified a second time (albeit with no reduction in salary) to “Patrolman Parks, Permanent Seasonal, Uncertified Peace Officer[s]” before seeking certiorari. *Id.* at 238, 245 N.W.2d at 611. For brevity “park patrol agents” is used throughout this opinion.

⁶ As noted above, older cases did not always distinguish between waiver and forfeiture. Because *Evenrud* contains no indication that the park patrol agents “intentionally” relinquished their rights, it is appropriate to rely on that case in the context of determining whether or not forfeiture applies. *See Beaulieu*, 859 N.W.2d at 278 n.3.

until January 1974.” *Id.* By taking the new, lower-paying positions without timely objection, the park patrol agents “waived whatever rights they had at the date of their reassignment.” *Id.* at 240; 245 N.W.2d at 612.

Evenrud supports finding a forfeiture by AHS in this case. Like the park patrol agents with their job reclassification, AHS was aware, two years prior to seeking review, of the board’s determination that Rowell’s 2013 conviction did not constitute animal cruelty. And, like the park patrol agents, rather than timely seeking review of that determination, AHS sat on its rights for two years. Now, as part of a timely challenge to the recent renewal decision, AHS seeks to litigate the determination made two years ago by the board. We believe this is analogous to the action brought by the park patrol agents in *Evenrud*; both the park patrol agents and AHS sought review of a recent decision (there the retroactive reclassification, here the 2017 renewal) as a means of attacking a past decision (there the 1972 salary reduction, here the 2015 determination that Rowell was not convicted of animal cruelty) that could have been challenged at the time the past decision was made. The same result should obtain in both cases: the park patrol agents forfeited their challenge to the 1972 salary reduction, and AHS has forfeited its challenge to the 2015 determination that Rowell was not convicted of animal cruelty.

We recognize that, unlike in *Evenrud*, the statutory scheme in this case provides for explicit renewal decisions each year by the board. Thus, unlike the case of the park patrol agents, the ultimate decision AHS challenges is not two years old. However, following the reasoning of *Evenrud*, we conclude that, when the argument against renewal is identical to

the argument against initial licensure, a party that failed to challenge the initial licensure cannot raise the same, two-year-old argument in a renewal challenge.

At oral argument, AHS argued it could raise this question now because, between 2015 and 2017, the board was “provided additional information after it granted the initial license.” AHS contends that, “if that additional information indicates that the conviction of Ms. Rowell did constitute cruelty, then the board should have considered that information and have made the decision to revoke or to not renew that license.” We disagree that such a conclusion is required in this case. Although we do not foreclose the possibility that, in some cases, additional facts could come to light that would compel the board to reevaluate whether an individual was convicted of animal cruelty and should not be granted a renewed license, that is not what occurred in this case. The “additional” facts to which AHS refers were all known or knowable by the board at the time it made its 2015 decision. More importantly, the additional facts were all known by AHS at that time. Assuming *arguendo* that the board, due to a lack of a thorough investigation, was unaware of the facts on which AHS now relies, AHS had the right to challenge the board’s decision as based on an inadequate investigation and therefore arbitrary and capricious in 2015. It did not do so, and it has forfeited its right to challenge the investigation and the board’s 2015 determination via a challenge to Rowell’s 2017 renewal.

Affirmed.