STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0936

Chad Nelson,
Respondent Below,

vs.

Troy Schlener,
Relator,

Carla Brown, et al.,
Respondents Below,

Minnesota Department of Human Services,
Respondent.

Filed February 10, 2014
Reversed and remanded
Johnson, Judge

Department of Human Services

Seth Leventhal, Leventhal pllc, Minneapolis, Minnesota (for relator)

Lori Swanson, Attorney General, Kristyn M. Anderson, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Department of Human Services)

Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Smith, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Troy Schlener is a defendant in a putative class action in which it is alleged that, while he was employed by the Department of Human Services (DHS), he accessed the driving records of approximately 1,100 individuals without authorization. Schlener requested that the department indemnify him for the costs of his defense and for any liability imposed on him in the class action. The department denied his request. In this appeal, Schlener seeks judicial review of the department's denial by way of a writ of certiorari. We conclude that the agency record does not contain substantial evidence to support the department's reasons for denying Schlener's request. Therefore, we reverse and remand with directions for DHS to grant his request.

FACTS

In July 2011, Sarina L. Turner, a DHS privacy officer, sent a letter to Chad Nelson, a Minnesota resident, to inform him that his driver's license record had been accessed without authorization by a person previously employed by DHS.

In February 2013, Nelson commenced an action in the United States District Court for the District of Minnesota concerning the unauthorized access of his driver's license record. In March 2013, Nelson served and filed an amended complaint in which he alleged claims against Schlener, DHS, the State of Minnesota, and four other individuals who are officers or employees of DHS. In his amended complaint, Nelson alleges that, "as a result of Defendant Schlener's conduct, Defendant DHS sent out approximately 1,100 data-breach letters informing the subjects of Defendant Schlener's queries that an

employee of DHS had engaged in 'unauthorized access of your private information.'" Nelson's complaint alleges four theories of relief in six counts, including claims under the federal Driver's Privacy Protection Act (DPPA), 18 U.S.C. § 2721 (2012), and the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. ch. 13 (2012). In his prayer for relief, Nelson seeks, among other things, damages of at least $2,750,000 under the DPPA, which provides for liquidated damages of $2,500 for each violation of the act. *See* 18 U.S.C. § 2724(b)(1). Nelson also seeks attorney fees under three fee-shifting statutes.[1]

On April 2, 2013, an attorney representing Schlener sent a letter to the attorney general to request that the state assume responsibility for Schlener's defense and indemnify him in connection with the putative class action pursuant to section 3.736, subdivision 9, of the Minnesota Statutes. On April 9, 2013, an employee of the office of the inspector general of DHS's licensing division sent a three-sentence e-mail message to six other employees of DHS stating that Schlener had searched the records of eight persons named Chad Nelson between March and May of 2011 and that the most recent background study on a person named Chad Nelson was completed in 2008. Based on those two facts, the author of the e-mail concluded that Schlener's "access to Chad

[1]In May 2013, after DHS denied Schlener's request, Nelson served and filed a second amended complaint. Shortly before oral argument in this appeal, the federal district court granted the defendants' motion to dismiss in part and dismissed all claims against all defendants except for two counts against Schlener. *Nelson v. Schlener*, No. 13-CV-340 (RHK-JJK), 2013 WL 5888235, at *8-9 (D. Minn. Nov. 1, 2013). Thus, Schlener is the only remaining defendant in the case.

Nelson's information was not within the scope of his employment as a background study research staff."

On April 23, 2013, DHS responded to Schlener's attorney in a letter from Charles Johnson, DHS's chief financial and operating officer. Johnson's letter stated that DHS was considering denying the request for defense and indemnification on the ground that Schlener engaged in conduct that was outside the scope of his employment. Johnson's letter stated that Schlener could submit a written response to the letter or could request a meeting within three days. On April 26, 2013, Schlener's attorney submitted a three-page letter that sought to justify Schlener's request for indemnification. That same day, the employee in the inspector general's office sent a slightly longer follow-up e-mail message in which she provided additional information about Schlener's searches of driving records for persons named Chad Nelson and two other persons with the last name Nelson.

On May 6, 2013, DHS's chief compliance officer, Gregory Gray, sent Schlener a one-page letter stating that DHS had concluded that Schlener's actions were outside the scope of his employment and, thus, that his request for defense and indemnification was denied. The letter explained that Schlener "acted based solely on personal motivation and not in furtherance of [his] duties as a Department employee."

Schlener appeals the denial of his request for defense and indemnification by way of a writ of certiorari.

D E C I S I O N

Schlener argues that DHS erred by denying his request for defense and indemnification with respect to the putative class action. DHS's denial of Schlener's request for defense and indemnification under section 3.736, subdivision 9, is a quasi-judicial decision. *See State v. Tokheim*, 611 N.W.2d 375, 378 (Minn. App. 2000). A quasi-judicial decision of a state administrative agency may be reviewed by this court by way of a writ of certiorari. *In re Haymes*, 444 N.W.2d 257, 259 (Minn. 1989); *Tokheim*, 611 N.W.2d at 378. We do not apply chapter 14 of the Minnesota Statutes because this is not an appeal from an administrative proceeding conducted pursuant to the Minnesota Administrative Procedures Act (MAPA).

A.

Before analyzing the merits of the parties' arguments, we must determine which documents are properly included in the agency record. In Schlener's reply brief, he argues that DHS has improperly placed documents before this court by two means. Schlener's argument is well founded in both respects.

First, Schlener contends that DHS added two documents to the agency record in an untimely manner such that they should not be considered by the court. On July 1, 2013, DHS served and filed an itemized statement of the agency record, which lists nine documents. On July 24, 2013, Schlener filed his appellate brief. On August 7, 2013, DHS served and filed an amended itemized statement of the agency record, which lists two additional documents: an undated one-page form requesting an internal auditor's

examination of Schlener's computer and e-mail account,[2] and a three-page memorandum from the internal auditor to the human resources department summarizing that examination, dated July 28, 2011.[3] DHS filed its responsive appellate brief shortly thereafter and referred to the two additional documents in the amended itemized statement of the agency record. As a result of DHS's amendment, the agency record changed between the filing of Schlener's initial brief and the filing of DHS's responsive brief.

An agency must file an itemized statement of the agency record within 30 days after the service of a petition for writ of certiorari "[u]nless the time is extended by order of the court on a showing of good cause." Minn. R. Civ. App. P. 115.04, subd. 3. One of the purposes of subdivision 3 is "to defer briefing until the contents of the record are known to the parties." Minn. R. Civ. App. P. 115.04, 2009 advisory committee cmt. In this case, DHS did not timely file an itemized statement of the agency record that

[2]The form states that the Driver and Vehicle Services division (DVS) of the Department of Public Safety had notified DHS that Schlener was "one of the major users of their DVS system."

[3]The internal auditor's memorandum states that Schlener was employed by DHS as a background-studies researcher and was responsible for performing background checks. The memorandum concludes that Schlener searched the DVS driver's license database for at least 1,964 driver's license numbers and 1,274 names during his one-year period of employment. The memorandum does not state that any of these searches were unauthorized. The memorandum also concludes that Schlener conducted searches of a MNCIS database that yielded only public data. The memorandum further concludes that Schlener conducted searches of an EDMS database and that all known searches were work-related. Lastly, the auditor's memorandum concludes that there is no indication that Schlener removed protected data from the workplace. By itself, the auditor's memorandum does not state that Schlener violated any law or any of his employer's rules or expectations. Thus, the memorandum would not support DHS's decision to deny Schlener's request even if it were part of the agency record.

included the tenth and eleventh documents. In addition, DHS did not attempt to show good cause and obtain a court order allowing an extension of the 30-day deadline. Thus, the tenth and eleventh documents are not properly part of the agency record and are stricken from respondent's amended itemized statement of the agency record.

Second, Schlener contends that DHS improperly appended a four-page document to its brief that is not part of the agency record. Indeed, the four-page document is not included in either DHS's original or amended itemized statement of the agency record. At oral argument, DHS's attorney conceded that the four-page document was not relied on by the department's decisionmaker. Thus, the four-page document is not properly before the court and is stricken from respondent's appendix.

B.

The statute under which Schlener seeks defense and indemnification provides as follows:

> The state shall defend, save harmless, and indemnify any employee of the state against expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any tort, civil, or equitable claim or demand, . . . arising out of an alleged act or omission occurring during the period of employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee was acting within the scope of employment. . . . This subdivision does not apply in case of malfeasance in office or willful or wanton actions or neglect of duty . . . .

Minn. Stat. § 3.736, subd. 9 (2012). For purposes of this opinion, we assume that the common law of agency provides guidance for the determination whether an employee was acting within the scope of his or her employment when the employee engaged in the

conduct for which the employee later was sued. Under the common law of agency, "A principal does not have a duty to indemnify an agent against losses caused by unauthorized action taken by the agent that did not benefit the principal or losses caused solely by wrongful acts committed by the agent." *Restatement (Third) of Agency* § 8.14 cmt. d. (2006)

C.

This court's certiorari review of a quasi-judicial decision is limited to whether the decision is "unconstitutional, outside the agency's jurisdiction, procedurally defective, based on erroneous legal theory, unsupported by substantial evidence, or arbitrary and capricious." *Carter v. Olmsted Cnty. Hous. & Redevelopment Auth.*, 574 N.W.2d 725, 729 (Minn. App. 1998). "We must uphold the agency's findings if they are supported by substantial evidence in view of the record as a whole." *REM-Canby, Inc. v. Minnesota Dep't of Human Servs.*, 494 N.W.2d 71, 74 (Minn. App. 1992), *review denied* (Minn. Feb. 25, 1993). "Substantial evidence consists of: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than 'some evidence'; (4) more than 'any evidence'; and (5) evidence considered in its entirety." *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (quotation omitted).

DHS's decision to deny Schlener's request for defense and indemnification is reflected in Gray's letter to Schlener, which states that DHS denied Schlener's request for defense and indemnification on the ground that his actions were outside the scope of his

employment. The agency record does not contain substantial evidence to support that decision. The agency record before the court actually is very slim, consisting of only a few documents, the contents of which are fully described in the text of this opinion. None of the documents in the agency record reveals Schlener's reasons for his searches or the reasons why his conduct was outside the scope of his employment. The agency record does not include any documents created in the summer of 2011, when Schlener's employment was terminated. The agency record also does not reveal any fact-gathering and factual development, as would be expected before a quasi-judicial decision. *See Minnesota Ctr. for Envtl. Advocacy v. Metropolitan Council*, 587 N.W.2d 838, 842 (Minn. 1999) (noting that "investigation into a disputed claim and weighing of evidentiary facts" is indicator of quasi-judicial decision). We can imagine that one or more persons within the department might have possessed additional documents that are consistent with Gray's decision. We would not expect a state administrative agency to send more than 1,000 inculpatory letters to Minnesota drivers without good reason. But the documents we merely suppose to exist are not in the agency record and, thus, are not before the court. *See* Minn. R. Civ. App. P. 110.01, 115.04.

The agency record is insufficient to support Gray's decision with respect to Nelson's individual claim against Schlener because the agency record does not contain, among other things, any documents describing Schlener's job duties, any documents defining the scope of his authorization to search DVS records, or any documents explaining the extent to which his conduct exceeded either the norm or the permissible limits. The agency record contains only two conclusory e-mail messages, which are

unaccompanied by any meaningful explanation or supporting documentation. The agency record in this case is similar to the agency record in *In re Appeal of Selection Process for Position of Electrician*, 674 N.W.2d 242 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004), in which we concluded that the "staff reports" on which an agency's decisionmaker relied were "entirely conclusory and insufficient to support the [agency's] decision." *Id.* at 250. We concluded that the record was insufficient because the staff reports made simple statements "without providing any basis for the conclusion" and left various issues "unclear." *Id.* The two e-mail messages in this case are similarly lacking in detail and explanation.

Furthermore, and more importantly, the agency record is insufficient to support Gray's decision with respect to the claims of all other class members against Schlener. At oral argument, Schlener's attorney confirmed that Schlener requested defense and indemnification against the claims of all class members, and DHS's attorney confirmed that Gray's denial of Schlener's request related to the entire putative class action. The extent of Schlener's potential liability in the action appears likely to be a function of the number of persons in the class, if a class is certified. *See* 18 U.S.C. § 2724(b)(1)-(2); *see also* Fed. R. Civ. P. 23. The putative class consists of approximately 1,100 persons, but the agency record is limited to information about Schlener's searches of the DVS records of no more than three members of the putative class (Chad Nelson and two other persons with the last name of Nelson). The agency record contains no information whatsoever about the other members of the relatively large putative class. DHS's decision to deny Schlener's request for defense and indemnification with respect to a putative class action

involving approximately 1,100 class members cannot be justified by information relating primarily to only one person and only tangentially to two other persons.

Considered as a whole, the agency record in this case is insufficient to support a finding that Schlener's actions were "unauthorized," that his actions "did not benefit" DHS, or that his potential liability to putative class members was "caused solely by wrongful acts committed by [him]." *See Restatement (Third) of Agency* § 8.14 cmt. d. Accordingly, the agency record does not support Gray's decision that Schlener's actions were outside the scope of his employment. *See* Minn. Stat. § 3.736, subd. 9. Thus, DHS erred by denying Schlener's request for defense and indemnification.

D.

In light of our conclusion that DHS erred, we must determine the remedy to which Schlener is entitled. In the conclusion of his initial brief, Schlener asks this court simply to reverse DHS's decision. We understand this request to be a request that we order DHS to reimburse him for the costs of his defense and for any liability imposed on him. In its responsive brief, DHS argues, in the alternative, that if this court were to conclude that its decision is not supported by the facts in the agency record, we should remand the matter back to DHS to allow it to develop the record further. In his reply brief, Schlener also argues, in the alternative, that if further development of the record is necessary, this court should transfer the case to the Ramsey County District Court for further proceedings pursuant to section 14.68 of the Minnesota Statutes.

The supreme court has stated generally that, in a certiorari appeal challenging a quasi-judicial decision, "If the findings are insufficient, the case can be either remanded

for additional findings or reversed for lacking substantial evidence supporting the decision." *Dokmo v. Independent Sch. Dist. No. 11*, 459 N.W.2d 671, 675 (Minn. 1990). As explained below, the supreme court has developed its caselaw concerning appellate remedies in certiorari appeals primarily in cases concerning land-use decisions of local governmental bodies, such as city councils and county boards. We are unable to find relevant caselaw in the context of certiorari appeals from quasi-judicial decisions of state administrative agencies. For purposes of this case, we assume that the caselaw found in the local-government, land-use context is equally applicable to a certiorari appeal from a state administrative agency.

As a general rule, in a certiorari appeal, if a governmental body's quasi-judicial decision is not supported by the record of proceedings before the governmental body, the appropriate form of relief is for an appellate court to reverse the decision and remand the matter to the governmental body with instructions to grant the relief sought. For example, in *In re Livingood*, 594 N.W.2d 889 (Minn. 1999), a landowner sought judicial review of a county's denial of his application for a conditional-use permit. *Id.* at 891-92. On appeal, this court concluded that the record of the county's consideration of the application was insufficient to support the county's decision. *Id.* at 892. Accordingly, we reversed the county's decision and remanded with directions to the county to issue the sought-after permit. *Id.* The supreme court reviewed the case at the county's request solely to determine the appropriate remedy, *i.e.*, whether "the case should be remanded with directions requiring the county to issue the permit, or with directions allowing the county to compile a record and provide an adequate basis for its denial." *Id.* at 893-94.

The supreme court concluded that the county was not permitted to conduct further proceedings:

> Governmental bodies must take seriously their responsibility to develop and preserve a record that allows for meaningful review by appellate courts. Instead, the county has misrepresented the reason for the lack of a transcript and has reversed its position on the adequacy of the record. To reward the county's actions and legal strategy with a remand allowing it to again deny Livingood's permit would only encourage similar behavior by other local governments. The county must be held to its representations to the court of appeals that the record was complete. There is no basis to grant a remand to allow the county another chance to build a record to support its denial of the permit. Instead, we affirm the decision of the court of appeals and remand the case to the county board with directions to issue the permit, subject to the imposition of reasonable conditions.

Id. at 895. Thus, the general rule in the present situation is that an appellate court should reverse and remand with instructions to grant the application, but should *not* allow additional proceedings by which the governmental body might justify its earlier decision. *See id.*

Notwithstanding the general rule, the supreme court has recognized two circumstances in which a broader remand may be appropriate such that an agency may conduct further proceedings. The first exception to the general rule is reflected in the supreme court's opinion in *White Bear Rod and Gun Club v. City of Hugo*, 388 N.W.2d 739 (Minn. 1986). In that case, the appellant sought an amendment to its special-use permit from a city council, which denied the application. *Id.* at 741. The supreme court concluded that the matter should be reversed and remanded to the city council because its decision "lack[ed] any findings of fact or other explanation of its decision adequate for

any judicial review." *Id.* at 742. The supreme court reasoned that the city council's decision was so devoid of detail that it "tell[s] a reviewing court nothing about how the council may have evaluated or used [the] information" that was presented to the council. *Id.* Accordingly, the supreme court remanded to the city council "to prepare appropriate findings for its decision." *Id.*

The second exception to the general rule is reflected in the supreme court's opinions in *Earthburners, Inc. v. County of Carlton*, 513 N.W.2d 460 (Minn. 1994), and *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566 (Minn. 2000). The *Earthburners* case was commenced in the district court and came to the appellate courts by a notice of appeal; the *Interstate Power* case came directly to the appellate courts on a petition for writ of certiorari, but the supreme court cited and followed its prior *Earthburners* opinion. *See Interstate Power*, 617 N.W.2d at 570; *Earthburners*, 513 N.W.2d at 462. In *Earthburners*, a company sought a conditional-use permit to engage in certain waste-disposal activities at a gravel pit, and a county board denied the application. 513 N.W.2d at 460-61. The supreme court concluded that the matter should be reversed and remanded to the county board for further development of a factual record because the county board's decision was premature. *Id.* at 463. The supreme court determined that the county board's decision was premature primarily because the board chair stated that the application was "'much more complex than we have the time to give for it'" and that the board should simply deny the application and allow the applicant to re-apply in the future. *Id.* at 461. In addition, the county board failed to apply the relevant provision of the zoning ordinance. *Id.* at 463. In *Interstate Power*, the supreme

court made clear that a so-called *Earthburners* remand is appropriate only "in the rare case when . . . the record of a zoning decision is so inadequate that judicial review is impossible." 617 N.W.2d at 577. The supreme court also stated, "We emphasize that *Earthburners* was not intended to provide local government units with a routinized opportunity for a second bite at the apple by neglecting to provide an adequate record for review." *Id.* at 577 n.6.

Neither of the two recognized exceptions to the general rule applies to this case. The first exception does not apply because this case is unlike *White Bear Rod and Gun Club*. We cannot say that DHS's findings and explanation of its decision makes it impossible for this court to engage in judicial review. *See White Bear Rod & Gun Club*, 388 N.W.2d at 742. We have a basic understanding of DHS's decision and its statement of reasons; we simply conclude that the decision is not supported by the agency record. Thus, the first exception to the general rule does not apply.

The second exception does not apply because this certiorari appeal is unlike *Earthburners* and *Interstate Power*. We cannot say that DHS made its decision to deny Schlener's request prematurely. In fact, DHS's primary argument on appeal is that the record contains substantial evidence to support its findings. The supreme court has reasoned that such an argument cuts against an agency's alternative argument that a broad remand for additional fact-gathering is appropriate. In *Livingood*, the supreme court noted that "the county first argued to the court of appeals that the record was adequate to support its decision, then claimed to this court that the record was inadequate" and then "request[ed] a remand to allow it to make a more adequate record

and articulate its findings and conclusions." 594 N.W.2d at 893. The supreme court noted that the county made "little attempt to argue to this court that its decision was premature, and never made such a representation to the court of appeals." *Id.* at 895. The same is true in this case; DHS has argued that the record is adequate and has not argued that its decision was premature. Thus, the second exception to the general rule does not apply.

As the supreme court stated in *Livingood*, "The remands ordered in *Earthburners* and *White Bear Rod and Gun Club* are merely exceptions to the general principle that when a governmental body denies a permit with such insufficient evidence that the decision is arbitrary and capricious, the court should order issuance of the permit." *Id.* Because neither of the two exceptions applies, we must apply the general rule.

We need not address Schlener's alternative argument concerning the appropriate remedy because we have concluded that he is entitled to defense and indemnification without any additional proceedings. Even if a broader remand were appropriate, we would not apply section 14.68 because, as stated above, this is not a matter to which MAPA applies. In addition, a transfer of Schlener's request to a district court would be inconsistent with our opinion in *Tokheim*, in which we held that a district court lacks subject-matter jurisdiction over a state administrative agency's quasi-judicial decision to deny an employee's request for defense and indemnification under section 3.736, subdivision 9, because such a decision is reviewable only in a certiorari appeal. 611 N.W.2d at 378.

In sum, we reverse DHS's denial of Schlener's request for defense and indemnification under section 3.736, subdivision 9, and remand the matter to DHS, which shall grant his request. *See Livingood*, 594 N.W.2d at 895 (remanding to county board "with directions to issue the permit").

Reversed and remanded.