DISTRICT COURT, CITY & COUNTY OF DENVER, STATE OF COLORADO Lindsey-Flanigan Courthouse 520 W Colfax Ave, Denver, CO	DATE FILED: June 7, 2022 4:30 PM CASE NUMBER: 2021CV31971
Plaintiff: PINKERTON CONSULTING & INVESTIGATIONS, INC., v. **Defendant:** DENVER DEPARTMENT OF EXCISE AND LICENSES; and ASHLEY KILROY, Executive Director of the Department of Excise and Licenses	▲ **COURT USE ONLY** ▲ Case Number: 21CV31971 Courtroom: 280

ORDER RE: COMPLAINT FOR JUDICIAL REVIEW PURSUANT TO C.R.C.P. 106(a)(4)

THIS MATTER is before the Court on Plaintiff, Pinkerton Consulting & Investigations, Inc.'s ("Pinkerton") Complaint seeking judicial review filed on June 22, 2021. Pinkerton filed an Opening Brief on August 24, 2021, the Denver Department of Excise and Licenses (the "Department") filed an Answer Brief on September 14, 2021, and Pinkerton filed its Reply Brief on September 28, 2021. The Court, having reviewed the Briefs, the case file, the record, and being otherwise fully advised, FINDS and ORDERS as follows:

I. BACKGROUND

The facts of this case are largely undisputed. Pinkerton is a private security company that operates around the world including in Denver, Colorado. Pinkerton regularly provides service through its own employees, but also subcontracts its services to local security companies. In

Denver, Pinkerton contracted with Isborn Security Services, LLC ("Isborn"), through a Master Vendor Services Agreement ("MVSA"), to provide services when needed.

On October 8, 2020, KUSA-TV Channel 9News Denver ("9News") requested security services from Pinkerton to accompany its news crews for a planned protest on October 10, 2020 at the State Capitol. Pinkerton subcontracted with Isborn to provide the security guards for 9News. Isborn agreed to provide services for 9News and subsequently hired an independent contractor, Matthew Dolloff, to perform the requested services. The MVSA between Pinkerton and Isborn required the parties to comply with applicable laws, including the requirement that all employees be licensed security guards. Unbeknownst to Pinkerton, Mr. Dolloff was not an employee of Isborn and was not licensed to provide security services. At the protests on October 10, 2020, Mr. Dolloff engaged in an altercation in which he fired his weapon and killed Lee Keltner.

Following the incident, on November 16, 2020, the Department issued a Show Cause Order for Pinkerton to show cause as to why their license should not be suspended or revoked pursuant to Denver Revised Municipal Code ("D.R.M.C." or "the Code") § 32-22(4) and (8) for violating D.R.M.C. § 42-132(b)(2), which prohibits a private security employer from permitting or directing unlicensed persons to perform security services.

On December 4, 2020, Pinkerton and the Denver City Attorney's executed a settlement agreement to resolve the Show Cause Order. However, Ashley Kilroy, Executive Director of the Department ("the Director") rejected the settlement agreement and ordered a hearing. The hearing was held on February 3, 2021. Two weeks later, on February 17, 2021, the hearing officer issued a decision recommending Pinkerton's license be suspended for failing to comply with local licensing laws. The hearing officer also found that Pinkerton was liable for the acts and omissions of Isborn. On June 7, 2021, the Director issued a final decision in which she adopted the hearing

officer's determination on liability, but rejected the six-month license suspension. Instead, the Director revoked Pinkerton's license indefinitely pursuant to D.R.M.C. § 32-22(4) hereinafter ("Final Decision").

II. STANDARD OF REVIEW

The standard for review in a Rule 106(a)(4) proceeding is "limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer." C.R.C.P. 106(a)(4)(I). An abuse of discretion occurs when an agency applies an erroneous legal standard, *Langer v. Bd. of Commissioners of Larimer Cnty*, 462 P.3d 59, 62 (Colo. 2020), or when an agency's decision is not supported by any competent evidence in the record. *Yakutat Land Corp. v. Langer*, 462 P.3d 65, 70 (Colo. 2020). "No competent evidence" exists when "the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. *Id*; *Widder v. Durango School Dist. No. 9-R*, 85 P. 3d 518 (Colo. 2004); *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308–09 (Colo. 1986). In ascertaining whether an abuse of discretion has occurred, a reviewing court looks to see if the agency has misconstrued or misapplied applicable law. *DeLong v. Trujillo*, 25 P.3d 1194, 1197 (Colo. 2001).

The Court reviews a municipal ordinance or code using the same rules as interpreting statutes. *Treece, Alfrey, Musat & Bosworth, PC v. Dep't of Fin.*, 298 P.3d 993, 996 (Colo. App. 2011). When interpreting an ordinance, a reviewing court looks to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and applies words and phrases in accordance with their plain and ordinary meanings. *Nieto v. Clark's Mkt., Inc.*, 488 P.3d

1140, 1143 (Colo. 2021). "Interpretations that will render words or phrases superfluous should be rejected." *Id*. "Likewise, [the reviewing court] must avoid interpretations that produce illogical or absurd results." *Waste Mgmt. of Colorado, Inc. v. City of Com. City*, 250 P.3d 722, 725 (Colo. App. 2010). When the plain language of an ordinance is "clear and unambiguous," it must be interpreted solely based upon its "plain and ordinary meaning." *Fleury v. IntraWest Winter Park Ops. Corp*., 411 P.3d 81, 83 (Colo. App. 2014). Only when an ordinance is ambiguous may extrinsic evidence be considered to aid in its interpretation. *Id*.

In general, a reviewing court should defer to the statutory construction of the agency official in charge of its enforcement. *City & Cnty. of Denver v. Bd. of Adjustment for City & Cnty. of Denver*, 55 P.3d 252, 254 (Colo. App. 2002). If there is a reasonable basis for an administrative board's interpretation of the law, the reviewing court should accept the final agency decision. *See Wilkinson v. Board of County Commissioners*, 872 P.2d 1269 (Colo.App.1993). The reviewing court gives "deference to the interpretation provided by the officer or agency charged with the administration of the statute or code unless that interpretation is inconsistent with the legislative intent manifested in the text of the statute or code." *Treece*, 298 P.3d at 996 (Colo. App. 2011).

III. ANALYSIS

Pinkerton challenges the Director's Final Decision on five different grounds. Pinkerton argues that: 1) the Department abused its discretion by holding Pinkerton vicariously liable for Isborn's alleged violation of D.R.M.C. § 32-30(b); 2) the Department abused its discretion by misinterpreting and misapplying D.R.M.C. § 32-22(4) and 32-30(b) as a strict liability standard; 3) the Department abused their discretion by revoking Pinkerton's license in reliance on substantive, material evidence outside of the record; 4) the Department violated Pinkerton's

procedural due process rights by failing to provide fair notice of the Department's vicarious theory of liability; and 5) D.R.M.C. § 33-22 is unconstitutional and violates due process because the ordinance gives the Department discretion "to choose a penalty indiscriminately and without consideration of the seriousness of the purported violation." Op. Brief p. 5-6.

a. D.M.R.C. § 32-30(b)

Pinkerton challenges the Department's Final Decision by arguing that the Department misinterpreted and misapplied the Code relative to the Director's liability findings. Pinkerton contends that the license revocation premised upon D.R.M.C. § 32-22(4) is an abuse of discretion.

D.R.M.C. § 32-22(4) provides:

> (4) "that the Director may. . .suspend or revoke any license previously issued by him for any violation of any of the following provisions, requirements, or conditions: (4) The licensee, ***either knowingly or without the exercise of due care*** to prevent the same, has violated any terms of the provisions pertaining to the license or any regulation or order lawfully made under and within the authority of the terms of the provisions relating to the license;" (emphasis added)

The Department charged Pinkerton with violating D.R.M.C. § 42-132(b)(2). This provision provides that it is unlawful for a private security employer to permit or direct any person to perform security services without a license. D.R.M.C. § 42-132(b)(2)(2019). The Final Decision affirmed the hearing officer's conclusion that Pinkerton stood in the same position as Isborn when the company hired an unlicensed guard to perform security services under D.R.M.C. § 32-30(b). Exh. H. p. 3.

D.R.M.C. § 32-30(b)(2019) ("Suspension, revocation and other sanctions") provides as follows:

> "Any act or omission committed by any employee, agent, or independent contractor that occurs in the course of ***his or her*** employment, agency, or contract with the licensee shall be imputed to the licensee or permittee for purposes of imposing any suspension, revocation or other sanction on the licensee or permittee." (emphasis added).

Pinkerton argues that D.R.M.C. § 32-30(b) cannot impute liability to Pinkerton because the Code section only imputes liability for the acts or omissions of natural persons. The Code defines "Gender" as:

> "[w]hen any subject matter, party, or person is described or referred to by words importing the ***masculine,*** females as well as males, firms, associations, and corporate organizations as well as individuals, shall be deemed to be included." *Id.* (emphasis added).

Because D.R.M.C. § 32-30(b) uses masculine and feminine pronouns—"his or her"—instead of only "his," Pinkerton argues that D.R.M.C. § 1-2(8) is not applicable to Pinkerton. Pinkerton avers that D.R.M.C. § 32-30(b) only applies to natural persons. Op. Brief. p. 10.

The Court agrees with Pinkerton. The definition of "Gender" provides that "words importing the masculine" includes "females, as well as males…and corporate organizations as well as individuals…" D.R.M.C. § 1-2(8)(2019). Here, D.R.M.C. § 32-30(b) uses "his or her." The word "his" as defined in the "Gender" definition also includes females as well as corporate entities and renders the use of "or her" as superfluous because the use of "his" already incorporates females. As noted, "[i]nterpretations that will render words or phrases superfluous should be rejected." *Treece*, 298 P.3d at 996. Additionally, the reviewing court gives "effect to every word and render none superfluous…" *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571. The Court finds that D.R.M.C. § 1-2(8) does not apply to D.R.M.C. § 32-30(b)'s use of "his or her" because the Court must give meaning to every word. If the Court were to accept the Director's interpretation, the Court would ignore the words "or her" or conversely would adopt a redundant or flawed legal interpretation.

Additionally, the Director's Final Decision relied on the definition of "Person" to impute liability to Pinkerton through D.R.M.C. § 32-30(b). The word "Person" is defined as including "a firm, corporation, association, or other organization acting as a group or unit as well as an

individual." D.R.M.C. § 1-2(12). The Court agrees that the word "Person" includes business entities. However, the word "Person" does not appear in D.R.M.C. 32-30(b):

> "Any act or omission committed by any employee, agent, or independent contractor that occurs in the course of his or her employment, agency, or contract with the licensee shall be imputed to the licensee or permittee for purposes of imposing any suspension, revocation or other sanction on the licensee or permittee."

As a result of the foregoing, the Final Decision adds the definition of "Person" into the ordinance's use of "his or her" when the word "his" is separately defined under "Gender" in D.R.M.C. § 1-2(8). The Department fails to reconcile this fact. For purposes of interpreting a statute or an ordinance, the Court does not "add words to or subtract words from a statute." *Nieto v. Clark's Mkt., Inc*., 488 P.3d 1140, 1143 (Colo. 2021). If the City Council intended to include corporate entities within the scope of D.R.M.C. § 32-30(b), it could have simply used "his" instead of "his or her" or substituted "Person" in place of a gendered term.[1]

The Department's asks the Court to give deference to the agency's interpretation of the ordinance. *Id*. at 8. The plain language of the ordinance is unambiguous. The Court does not defer to agency interpretation when an ordinance is unambiguous. *Nieto*, 488 P.3d at 1143. Instead, the Court finds that the plain language of D.M.R.C. § 32-30(b) and its use of "his or her" is unambiguous and declines to defer to the Director's interpretation of the ordinance.

Finally, the Department argues that an interpretation that excludes business entities leads to an absurd result because it would allow businesses to subcontract away liability. Resp. p. 7. However, this public policy argument does not persuade the Court's plain language interpretation because the Court finds the ordinance unambiguous. *Samuel J. Stoorman & Assocs., P.C. v. Dixon*, 394 P.3d 691, 695 (Colo. 2017) ("When a statute is unambiguous, public policy considerations

[1] For example, the ordinance could read "Any act or omission committed by any employee, agent, or independent contractor that occurs in the course of ***the Person's*** employment…"

beyond the statute's plain language have no place in its interpretation."). Here, the phrase "his or her" on its face does not include business entities. The policy issue and resulting impact on the community must be addressed by the City Council, not the courts.

The Court finds and concludes that the Director's interpretation of § 32-30(b) in the Final Decision was an abuse of discretion and sets aside the license revocation.

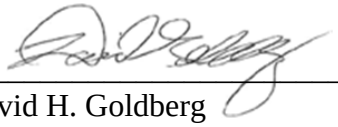
The Court declines to address Pinkerton's remaining arguments.

IV. CONCLUSION

The Court finds and concludes that the Director abused her discretion and Pinkerton's revocation is set aside and reversed.

So, ORDERED: June 7, 2022.

BY THE COURT:



David H. Goldberg
Denver District Court Judge