

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

GENE P. JOHNSON,

CASE NO. 13CVF-07-8370

APPELLANT ,

JUDGE SHEWARD

VS.

OHIO REAL ESTATE COMMISSION,

APPELLEE.

DECISION AND ENTRY
ON MERITS OF APPEAL AFFIRMING THE APPELLEE'S ADJUDICATION
ORDER OF JULY 17, 2013

SHEWARD, J.

This Court has for determination the appeal of Gene P. Johnson, (hereinafter referred to as the Appellant). The Appellant has appealed from an Adjudication Order, dated July 17, 2013 and issued by the Ohio Department of Commerce, Division of Real Estate & Professional Licensing, Ohio Real Estate Commission (hereinafter referred to as the Appellee). The instant appeal was filed on July 31, 2013. The Order imposed fines and revoked the Appellant's license. For the reasoning that follows, this Court **AFFIRMS** the July 17, 2013 Adjudication Order.

I. Statement of the case

Appellant had his broker licenses suspended after he failed to report a felony conviction in violation of R.C. §4735.18(C). Appellant was also informed that his conduct was a violation of R.C. §4735.18(A) & §4735.18(A)(6). After a hearing the Appellee found that the Appellant had violated R.C. §4735.18(A) & §4735.18(A)(6). The Appellant was fined and his license was revoked.

II. FACTUAL HISTORY

The facts are not in dispute. After a long career in real estate, the Appellant was charged with a felony due to some real estate transactions that he was involved in. The Appellant pled guilty to one count of theft concerning mortgage fraud. He was found guilty of a violation of R.C. §2913.02 – a felony of the third degree. Appellant entered his plea of guilty on October 10, 2012. On December 28, 2012 the criminal court entered a judgment entry convicting the Appellant. The Appellant apparently is in compliance with his criminal sanctions.

The Appellant failed to timely report the felony to the Appellee as required by R.C. §4735.13(C). The language of the statute reads in part as follows:

§ 4735.13. Definite place of business required; display and care of licenses
(C) A licensee shall notify the superintendent in writing within fifteen days of any of the following occurrences: (1) The licensee is convicted of a felony. (2) The licensee is convicted of a crime involving moral turpitude.

The Appellant did not contest the fact that he failed to report the felony to the Appellee.

Eventually, the Appellee became aware of the felony conviction. Appellee investigated the matter and confirmed the existence of the conviction. At that point the Appellee issued its summary suspension pursuant to R.C. §4735.13(C).

By a letter dated February 15, 2013 the Appellee sent to the Appellant a Notice of Suspension, suspending Appellant's broker license due to his failure to report the felony conviction. That letter informed the Appellant that his license had been suspended effective February 14, 2013. The February 15, 2013 Notice informed the Appellant of his rights to contest the suspension and the letter inform him of his right to a hearing. Appellant signed for the February 15, 2013 letter on February 19, 2013.

Another Notification of Formal Hearing was sent to the Appellant by the Appellee on February 21, 2013. That document notified the Appellant that the Appellee suspected a violation of R.C. §§4735.18(A) and (A)(6). The February 21, 2013 letter set a hearing date for March 27, 2013. The February 21, 2013 Notification was also received by the Appellant.

Appellant's attorney addressed a letter to the Appellee on February 21, 2013. Said letter was the formal request for a hearing concerning the February 15, 2013 Notice from the Appellee that informed the Appellant of the R.C. §4735.18(C) suspension. Appellant's letter requested a hearing and further requested that that the Appellant's license be re-activated until a final determination was made. The request to re-activate the license was denied by the Appellee in a February 25, 2013 letter to the Appellant's counsel. The Appellee notified the Appellant that a hearing would take place on March 8, 2013 concerning the R.C.§4735.18(C) suspension.

The Appellee then notified the Appellant that the two matters; i.e., the Notification of Appellant's failure to report and the Notification of the violation of R.C. §§473518(A) and (A)(6) would be consolidated into one hearing. That notice was faxed to Appellant's counsel on March 4, 2013. The fax also confirmed that both matters would be heard on March 27, 2013. The Appellee also issued a letter to the Appellant on March 5, 2013 informing the Appellant of the consolidation.

The March 27, 2013 hearing was eventually moved to May 6, 2013. The hearing was moved at the request of counsel for the Appellant. The Appellee's attorney did not contest the continuance and both sides picked May 6, 2013 as the new hearing date. The matter was finally heard on that date.

At the hearing the Appellant, with counsel, had the opportunity to be heard. Appellant also had the opportunity to examine the witnesses against him and to produce evidence in support of his position. At the May 2013 hearing the Appellee established the conviction and established that the Appellant had not timely reported the conviction to the Appellee.

The Appellant testified primarily concerning mitigation. As it relates to the charges, the Appellant provided the following testimony:

Q. – you understood, there's no dispute that you had an obligation to report this conviction within 15 days.

A. Absolutely. (Hr. 5/6/13 Tr., p. 49, l. 22 – 25)

The Appellant did not address any issue concerning his conviction. In closing, his counsel argued only mitigation. There was no due process or constitutional issues raised.

The Hearing Examiner issued his Report and Recommendation on May 31, 2013. The Hearing Examiner concluded that the Appellant had failed to timely report his felony conviction in violation of R.C. §4735.13(C); that the Appellant had violated R.C. §4735.18(A) having been convicted of a felony; and the Appellant had violated R.C. §4735.18(A)(6) by being found guilty of dishonest or illegal dealings, gross negligence, incompetency, or misconduct. The Hearing Examiner acknowledged the prior good reputation of the Appellant in the community and further acknowledged that the Appellant was remorseful. However, the Hearing Examiner held that the evidence warranted the suspension of the Appellant's license and thus recommended that the prior decision to suspend the license be affirmed.

The Appellant did not file any objections to the Report and Recommendations. The Appellant did file a request to clarify one statement in the Report and

Recommendation, but the Appellant did nothing more. Once again, there was no attempt by the Appellant at that point in the administrative process to raise due process or constitutional issues. The Appellee gave the Appellant notice that the Commission would review the Report and Recommendation at its July 10, 2013 hearing.

On July 10, 2013 the Appellant's case came before the Appellee's Commission. Appellant appeared with counsel. Appellant's counsel addressed the Commission concerning the issue of mitigation. There was no effort taken to contest the authority of the Appellee or the validity of the statutes in question. Appellant's counsel pointed out that – due to the summary suspension – the Appellant had already been without a license for 6 months by the time his case was finally in front of the Commission. The following is from page 38 of the July 10, 2013 transcript:

Chairman Froelich: So just for the record you're not challenging the report?

Mr. Schneider: No.

Chairman Froelich: You're making argument as to what would be the appropriate penalty; is that correct?

Mr. Schneider: Correct.

The argument was made that the Appellant had already suffered enough. Appellant should be given "credit for time served."

During the Commission hearing a question developed concerning the charges pending. It was unclear to the Commission that the consolidation of the two Notices; i.e., the February 15 and the February 21, 2013 Notices, had occurred and that all of the issues had been handled at the May 6, 2013 hearing. In any event the Appellant waived any issue concerning this alleged deficiency. (Hr. 7/10/13 Tr. p. 37 – 38) The Commission voted to adopt the recommendations of the Hearing Examiner in regard to a finding of a

violation of §4735.18(A) and R.C. §4735.18(A)(6). The Commission made the following determination as to the sanctions:

Count 1: revocation of the real estate broker license and a \$2,500.00 fine

Count 2: revocation of the real estate broker license and a \$2,500.00 fine

The Commission did not sanction the Appellant for his clear violation of R.C. §4735.18(C).

The Appellant filed his appeal. The matter has been fully briefed and is now ready for review.

III. STANDARD OF REVIEW

Appellant has asserted various arguments including that the Adjudication Order issued by the Appellee was not supported by reliable, probative, and substantial evidence and was in error of law. Revised Code §119.12 and the multitude of cases addressing that section govern the Court's review of an order of an administrative agency, such as the Appellee. An often cited case is that of *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 407 N.E.2d 1265. The *Conrad* decision states that in an administrative appeal filed pursuant to R.C. §119.12, the trial court must review the agency's order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. The Court states at pages 111 and 112 that:

In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. The findings of the agency are not conclusive. 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.

The *Conrad* case has been cited with approval numerous times. (See, also *City of Hamilton v. State Employment Relations Bd.*(1994), 70 Ohio St. 3d 210, 638 N.E.2d 522; *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. (See, *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 614 N.E.2d 748. 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.* (1998), 83 Ohio St.3d 79, 82, 697 N.E.2d 655) 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. (See, *Joudah v. Ohio Dept. of Human Serv.* (1994), 94 Ohio App. 3d 614, 617, fn.2, 641 N.E.2d 288)

As indicated, the Appellant has now claimed that the Adjudication Order of the Appellee was not supported by the evidence. The quantum and quality of evidence to support the order must be evidence that is reliable, probative, and substantial. The case of *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St. 3d 570, 589 N.E.2d 1303 is often cited for its explanation of the terms reliable, probative, and substantial in a Chapter 119 application. Justice Wright applied the following definitions.

- (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.

From within this legal framework this Court will now review the arguments of counsel.

IV. ANALYSIS

The Appellant raised three arguments in his Brief. This Court will address the arguments in the order briefed by the Appellant.

A. The Commission's decision to suspend Johnson's license pursuant to 4735.13(C) is not supported by reliable, probative and substantial evidence and contrary to law in that it violates the Respondent's due process rights by failing to first hold a hearing:

R.C. §4735.13 reads, in part, as follows:

§ 4735.13. Definite place of business required; display and care of licenses
(C) A licensee **shall** notify the superintendent in writing **within fifteen** days of any of the following occurrences: (1) The **licensee is convicted of a felony**.

If a licensee fails to notify the superintendent within the required time, the superintendent **immediately may suspend** the license of the licensee.
(Emphasis added)

It is undisputed that the Appellant was convicted of a felony and that he failed to notify the Appellee within fifteen days of his conviction.

The Appellant asserted that the February 15, 2013 letter to the Appellant was a violation of his procedural due process rights. The Appellant felt that due to the summary nature of the suspension associated with R.C. §4735.18(C), his rights had been violated. The Appellant asserted that Appellee's process left him exposed to a potential claim – from February 14, 2013 until he knew he was suspended - that he was working as a broker without a license. However, there was never any allegation raised against the Appellant concerning that time frame.

The Appellee asserted that the suspension was legitimate and followed the law.

The Appellee relied upon the following language as contained in R.C. §119.07:

When a statute specifically permits the suspension of a license without a prior hearing, notice of the agency's order shall be sent to the party by registered mail, return receipt requested, not later than the business day next succeeding such order. The notice shall state the reasons for the

agency's action, cite the law or rule directly involved, and state that the party will be afforded a hearing if the party requests it within thirty days of the time of mailing the notice. A copy of the notice shall be mailed to attorneys or other representatives of record representing the party.

The evidence from the certified record established that the Appellee met the requirements of R.C. §119.07.

The Appellee claimed that due process had been given to the Appellant. Please note the following:

"The essence of due process dictates, at the very least, that an individual have an opportunity to be heard and to defend, enforce and protect his rights before an administrative body in an orderly proceeding." Gibraltar Mausoleum Corp. v. Cincinnati (1981), 1 Ohio App.3d 107, 109-110, 439 N.E.2d 922. Accordingly, "due process includes the right to a hearing before an unbiased and fair and impartial tribunal." Frost v. Wilmington (Jan. 31, 1986), Clinton App. No. CA85-08-014, at 7.

The record reflected that the Appellee provided due process to the Appellant. Appellant was timely notified of the suspension. Appellant was given a process to object to the suspension. Appellant requested a hearing and a hearing was set. Appellant appeared with counsel at the hearing and was given the opportunity to raise any issue the Appellant felt was justified.

Appellant's argument that he was not given procedural due process has no merit.

B. The Commission's decision that Johnson violated R.C. 4735.18(A), misconduct, as that section incorporates Section 1, Articles 1 and 2 of the Canons of Ethics for Real Estate Industry is not supported by reliable, probative and substantial evidence and contrary to the law in that it violates the Respondent's due process rights by mandating a disciplinary action:

Here the Appellant asserted that the language of R.C. §4735.18(A) led to a mandatory sanction. Therefore any hearing conducted pursuant to that discipline process would only address mitigation and therefore is not a real opportunity for the Appellant to defend himself. Please note the following language from R.C. §4735.18:

§ 4735.18. Disciplinary actions

(A) Subject to section 4735.32 of the Revised Code, the superintendent of real estate, upon the superintendent's own motion, may investigate the conduct of any licensee. Subject to section 4735.32 of the Revised Code, the Ohio real estate commission **shall** impose disciplinary sanctions upon any licensee who, whether or not acting in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is **found to have been convicted of a felony** or a crime of moral turpitude, and may impose disciplinary sanctions upon any licensee who, in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found guilty of: (Emphasis added)

Using the emphasized language, the Appellant contented that the notice and opportunity to be heard was a sham. The argument has no merit.

First, nothing would have stopped the Appellant from bringing forth evidence that he in fact had not been found guilty of a felony. Nothing prevented the Appellant from establishing that the nature of the alleged conviction should/could not be viewed as a felony conviction; i.e., an Alford Plea, or the conviction was overturned, etc. What turned the administrative hearing into one of mitigation only, was the fact that the Appellant **did** plead guilty to a felony offence and he had **no** valid defense to the charges filed by the Appellee.

Setting aside the fact that the Appellant never raised the due process issue at the administrative level, the Appellee provided the Appellant with due process and the Appellee's decision was supported by reliable, probative, and substantial evidence and was in accordance with law.

C. The Commission's decision to revoke Johnson's license pursuant to 4735.18 is not supported by reliable, probative and substantial evidence and contrary to law in that it violates the Respondent's equal protection rights:

Appellant claimed that there was a disparity in the nature and extent of sanctions imposed by the Appellee in cases where other licensees were convicted of a felony. In

his Brief, the Appellant submitted previous disciplinary actions where a lesser sanction was issued by the Appellee. The Appellant argued that the statute was facially unconstitutional because the Appellee had discretion as to the sanction to impose and it did so arbitrarily.

The Appellee responded that the Appellant waived this argument because he did not make the as-applied argument during the administrative process. *Wymyslo v. Bartec, Inc.*, 2012-Ohio-2187 at ¶22. The Appellee also pointed out that the Appellant timely could have raised the issue and should have during the administrative process. The other disciplinary actions relied upon by the Appellant in his Brief all occurred prior to his hearing. Hence, he could have made his argument timely at the agency level. Having failed to do so, the Appellant cannot raise the issue now.

The Appellant's argument against the disparity in the sanction seems to bring into question the authority of the Appellee to determine what punishment is warranted by the facts presented to it. The ability of a reviewing court to address the fine and/or sanction imposed has been limited by the Ohio Supreme Court in *Henry's Café, Inc., v. Bd. Of Liquor Control*, 170 Ohio St. 233. Please note the following from the *syllabus* of *Henry's Café*:

2. On appeal from an order of an agency (as defined in Section 119.01, Revised Code) to the Court of Common Pleas, the power of the court to modify such order is limited to the ground set forth in Section 119.12, Revised Code, i. e., the absence of a finding that the order is supported by reliable, probative, and substantial evidence.
3. On such appeal, the 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.*

It is undisputed that the Appellee had the right to issue the sanctions it imposed.

Concerning the validity of *Henry's Café*, please note the following:

As a court inferior to the Supreme Court of Ohio, we are bound by and must follow the decisions of that court. *State ex rel. Abrusci v. Indus. Comm.*, 10th Dist. No. 08AP-756, 2009-Ohio-4381, ¶5; *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554, ¶21; *State v. Worrell*, 10th Dist. No. 06AP-706, 2007-Ohio-2216, ¶10. Ohio appellate courts have no authority to declare unconstitutional a decision of the Supreme Court of Ohio. *State v. Howard*, 7th Dist. No. 08-MA-121, 2009-Ohio-6398, ¶49. Consequently, this court has repeatedly rejected appellants' requests that we modify or overrule *Henry's Café. Auchi v. Liquor Control Comm.*, 10th Dist. No. 06AP-493, 2006-Ohio-6003, ¶8, fn. 3; *Gehad & Mandi, Inc. v. Ohio State Liquor Control Comm.*, 10th Dist. No. 05AP-1181, 2006-Ohio-3081, ¶7; *Goldfinger Enterprises, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1172, 2002-Ohio-2770, ¶22; *Lindner v. Ohio Liquor Control Comm.* (May 31, 2001), 10th Dist. No. 00AP-1430. We do so again in this case. *Kellough v. Ohio State Board of Education*, 2011-Ohio-431 at ¶58.

Due to the clear authority for the sanction, Appellant's arguments concerning the severity of the sanction, lacks merit.

Finally, this Court concurs with the Appellee that the code is constitutional. The burden was on the Appellant to establish his claim that the code was unconstitutional.

Please note the following:

" 'An enactment of the General Assembly is presumed to be constitutional, and Before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.' " *State, ex rel. Jackman, v. Court of Common Pleas* (1967), 9 Ohio St.2d 159 at161.

The Appellant failed to rebut that presumption. The following from *Coldwell Banker Residential Real Estate Services, Inc. v. Bishop*, 26 Ohio App.3d 149 (1st Dist.) is also important to note:

As previously explained, the state has a special interest in maintaining high standards of professionalism among real estate brokers because of the magnitude of the transactions (both in an economic and a personal sense) with which they are involved. A rational basis therefore exists for applying the differential regulation of R.C. 4735.18(N) to real estate brokers. *Id.* at 153.

Hence, R.C. §4735.18 is constitutional.

V. DECISION

The Appellee's Adjudication Order dated July 17, 2013 is **AFFIRMED**.

THIS IS A FINAL APPEALABLE ORDER

Judge Richard Sheward

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Franklin County Court of Common Pleas

Date: 11-11-2013
Case Title: GENE P JOHNSON -VS- OHIO STATE REAL ESTATE
COMMISSION
Case Number: 13CV008370
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, "Richard S. Sheward", is written over a blue circular official seal. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "ALL THINGS ARE" around the bottom.

Judge Richard S. Sheward

Court Disposition

Case Number: 13CV008370

Case Style: GENE P JOHNSON -VS- OHIO STATE REAL ESTATE
COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes