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**IN THE COURT OF COMMON PLEAS FRANKLIN COUNTY, OHIO**

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| **3-D PROPERTY SOLUTIONS, INC.,** | : | |
| | : | **Case No. 09 CVF-08-13127** |
| **Appellant,** | : | |
| | : | |
| **v.** | : | **JUDGE TIMOTHY S. HORTON** |
| | : | |
| **OHIO REAL ESTATE COMMISSION,** | : | |
| | : | |
| **Appellee.** | : | |

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| **DARREN E. DICKE,** | : | |
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| **Appellant,** | : | **Case No. 09 CVF-08-13129** |
| | : | |
| **v.** | : | |
| | : | **JUDGE TIMOTHY S. HORTON** |
| **OHIO REAL ESTATE COMMISSION,** | : | |
| | : | |
| **Appellee.** | : | |

**DECISION AND ENTRY**

**AFFIRMING THE AUGUST 14, 2009 ADJUDICATION ORDERS OF THE OHIO DEPARTMENT OF COMMERCE, DIVISION OF REAL ESTATE & PROFESSIONAL LICENSING**

This Court has for determination the consolidated appeal of 3-D Property Solutions, LLC and Darren E. Dicke (hereinafter collectively referred to as the "Appellants"). Appellants appeal the Ohio Real Estate Commission's (hereinafter referred to as "Appellee") Adjudication Orders of August 14, 2009. For the reasoning that follows, this Court **AFFIRMS** the August 14, 2009 Adjudication Orders.

## I. FACTUAL AND PROCEDURAL HISTORY

Appellants were engaged in the business of real estate sales. Appellants assert that they were in the 'wholesale' business. It is undisputed that Appellants did not hold a real estate license.

After an investigation, Appellee determined that Appellants' conduct violated R.C. 4735.02 and issued a letter to Appellants. Appellants agreed to conduct a consolidated administrative hearing.

On August 4, 2009, the administrative hearing was held. Appellants were present and represented by counsel. The hearing was conducted using stipulated exhibits.

Mr. Dicke testified and explained the business of the Appellants as follows:

> Q. And what you do with 3-D Property Solutions, LLC is find buyers and sellers and put them together to buy a property; is that correct?
> A. What I do and what 3-D Property Solutions does with the wholesale side of the operation is they put up property under contract and then take that contract and sell it to an individual landlord who's going to purchase and close directly with them, with the owner.

(Hearing Tr. at 26). In regards to Appellants' knowledge of the requirement of having a legal interest in a property, Mr. Dicke testified as follows:

> THE WITNESS: I don't know -- I don't know where the term "legal interest" came from, but in all the reading that I've done and all the learning that I've done, real estate is, you know, with like this. This purchase contract. So say the legal interest, so for me to get a call from this person and say, hey, I want to sell for 15,000 and for me to turn around without actually a legal interest in the property, via purchase or an option contract, it would not -- I mean, that's -- I can't do that. That's against the law. But for me to actually be able to talk to somebody else about the property, I have to have a legal interest, which is why I use the option to purchase and purchase and sale agreement.

(Hearing Tr. at 33). He clarified that, after speaking with realtors and attorneys, he came to the conclusion that a legal interest in the property was sufficient to enable him to speak with

potential buyers. (See Hearing Tr. at 42:3-7). Mr. Dicke also admitted during the hearing that he never held a deed to the properties in question and did "not actually take title to the property." (Hearing Tr. at 74). He also explained how the business earned money. Mr. Dicke testified that if he did not find an "end-buyer," he would not make money:

MR. FROELICH: So you're entitled then to 50 percent and your understanding it's based upon if you find an end-buyer; is that correct?
THE WITNESS: Correct.

(Hearing Tr. at 61). He went on to clarify that he was not entitled to a 50 percent fee until the buyer entered a deal with the seller.

MR. FROELICH: In paragraph 6 it says you're entitled to 50 percent when you bring a buyer to the table.
THE WITNESS: Correct.
MR. FROELICH: So you're entitlement to the 50 percent is based upon finding a buyer?
THE WITNESS: Actually making the deal happen, correct.
MR. FROELICH: And you seek to find a buyer. Do you negotiate with prospective buyers?
THE WITNESS: Yes.

(Hearing Tr. at 80). In addition, Appellants included terms in the contracts that would allow Appellants to leave the deal without any financial commitments if a buyer could not be located. (Hearing Tr. at 134).

Ultimately, Mr. Dicke asserted that his business did not sell homes. Instead, his business was selling paper:

MS. HAYES: But you're not selling homes, you're selling paper.
THE WITNESS: Correct.

(Hearing Tr. at 62).

The following response from Mr. Dicke, at page 77 of the transcript, shows the nature of Appellants' services:

MR. PAUL: But what are you giving him in return for giving you the option?
THE WITNESS: I'm giving him my time. I'm giving him my marketing efforts. I'm giving him my experience and I think that at this price I'll probably be able to turn a profit and get this deal closed. And it won't cost' --

The following testimony is also compelling:

Q. And the buyer is getting the house. So what you're doing is you've got the seller who can finally unload the house, for lack of a better term,

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okay. You sell a house, you've got a buyer who gets what they want, and you get a fee for bringing them both together.
A. Correct.

(Hearing Tr. at 84).

During the hearing, Appellee called Mr. Davis to testify. Mr. Davis investigated the matter and established the recommended number of violations. Mr. Davis stated the following opinion on the number of recommended violations:

MR. FROELICH: So your testimony is that there are 495 separate violations reflected by the documents that are before us that have been stipulated and admitted into evidence?
THE WITNESS: That is correct, sir.
MS. KATZ: If I may, that is for each case and we have two cases; is that correct?
THE WITNESS: That's for each -- yes. For each separate case.
MR. FROELICH: For each respondent.
THE WITNESS: Yes.
MS. KATZ: Each separate case.
MR. FROELICH: 495 for each.
THE WITNESS: Yes.

(Hearing Tr. at 147). Appellee ultimately found 403 violations of R.C 4735.02 per Appellant and imposed at civil penalty of $1,000 per violation.

Appellants filed their separate appeals on August 28, 2009. In response to both appeals, Appellee filed a Motion to Dismiss Appeal, asserting that Appellants failed to file the original Notice of Appeal with Appellee as mandated by R.C. 119.12. This Court found on that, due to an error, Appellants' agent left Appellee's office with the original documents in his/her possession. The Court held that Appellants did not strictly comply with the version of R.C. 119.12 in effect at the time and thus lacked subject matter jurisdiction. Both appeals were dismissed by this Court on January 25, 2010.

Both Appellants appealed those rulings to the Tenth District Court of Appeals. While on appeal, the statute was amended and the effect of the language of R.C. 119.12 was changed in such a way as to allow for the reactivation of Appellants' appeals to this Court. Hence, on October 6, 2010, the matter was remanded by the Tenth District for further proceedings.

On remand to this Court there was a delay in the production of a new briefing schedule and the cases—originally appealed separately—were finally consolidated. After consolidation of the cases, Appellants filed a Brief far in excess of the page limit allowed by the local rules of this Court. That triggered a Motion to Strike from the Appellee. The Motion to Strike triggered an after-the-fact Motion for Leave to File that was submitted by Appellants. This Court, in the interest of getting to the merits of the case, allowed Appellants' Brief to stand and gave Appellee the ability to also exceed the page limit. The parties have now fully briefed the matter.

This Court has reviewed the merit Briefs of the parties, Appellants' Reply Brief, the certified record with exhibits, and the case law cited by the parties. The matter is ready for determination.

## II. STANDARD OF REVIEW

Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of the SPBR if it is supported by reliable, probative and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad,* 63 Ohio St. 2d 108, 111 407 N.E.2d 1265 (1980), 111; *Henry's Cafe, Inc. v. Board of Liquor Control* (1959), 170 Ohio St. 233. That quality of proof was articulated by the

Ohio Supreme Court in *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 589 N.E.2d 1303 (1992) as follows:

> (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

*Id.* at 571.

A Court of Common Pleas performs a hybrid review of the administrative record, in which the court must appraise the credibility of the witnesses, the probative character of the evidence, and the weight of the evidence presented. *Conrad,* 63 Ohio St. 2d 108. When undertaking this hybrid review, a trial court "must give due deference to the administrative resolution of evidentiary conflicts" as the administrative body, as fact-finder, had "the opportunity to observe the demeanor of the witnesses and weigh their credibility." *Conrad* at 111-12. However, findings by administrative agencies are not conclusive. *Id.*

> Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, the court may reverse, vacate or modify the administrative order. Where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.

*Id.* The *Conrad* case has been cited with approval numerous times. See *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591.

Although a review of applicable law is *de novo*, the reviewing court should defer to the agency's factual findings. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993) (rehearing denied by: *Pons v. State Medical Bd.* (1993), 67 Ohio St. 3d 1439, 617 N.E.2d 688); *See also* VFW *Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 82, 697 N.E.2d 655(1998). The basis for such due deference is the expertise in interpretation of the technical and ethical requirements of a profession provided by its administrative body. *Joudah v. Ohio Dept. of Human Serv.*, 94 Ohio App. 3d 614, 617, fn.2, 641 N.E.2d 288 (1994). Yet, this Court

understands that deference to the agency's findings does not equate to willful blindness. Please note the following from *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 613 N.E.2d 591 (1993):

> We take this precedent to mean that an agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable.

Hence, this Court must review the record to see if any material internal inconsistency exists.

This Court is also aware of the Tenth Appellate District's Opinion in *Harr v. Jackson Township*, 10th Dist. No. 10AP-1060, 2012-Ohio-2030, 970 N.E.2d 1128. This Court has considered and weighed **all** of the evidence in the record in order to make the Court's determination. The fact that this Court has not specifically addressed **all** facts and exhibits within this decision does not indicate that the Court failed to take any such fact into consideration.

## III. LAW AND ANALYSIS

Appellants have asserted a number of claimed errors, which the Court will address in the order advanced by the Appellants.

### A. There Is Sufficient Evidence to Support the Violations for Which Appellants Were Found Liable.

Appellants assert that a number of violations were not supported by reliable, probative and substantial evidence. According to Appellants, the evidence presented at the hearing cannot be construed to equate to 403 violations. They assert that, when calculating days of violation, Appellee did not take into account the dismissal one of the properties that was originally alleged against Appellants.

In response, Appellee argues that the matter had been submitted on stipulated facts and stipulated exhibits. Appellee relies on a waiver argument: Because they did not raise any issue regarding the number of violations advanced during the hearing, Appellants should be

precluded from claiming error now. In addition, Appellee alleges that any error in the number of violations would be an error in favor of the Appellants; i.e., there is evidence of more violations than assessed by the Appellee.

Appellants allege that it was inappropriate for Appellee's investigator to only look at Appellants' website on one or two occasions in order to determine the number of possible violations. However, if the property was listed on day one, and still listed on day ten, it is a reasonable inference to be drawn from the evidence that the property was listed during the interim days. In any event, Appellants had the opportunity to contest the evidence and did not do so at the hearing.

Ultimately, there is reliable, probative, and substantial evidence contained within the stipulated documentary evidence, and the hearing testimony, that supports at least 403 violations. Therefore, on this issue, Appellants' argument is without merit.

**B. Because Appellants Did Not Acquire Any Interest in the Properties, the Commission Did Not Err When Finding That Appellants Violated R.C. 4735.02.**

Appellants also allege that Appellee erred when finding that Appellants violated R.C. 4725.02. This argument can be summarized as follows: "O.R.C. §4735.02 does not require a party to have license if they own or have acquired an interest in the relevant property," and "Appellants, who acquired and interest in the relevant properties, satisfy the statutory exemption."

Ultimately, Appellants allege that they had an interest in the relevant properties and are, therefore, covered by the exception to the licensing statute found in R.C. 4735.01(I). The relevant portion of the statute states as follows:

> (1) The terms "real estate broker," "real estate salesperson," "foreign real estate dealer," and "foreign real estate salesperson" **do not include** a person, partnership, association, **limited liability company**, limited liability partnership, or corporation, **or the regular employees thereof**, who perform any of the acts or transactions specified or comprehended in division (A) of this section, whether or not for, or with the intention, in expectation, or upon the

> promise of receiving or collecting a fee, commission, or other valuable consideration:
>
> > (a) With reference to real estate situated in this state or **any interest in it owned by such** person, partnership, association, **limited liability company**, limited liability partnership, or corporation, or acquired on its own account in the regular course of, or as an incident to the management of the property and the investment in it. (Emphasis added).

R.C. 4735.01(I)(1)(a). Appellants assert that the contract and/or options taken on the properties are sufficient to qualify Appellants under the "any interest in it" language of the exception.

During the hearing and again on appeal, Appellants advanced the case of *Ohio Div. of Real Estate v. Vantell*, 128 Ohio App.3d 410, 715 N.E.2d 217 (7th Dist., 1998). Appellants allege that their situation is similar to situation presented in *Vantell*. In *Vantell*, the Seventh District Court of Appeals reversed the trial court, holding that Ohio Real Estate Commission did not have jurisdiction to suspend the broker's license because the party had an interest in the property at issue. However, upon review, the facts of *Vantell* stand in stark contrast to the situation presented in the case *sub judice*.

In *Vantell*, a licensed real estate broker and a friend, without a real estate license, entered into a joint venture agreement (which was not in writing) to purchase property and re-sell it at a profit shared by both parties. The property was sold, but the buyer was dissatisfied and filed a complaint against the broker. The broker supplied the down payment, gave a mortgage for the balance and acquired title to the property. The OREC filed a complaint against the broker for authorizing his friend to act as an agent in the capacity of a real estate broker. The analysis revolved around whether the friend had any interest in the property. The Court found that the friend had an interest in the property because he had formed a joint venture agreement resulting in the purchase of the property, assumed repair expenses, and shared mortgage payments.

The friend, or the non-licensed individual, in *Vantell* invested significant amounts time and of money into the property, and had an agreement that resulted in his business partner receiving title to the property. Unlike the situation in *Vantell*, the evidence at the hearing

established that in most cases, Appellants invested nothing into the properties; for those properties they did invest, the evidence showed it was a modest amount of earnest money that the Appellants would get back even if they were unable to secure a buyer. Ultimately, Appellants did not nearly have the same level of interest in the properties they marketed. Hence, *Vantell* does not support Appellants' assertions that they had an interest in any of the properties they marketed.

On the other hand, Appellee proffers *Sause v. Ward*, 7 Ohio App. 446, 1917 Ohio App. LEXIS 234 (11th Dist., 1917) in support of their argument that Appellants did not have any legal interest in the properties they sold. Paragraphs 3 and 4 of the *syllabus* in *Sause* states:

> 3. A written optional contract for a nominal consideration given by the owner to sell his real estate is not a sale thereof, but only a standing offer to sell to the person, at the price named and within the time stated in the contract, and the holder of the option does not acquire any title to the real estate unless he accepts the offer prior to its expiration.
> 4. After the offer has been accepted by the holder of an option the contract is binding upon both parties, and he has the equitable title thereto.

*Sause* may be an old case, but it has been followed as recently as 2009 in *Howick v. Lakewood Village Ltd. Partnership*, 3rd Dist. No. 10-08-20, 2009-Ohio-1921 and is therefore, still good law. *Sause* was also the foundation of the decision in *Glick v. Dolin*, 80 Ohio App.3d 592, 609 N.E.2d 1338 (8th Dist., 1992). The *Glick* court relied on *Sause* to find that the holder of the option never acquired an equitable interest in the property in question because there was no evidence that he exercised the option. *Id.* at 599. Though clearly dealing with a different issue, the *Glick* court used the authority of *Sause* to establish when someone has an interest in real property. That is the same issue in the case *sub juice*.

It is clear to this Court that Appellants purposefully attempted to avoid the licensing laws of this state. Appellant Dicke acknowledged as much in his testimony before Appellee. By the use of an illusory promise, Appellants attempted to avoid the need to be licensed. The agreements engineered between Appellants and the property owners equated to nothing more than a consent to market the properties. This Court holds that the contracts held by the

Appellants did not create any interest in the real property sufficient for the exclusion of R.C. 4735.01(I)(1) to apply.

### C. R.C. 4735.01 and R.C. 4735.02 Provide Sufficient Notice of the Conduct the Provisions Proscribe.

Appellants alleged that the Commission also erred by construing and applying R.C. 4735.01(I)(1) and R.C. 4735.02 in a manner that renders the previsions void for vagueness. Appellants first challenge the constitutionality of the statute itself, arguing that due process requires any statute provide sufficient notice and detail of its proscriptions to facilitate compliance and prevent arbitrary or discriminatory enforcement of the statute. Second, they assert that an as applied challenge, that applying R.C. 4735.02 to Appellants based upon their circumstances violates due process. Appellants proffer the same arguments in support of both challenges.

The Court first notes that Appellants did not advance any "void for vagueness" argument during the administrative process. But, even if they had, the argument is without merit. As already determined in the prior section of this Decision, Appellee's position concerning R.C. 4735.01 is correct and lawful. Appellants did not have an "interest in" the real estate, so the exception was not applicable to their case.

> The vagueness doctrine is an outgrowth of the Due Process Clause of the Fifth Amendment. Due process demands that the law give sufficient warning of what conduct is proscribed so that people may conduct themselves so as to avoid that which is forbidden. Consequently, a legislative enactment is void for vagueness if it fails to provide sufficient definition and guidance to enable a person of ordinary intelligence to conform his or her conduct to the law. (Internal citations omitted).

*City of Columbus v. Bahgat*, 2011-Ohio-3315 at ¶ 20. The Court notes that it is well established that a reviewing court should give a statute, challenged on vagueness grounds, all deference in order to uphold the statute as constitutional. *City of Oregon v. Lemons*, 17 Ohio App.3d 195, 196, 478 N.E.2d 1007 (6th Dist., 1984).

Upon review of the statutory language, it is clear that R.C. 4735.01 is written in such a way that a person of common intelligence can understand and conduct him or herself

accordingly. The statute contains sufficient warnings and definite statements as to the proscribed conduct. Furthermore, the fact that an option contract is not "an interest in" property has been well established since 1917 when the option concept was put to rest by the *Sause* court, *supra*.

In addition, Appellants allegations that they did not have sufficient notice of what conduct is prohibited under R.C. 4735.01 is in direct contradiction to the Appellants' own testimony at the administrative hearing. Appellant Dicke testified as to his knowledge and understanding of the statute during the hearing. It was because of this knowledge that Appellants attempted to create an interest in the real estate by using the discredited "Purchase and Sale Agreement" and "Option to Purchase Real Property Agreement." Appellants' unsuccessful attempt to avoid the application of the statute does not establish that the statute is void for vagueness. Accordingly, Appellants' argument lacks merit.

**D. The Fine Issued Against Appellants Is Not Excessive.**

Appellants also raise a number of issues regarding the finds imposed by the Commission against Appellants. Appellants argue that the finds violate the U.S. and Ohio Constitutions, and also allege that the Commission erred by allowing fines to accrue during its investigation. The Court will address each argument in the order raised.

**1. The fine imposed by the Commission does not violate the U.S. and Ohio Constitutions.**

Appellants first allege that the fine imposed was designed to punish, and therefore violates the Eighth Amendment to the U.S. Constitution; i.e. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Pursuant to R.C. 4735.052, the Appellee has the right to issue a fine. The statute states in part:

> (C)(4) The commission shall decide whether to impose disciplinary sanctions upon a party for a violation of section 4735.02 of the Revised Code. If the commission finds that a violation has occurred, the commission **may assess a civil penalty**, in an amount it determines, **not to exceed one thousand**

> **dollars per violation**. Each day a violation occurs or continues is a separate violation. The commission shall determine the terms of the payment. *** (Emphasis added)

The ability of a common pleas court in an administrative appeal to address the fine imposed has been limited by the Ohio Supreme Court in *Henry's Café, Inc. v. Bd. Of Liquor Control*, 170 Ohio St. 233, 163 N.E.2d 678 (1959). The Ohio Supreme Court has held that the power of a court of common pleas to modify an order of an agency is limited to determining whether the order "is supported by reliable, probative and substantial evidence." *Henry's Café,* at paragraph two of the syllabus. In regards to the penalty assessed, a court of common pleas "has no authority to modify a penalty that the agency was authorized to and did impose, on the ground that the agency abused its discretion." *Id.* at paragraph three of the syllabus. The Supreme Court's decision in *Henry's Café* has been repeatedly upheld as valid. See, *Kellough v. Ohio State Bd. of Educ.*, 10th Dist. No. 10AP-419, 2011-Ohio-431, 2011 Ohio App. LEXIS 370, at ¶58.

The constitutional argument advanced by Appellants in their Brief is strikingly similar to the arguments advanced in *Gehad & Mandi, Inc. v. Ohio St. Liquor Control Comm'n*, 10th Dist. No. 05AP-1181, 2006-Ohio-3081, 2006 Ohio App. LEXIS 2832. The Tenth District rejected the arguments presented by the appellant that the penalty assessed violated the Ohio and U.S. Constitutions. Instead, the Tenth District held that it was bound by the Ohio Supreme Court's decision in *Henry's Café*. See also, *Abdel Latif, Inc. v. Ohio Liquor Control Comm'n.*, 10 Dist. Nos. 06AP-1078, 06AP-1079, 06AP-1080, 06AP-1081, 06AP-1082, 06AP-1083, 06AP-1084, 06AP-1085, 06AP-1086, 2007-Ohio-2943, 2007 Ohio App. LEXIS 2690.

Due to the clear prior authority, Appellants' arguments concerning the fines imposed lacks merit. It is undisputed that, pursuant to statute, the Appellee has the right to issue up to a $1,000.00 fine for each violation, each day the violation occurs.

**2. It is not unreasonable for the Commission to not give notice of a violation during the pendency of its investigation.**

Next, Appellants argue that had Appellee moved faster to stop Appellants from violating the law, their sanction would have been lessened. In essence, Appellants claim that they would have stopped violating the law sooner had the Appellee told them so; therefore, Appellee's alleged delay in acting led to the claimed excessive fine.

Appellants cite to Federal case law on civil penalties in support of this argument. First, Appellants assert that *United States v. J.B. Williams Co., Inc.*, 498 F.2d 414 (2nd Cir. 1974) supports their argument. Specifically, Appellants quoted the following from the *Williams* case:

> We agree with Judge Winner that 'it would seem unreasonable to permit the commission to knowingly let daily penalties accrue without giving notice of the commission's position at the earliest reasonable time.'

*Id.* at 435. Taking the quote at face value, the Appellants' argument seems to be supported by Federal case law. However, the remainder of the quote reads as follows:

> The difficulty lies in knowing when that occurs. It is undesirable for courts, unacquainted with the Commission's workload, to lay down lines that would necessarily be arbitrary. Although perhaps a case will arise which is so extreme as to demand judicial intervention, the present is not one. This is particularly true since, as we now hold, the Commission could have demanded even larger penalties than it did.

*Id.* Upon viewing the quote offered by Appellants in context, it is clear that *Williams* does not support the Appellants' argument.

Appellants next rely upon *United States v. American Greetings Corp.*, 168 F.Supp. 45 (N.D.Ohio 1958). Appellants assert that *American Greetings* establishes that the Appellee's alleged delay should be grounds to contest the amount of the penalty. However, the facts of *American Greetings* are quite different from the case at bar.

In *American Greetings*, the defendant had reached out to the Federal Trade Commission (FTC) and specifically asked for clarification on whether conduct in which the defendant was engaged would violate an order by FTC. Not only did the defendant seek guidance, the evidence also showed that during discussions with the FTC, the FTC initially seemed willing to permit the conduct of the defendant. Then, approximately four years later, the FTC finally decided that it

would not permit the conduct and sanctioned the defendant for the past conduct. There exist no similar facts in this case. Appellants did not reach out to the Appellee to seek guidance regarding their conduct. Instead, Appellants violated the law and were eventually found out.

*American Greetings* is also distinguishable because the District Court was the entity assessing the fine. In the case *sub judice*, the Appellee was responsible for assessing the fines. Therefore, if the *American Greetings* facts existed, it would have been a topic for debate at the administrative hearing.

Appellants also argue that language contained within R.C. §4735.052(B)—i.e., 'within seven business days'—mandates the Appellee to notify the Appellants much earlier in the process, thereby limiting Appellants' violations of the statute. R.C. 4735.052(B) states in relevant portion as follows:

> If, **after investigation**, the superintendent determines there exists reasonable evidence of a violation of section 4735.02 or 4735.25 of the Revised Code, **within seven business days after that determination**, the superintendent **shall** send the party who is the subject of the investigation, a written notice, by regular mail ***. (Emphasis added).

It is the position of the Appellants that because of Appellee's alleged delay, they were harmed; i.e., they incurred more fines. For this argument to have any merit, one must first work under the assumption that the Appellants would have stopped violating the rule once they received the notice from Appellee. There is no evidence in the record to support such an argument and it is therefore, speculative at best. Second, and more importantly, the Appellants' reading of the statute must also have merit.

Appellee responds to Appellant's interpretation of the statutory language by arguing that the 'after investigation' language in the statute creates a timeframe, which does not start to run until the conclusion of the investigation, not at the beginning. Said argument has merit and accords the statutory language its plain meaning.

For Appellants' argument to have any merit, the seven business days mentioned in R.C. 4735.052(B) would have to apply as a type of statute of limitations. The Tenth District

addressed a similar claim in *Boggs v. Ohio Real Estate Commission*, 186 Ohio App.3d 96, 2009-Ohio-6325, 926 N.E.2d 663. The Tenth District Court of Appeals analyzed timelines laid out within R.C. 4735.051 and ultimately found that the administrative agency did not lose its jurisdiction over the claims when it failed to comply with the statutory time periods. Ultimately, it found that the time periods were discretionary in nature. The Court stated:

> The statute does not include any expression of legislative intent to restrict the commission's jurisdiction for untimeliness in performing its acts under the statute. Cf. R.C. 4735.32 (a statute of limitations which unequivocally expresses the legislature's intent that an investigation "shall be barred" if the commission does not commence the investigation within three years from the date of the real estate licensee's allegedly wrongful conduct). Had the General Assembly intended R.C. 4735.051(D)'s time frames to be jurisdictional in nature, it could have explicitly so stated, as it did in R.C. 4735.32.
>
> Because the time frames in R.C. 4735.051(D) are directory, the commission did not lose jurisdiction for failing to act within the statutory time periods. As a result, in claiming reversible error in the commission's failure to meet the statutory time limitations, Boggs also must demonstrate prejudice. Boggs maintained her real estate license throughout the proceedings, and she neither alleged nor demonstrated any prejudice resulting from any delays in this matter.
>
> In the final analysis, the time frames set forth in R.C. 4735.051(D) are not mandatory or jurisdictional, but instead are directory to encourage the "proper, orderly and prompt conduct of public business." The commission's failure to comply with the time frames expressed in R.C. 4735.051 did not divest the division of jurisdiction. Moreover, its failure to meet the statutory time limitations does not amount to reversible error, as Boggs did not demonstrate the delay prejudiced her in any way. Accordingly, because the common pleas court did not err in determining the commission had jurisdiction to enter the disciplinary order in this matter, Boggs' second and third assignments of error are overruled. (Internal citations omitted).

*Boggs* at ¶¶26-28.

There is no indication that R.C. 4735.052(B) should be viewed any differently than the statutory provision analyzed in *Boggs*. The 'shall' as contained within R.C. 4735.052 is one of the unique 'shalls' that are and should be viewed by the courts as 'directory' but not mandatory as against the State. See, *In re: Rodney Carr, A Minor Child*, 5th Dist. No. 08 CA 19, 2008-Ohio-5689, 2008 Ohio App. LEXIS 4797, and *State v. Bellman,* 86 Ohio St.3d 208, 714 N.E.2d 381 (1999). That is a logical conclusion based upon the language of R.C. 4735.052 and the

existing case law involving interpretation of similar statutory language. Appellants cannot utilize the statutory language to contest the validity of the sanction imposed by the Appellee. Appellants' arguments on this issue lack merit.

### E. The Commission Did Not Err When It Found Appellant Dicke Personally Liable for the Actions of Appellant 3-D Corporation.

Appellant Dicke challenges the Appellee's decision finding him personally liable for the actions of the Appellant 3-D Corporation. According to Appellant Dicke, all of the conduct subject to the sanction was solely the conduct of Appellant 3-D. Appellant Dicke asserts that corporate law protects him and/or insulates him from the regulatory process.

During the hearing, Appellant Dicke's testimony established that he was the sole owner of the LLC and its sole member.

MR. PAUL: Let me ask this, on your LLC, are you the sole owner?
THE WITNESS: Yes, sir.
MR. PAUL: And member?
THE WITNESS: Yes, sir.
MR. PAUL: So it's just you?
THE WITNESS: Correct.

(Hearing Tr. at 128).

In opposition to Appellant Dicke's argument, the Appellee proffers O.A.C 1301:5-1-03(C), which states:

> (C) For purposes of section 4735.06 of the Revised Code, an applicant who is a corporation or limited liability company must have at least one individual broker affiliated with the corporation or limited liability company. Said individual broker shall perform the functions of a real estate broker solely on behalf of and in the name of the corporation or limited liability company. No corporation or limited liability company shall maintain a valid real estate broker's license without at least one individual broker affiliated with said corporation or limited liability company.

Appellee argues that Appellant Dicke acted for the Corporation in the capacity of the required broker. However, due to the fact that he was not licensed, he too was violating R.C. 4735.01. It is the Appellee's argument that both the company and the individual are required to

have a license. Ultimately, because neither the company nor the individual had a license, both the individual and the entity violated the regulatory scheme. This Court agrees.

If R.C. 4735.01 were read to only allow the Commission to hold a company liable, then an individual need only create a corporation, limited liability company, or another applicable entity in order to engage in the prohibited conduct with impunity.

> The purpose of administrative rulemaking is to facilitate the implementation of legislative policy. In other words, administrative agency rules are an administrative means for the accomplishment of a legislative end. Hence, rules must bear a reasonable relationship to the legislative policy evident in the pertinent statute. It is axiomatic that rules in contravention of statute are invalid.

*In re Suitability of Young*, 70 Ohio App.3d 269, 274, 590 N.E.2d 1344 (1990).

The plain language of the statute and code require a license. A corporation or other business entity must hold a license and must have one individual who holds a license. That was not the case with the Appellants and both Appellants acted in violation of the statute. Both are therefore subject to the sanctions of the Appellee. Appellant Dicke can be held personally responsible for his actions by engaging in the regulated conduct. Appellant Dicke acted as a real estate agent without a license to do so.

## IV. DECISION

The Appellee's Adjudication Orders dated August 14, 2009 are **AFFIRMED**. The appeals by Appellants lack merit.

**THIS IS A FINAL AND APPEALABLE ORDER**

**IT IS SO ORDERED.**

**Judge Timothy S. Horton**

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Franklin County Court of Common Pleas

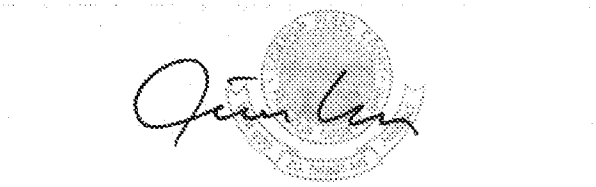
**Date:** 07-23-2013

**Case Title:** DARREN E DICKE -VS- OHIO REAL ESTATE COMMISSION

**Case Number:** 09CV013129

**Type:** DECISION/ENTRY

It Is So Ordered.



/s/ Judge Timothy S. Horton

Franklin County Ohio Clerk of Courts of the Common Pleas- 2013 Jul 23 4:01 PM-09CV013129

# Court Disposition

Case Number: 09CV013129

Case Style: DARREN E DICKE -VS- OHIO REAL ESTATE COMMISSION

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes