

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

FILED

MAY 11 2012

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

STEVEN A. GOLDMAN,)
)
 Petitioner,)
)
 vs.)
)
 MISSOURI REAL ESTATE)
 APPRAISERS COMMISSION,)
)
 Respondent.)

Cause No.:09SL-CC05169

Division No.: 10

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

This is an appeal of the Findings of Fact, Conclusions of Law and Disciplinary Order of the Missouri Real Estate Appraisers Commission ("MREAC") entered on June 24, 2011. Petitioner Goldman alleges that in revoking his state residential real estate certification the MREAC acted unlawfully, unjustly, unreasonably, and in excess of its powers and jurisdiction, in violation of the provisions of the Constitution of the United States and of the Constitution and laws of the State of Missouri, and in excess of the authority vested in it by Chapter 339.500 to 339.549, R.S.Mo. in that Petitioner Goldman's equal protection rights were violated because the sanction imposed was unreasonably excessive and more severe than punishments received by others similarly situated.

Both parties have fully briefed this matter and presented oral arguments on behalf of their respective clients and this matter is submitted for final disposition by the Court on April 20, 2012.

FINDINGS OF FACT

Petitioner Goldman is a resident of St. Louis County, State of Missouri. He has been certified by the Missouri Real Estate Appraisers Commission as a state-certified residential real estate appraiser, No. RA001763 since 1991, which was the inception of the State law licensing appraisers as a separate discipline. MREAC is a governmental agency established pursuant to Section 339.507 for the purpose of executing and enforcing the provisions of Sections 339.500 through 339.549, R.S.Mo., known as the Missouri Certified and Licensed Real Estate Appraisers Act.

On April 7, 2006, the MREAC and Petitioner entered into a Settlement Agreement which placed Petitioner's state residential real estate certification on probation for five (5) years following a three (3) month suspension. During the probationary period, Petitioner was required to submit written reports to the MREAC indicating whether he had complied with all terms and conditions of the Settlement Agreement, to maintain a log of all appraisal assignments completed and submit copies of his work product as requested by MREAC for review and otherwise comply with all provisions of Sections 339.500 through 339.549, R.S.Mo., and all federal and state laws.

On June 4, 2009, the MREAC filed a probation violation complaint against Petitioner alleging that he failed to comply with USPAP in completing two appraisals. Specifically, the MREAC claimed that Petitioner failed to comply with the USPAP, Sections 339.532 and 339.535, R.S.Mo. and the terms of the Settlement Agreement in preparing two property appraisal reports.

On November 3, 2009, the MREAC conducted a hearing for the purpose of determining whether Petitioner Goldman violated the Settlement Agreement and, if so, what disciplinary action against Petitioner Goldman's state residential real estate certification was appropriate.

Following the hearing, on November 13, 2009, the MREAC entered its Findings of Fact, Conclusions of Law and Disciplinary Order concluding that Petitioner's appraisals not only violated USPAP but were also intentionally misleading or fraudulent. Based upon these Findings of Facts, the MREAC revoked Petitioner's state residential real estate certification effective November 13, 2009 and ordered Petitioner to immediately return all evidence of licensure to the MREAC.

On December 2, 2009, Petitioner filed his Petition for Judicial Review seeking review of the MREAC's decision to revoke his certification and a Motion for Stay of Revocation. On December 15, 2009, this Court granted Petitioner's Motion for Stay of Revocation pending further order of the Court.

Following arguments on Petitioner's Petition, on July 30, 2010, this Court entered its Amended Judgment finding that the MREAC failed to prove the appraisals Petitioner prepared for Castlegate and Summerfield Manor were intentionally misleading or fraudulent. The case was remanded to the MREAC to issue findings not inconsistent with the Court's Judgment. At that time, this Court did not reach the ultimate issue presented in Petitioner Goldman's Petition for Judicial Review.

On June 24, 2011, the MREAC entered its Order revoking Petitioner's state residential real estate certification and ordered that Petitioner immediately return all evidence of licensure to the Commission.

On July 20, 2011, Petitioner Goldman timely filed his Petition for Review of the MREAC's Findings of Fact, Conclusions of Law and Disciplinary Order. On September 23, 2011, Petitioner Goldman filed his Second Amended Petition for Review. Petitioner Goldman alleges that the MREAC, in making its Findings of Fact, Conclusions of Law and Disciplinary Order, has acted unlawfully, unjustly, unreasonably, and in excess of its powers and jurisdiction, in violation of the provisions of the Constitution of the United States and of the Constitution and the laws of the State of Missouri, by intentionally treating Petitioner differently from others similarly situated and without a rational basis for the difference in treatment.

This Court allowed Petitioner to conduct limited discovery regarding the disciplinary orders or actions taken against similarly situated licensees who had previously been placed on probation but whose state residential license was not revoked as a result of an alleged probation violation. Respondent thereafter produced records pertaining to disciplinary actions taken against licensed appraisers from the year 2000 to the present that were previously placed on probation and had subsequently violated the terms of their probation.

Petitioner Goldman has advised the Court that if he were allowed to retain his appraiser's license he would limit his appraisals to agencies, departments and court proceedings of the City of St. Louis.

CONCLUSIONS OF LAW

Article V, section 18 of the Missouri Constitution articulates the standard of judicial review of administrative actions. The Court is to examine the decision to determine if, upon due consideration to the whole record, there is sufficient competent and substantial evidence to support the award. Missouri Real Estate Appraisers Commission v. Funk, 306 S.W.3d 101 (Mo. App. W.D. 2010); referencing Albanna v. State Bd. Of Registration for Healing Arts, 293 S.W.3d 423, 428 (Mo. banc 2009). The Court does not view the evidence in the light most favorable to the award. Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. banc 2003). However, the agency “is the sole judge of the credibility of witnesses and the weight and value to give to the evidence.” Funk, 306 S.W.3d at 105. When the agency’s decision involves a question of law, the court reviews the question de novo. State Bd. Of Healing Arts v. McDonagh, 123 S.W.3d 146, 152 (Mo. banc 2003).

In cases in which an equal protection claim based upon disparate punishment is raised the Circuit Court is the finder of fact. State Bd. of Registration for Healing Arts v. Brown, 121 S.W.3d 234, 237 (Mo. banc 2003). “For this reason, equal protection claims of this kind must be heard and decided in the first instance by the circuit court rather than the board, and it is the circuit court, rather than the board, that is the fact finder.” Brown, 121 S.W.3d 237.

The right to engage in a chosen profession is a valuable property right which cannot be deprived unless one is provided with the safeguards of due process. Callier v. Director of Revenue, 780 S.W.2d 639, 647 (Mo. banc 1989) citing Schware v. The Bd. of

Bar Examiners of the State of New Mexico, 353 U.S. 232, 238 (1957). A state may not exclude a person from his occupation in a manner or for reasons that contravene the due process or equal protection clause of the 14th Amendment. *Schwartz*, 353 U.S. 232, 239 (1957).

In this case, the MREAC's original punishment was based upon findings of facts that were not offered or proven at the hearing and, therefore, in addition to the 14th Amendment also violated Article I. §§ 2 and 10 of the Missouri Constitution. On remand, the MREAC simply removed the language that this Court determined was not supported by competent evidence and imposed the same exact severe punishment. The excessive punishment imposed by MREAC was not based upon competent evidence presented at the hearing. While the MREAC has removed the improper and unsupported language regarding fraud from its November 13, 2009 Findings of Fact, Conclusions of Law and Disciplinary Order, the MREAC imposed the exact same punishment which, is not warranted in this matter.

The MREAC's action following this Court's Order remanding the case for findings consistent with the actual evidence adduced at the hearing demonstrates the MREAC's disparate treatment of Petitioner Goldman. This becomes apparent when comparing the punishments imposed in five other cases produced by the MREAC.

In *Patty Jackson*, Case No. 2007-0000-005PV1, she was on a one year probation. The violation of her probation resulted from USPAP violations resulting in numerous errors and/or omissions she made on two subsequent appraisals. Nevertheless she was continued on probation for three additional years.

In 2006 Dana Scott, Case No.2006-004357 PV1, she was on probation for two years for numerous USPAP violations on two appraisals. In 2008 she was again charged with numerous USPAP violations relating to two appraisals performed in 2007. After a hearing her license was suspended for sixty days followed by two years of probation.

In 2007 Stuart Phelps, Case No.2007-000356 PV1 was placed on probation for two years as a result of numerous USPAP violations relating to two appraisals. In 2009 he was placed on an additional one year probation for failing to prepare an appraisal in compliance with USPAP for Bank 10. Then in 2009 he prepared two additional appraisals that contained errors and/or omissions in violation of numerous USPAP provisions. A hearing was held in May 2010 and the MREAC determined to revoke Phelps' certification as a state-certified general real estate appraiser. Phelps filed a Petition for Judicial Review in the Circuit Court of Cole County and obtained a stay order. The MREAC and Phelps then reached a settlement whereby Phelps admitted to the numerous USPAP violations in the two appraisals and he was once again placed on probation for a third time - this time for two years.

The Hand case, No. 2005-005448 PVI, is a clear demonstration of the MREAC's disparate treatment of Petitioner Goldman. In Hand, there were specific findings that Hand communicated results in a misleading and/or fraudulent manner and engaged in conduct that demonstrated incompetency, misconduct, gross negligence, dishonesty, fraud and/or misrepresentation in the performance of the functions and duties of a real estate appraiser. Based upon these findings, the MREAC placed Hand on probation for an additional period of one year. Alternatively, in the present case, there were no

findings that Petitioner Goldman intentionally mislead or engaged in fraudulent conduct, yet his real estate appraiser's certification was revoked.

The most recent decision of the MREAC that demonstrates the disparate treatment Petitioner Goldman received is the Newsome case, No. 2001-001551 PVI, issued less than one year ago on June 22, 2011. On February 23, 2005, the MREAC issued its Findings of Fact, Conclusions of Law and Disciplinary Order placing Newsome's real estate appraiser's certificate on probation for a period of five (5) years. While on probation, Newsome completed and signed two Summary Appraisal Reports for residential real estate on Brooklyn Avenue and Tudor Avenue. In reference to the Brooklyn Avenue property, the MREAC alleged that Newsome had: (1) failed to properly analyze the applicable market of the subject property, resulting in inflated values; (2) failed to properly analyze the conditions of the subject property and comparable properties; (3) in the Sales Comparison Approach, used renovated comparable properties for a subject property in average condition; (4) used superior comparable properties, which inflated the value of the subject property; (5) failed to analyze the market place for the subject property; and failed to adequately explain the condition of the subject property.

In reference to the Tudor Avenue property, the MREAC alleged that Newsome had: (1) failed to properly analyze the applicable market for the subject property, resulting in inflated values; (2) failed to properly analyze comparable properties; (3) failed to analyze sales concessions of comparable properties and identified a new property as three years old; (4) in the Sales Comparison Approach, used the three

highest-priced comparison properties, which differed in many features, when more appropriate comparable properties were available; (5) in developing a market value, failed to analyze all sales of the subject property that occurred within the three years prior to the effective date of the appraisal by performing no analysis of the subject property previously listing for \$169,300 and selling for approximately \$173,890; (6) used superior comparable properties, which inflated the value of the subject property; (7) failed to analyze the market place for the subject property; and (8) failed to analyze the fact that comparable sale #3 listed at \$186,900 and sold for approximately \$209,000.

Comparing the factual allegations in this matter and Newsome, the alleged misconduct in Newsome is nearly identical to the allegations against Petitioner Goldman in the present case. Moreover, the findings of the MREAC in Newsome are almost verbatim the findings in the present case. In Newsome the MREAC found that Newsome: (1) failed to correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal in violation of USPAP Standard 1 and SR 1-1(a); (2) committed substantial errors of omission and commission that significantly affected the appraisal in violation of USPAP Standard 1 and SR 1-1(b); (3) committed substantial errors of omission and commission that significantly affected the appraisal in violation of USPAP Standard 1 and SR 1-1(c); committed substantial errors of omission and commission that significantly affected the appraisal in violation of USPAP Standard 1 and SR 1-4(a); (5) committed substantial errors of omission and commission that significantly affected the appraisal in violation of USPAP Standard 1 and SR 1-5(b); (6) failed to clearly and accurately set forth the appraisal in a manner that would not be

misleading in violation of USPAP Standard 2 and SR 2-1(a); (7) failed to prepare a report that contained sufficient information to enable the intended users to the appraisal to understand the report in violation of USPAP Standard 2 and SR 2-1(b); and (8) failed to provide adequate support for the reasoning and conclusions in the Sales Comparison Approach thereby failing to summarize the information analyzed, the appraisal procedures followed and the reasoning that supports the analysis, opinions and conclusions, in violation of the USPAP SR2-2(b)(iii).

While the factual allegations lodged against Newsome and the Commissions' findings were nearly identical to the allegations the MREAC raised against Petitioner Goldman in the instant case, the sanctions imposed were very different then the sanction imposed on Petitioner Goldman. In *Newsome*, the MREAC determined that the appropriate sanction for his violations of the terms of his probation and the violations of the USPAP was a six month suspension of his real estate certification.

In contrast, Petitioner Goldman received the harshest of sanctions, revocation of his state residential real estate certification and a prohibition from pursuing his chosen profession. To suggest that Petitioner Goldman has not been treated in a disparate manner is not supported by the clear and convincing evidence when compared to the sanctions imposed by the MREAC in *Hand* and *Newsome*.

The MREAC has attempted to take Petitioner Goldman's livelihood and went well beyond the discipline needed to effectively punish Petitioner Goldman or to protect the general public. From the record it appears that Petitioner Goldman has had a lengthy and successful career, and it is inconceivable how a revocation of his state residential real

estate certification can be justified when there is no evidence of fraud or an intent to mislead and no one has suffered any damages. The only evidence presented and set forth in the MREAC's June 24, 2011 Findings of Fact, Conclusions of Law and Disciplinary Order relate to negligence in two appraisals.

As such, the severity of the punishment, in light of the MREAC's original punishment, demonstrates that Petitioner Goldman has been singled out for a more severe punishment in a manner which violates his constitutional rights. The Missouri Supreme Court has allowed an equal protection claim in an agency action based upon an allegation that a party has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment. *Brown*, 121 S.W.3d 234, 236-237 (Mo. banc 2003).

In the instant case, the MERAC brought the charges, hired the expert witness to testify against Petitioner and then found him guilty of not only the alleged charges but also of fraud which was not supported by the record. Petitioner Goldman received the harshest of sanctions, revocation of his state residential real estate certification and a prohibition from making a living in his chosen profession. The only evidence before the MREAC, and the only finding made by the MREAC in its June 24, 2011 Findings of Fact, Conclusions of Law and Disciplinary Order, was that Petitioner was negligent in preparing the appraisal reports for two properties. In fact, the only evidence before the MREAC was that Petitioner Goldman did not intend to mislead anyone. Moreover, no one suffered any damage as a result of Petitioner Goldman's alleged negligence. Under these circumstances, the MREAC's order revoking Petitioner Goldman's residential real

estate certification is arbitrary, capricious, unreasonable and a violation of Petitioner Goldman's equal protection rights.

JUDGMENT

Based upon the foregoing, in particular the severity of the MREAC's punishment when compared with the punishment of similar situated appraisers, this Court reverses the Findings of Fact, Conclusions of Law and Disciplinary Order of the MREAC and hereby reinstates Petitioner Goldman's state residential real estate certification because the imposed sanction was an excessive punishment which violated Petitioner Goldman's equal protection rights, was without the support of competent substantial evidence, was arbitrary and capricious, and an abuse of discretion. However, MREAC's Findings of Fact, Conclusions of Law and Disciplinary Order finding that Petitioner Goldman violated his probation is accurate and supported by the record, therefore, Petitioner Goldman is subject to further disciplinary action. The Court Orders that Petitioner Goldman's state certification for residential real estate appraiser, No. RA001762, be and is hereby placed on PROBATION for an additional period of two (2) years from the effective date of this Order, subject to the terms and conditions set forth herein:

1. During the probationary period, Goldman shall only perform appraisals in reference to agencies, departments and court proceedings of the City of St. Louis.
2. During the probationary period, Goldman shall successfully complete an approved 15-hour continuing education course regarding the USPAP. The

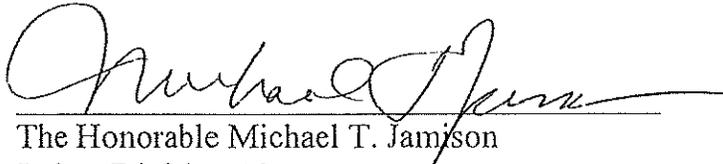
course shall be in addition to regular continuing education requirements for the renewal period;

3. During the probationary period, Goldman shall maintain a log of all appraisal assignments completed, including appraisal values. Goldman shall submit a true and accurate copy of his log to the MREAC every (3) three months after the effective date of this Order. The log shall comply with rule 20 CSR 2245-2.050;
4. During the probationary period, Goldman shall keep the Commission informed of his current work and home telephone numbers. Goldman shall notify the Commission in writing within ten (10) days of any change in this information;
5. During the probationary period, Goldman shall timely renew his certification granted hereby and shall timely pay all fees required for certification and comply with all other Commission requirements necessary to maintain said license in a current and active state;
6. During the probationary period, Goldman shall accept and comply with unannounced visits from the Commission's representatives to monitor compliance with the terms and conditions of this Order;
7. During the disciplinary period, Goldman shall comply with all provisions of §§ 339.500 to 339.549, R.S.Mo.; all federal and state drug laws, rules, and regulations; and all federal and state criminal laws. Goldman shall immediately report any violation of this provision to the Commission in writing within ten (10) days of said violation;

8. Any failure by Goldman to comply with any condition of discipline set forth herein constitutes a violation of this Order.

The MREAC shall maintain these Findings of Fact, Conclusions of Law and Order and Judgment as an open and public record of the MREAC as provided in Chapters 339, 610 and 324, R.S.Mo.

SO ORDERED this 11th day of May, 2012.


The Honorable Michael T. Jamison
Judge, Division 10