

OPINION NO. 80-092**Syllabus:**

As to complaints filed against licensees subject to regulation by the Ohio Division of Real Estate, the provisions of R.C. Chapter 4735 specifically governing Division of Real Estate proceedings prevail over any conflicting general hearing requirements of R.C. Chapter 119. In proceedings held pursuant to R.C. Chapter 4735, the more specific time provisions of R.C. 4735.051, as they apply to time of hearing and submission of hearing examiner reports, prevail over those articulated in R.C. Chapter 119; however, the due process protections of R.C. Chapter 119 regarding the contents of the letter providing notice of a right to a hearing and the filing and consideration of objections to the hearing examiner's report and recommendations are applicable, since R.C. Chapter 4735 does not speak specifically to those matters.

To: J. Gordon Peltier, Director, Department of Commerce, Columbus, Ohio
By: William J. Brown, Attorney General, December 23, 1980

I have before me your opinion request which concerns the application of R.C. 119.07 and 4735.051 to complaints filed against real estate licensees. Specifically, you have asked, in light of the apparent conflict between the hearing provisions of R.C. 119.07 and 4735.051, which procedure the Department of Commerce should utilize in the course of dealing with complaints filed against licensees subject to regulation by the Ohio Division of Real Estate.

R.C. 4735.051 provides as follows:

(A) The investigation and audit section of the division of real estate shall investigate the conduct of any licensee against whom a written complaint is filed. The superintendent shall notify the affected licensee and shall acknowledge receipt of a complaint, in writing, within ten business days. The acknowledgment shall notify the complainant that he will be contacted by an investigator, and that he may request either an informal meeting with the investigator and the licensee, or a formal hearing before the hearing examiner.

(B) Within five business days of receipt of the complainant's request specifying whether he wishes an informal meeting or a formal hearing, the investigator or hearing examiner shall notify the licensee and the complainant of the date of the hearing or meeting. Within twenty business days thereafter, the investigator or hearing examiner shall hold the meeting or hearing, except that any party may request an extension of up to fifteen business days for good cause shown. If the parties reach an accommodation at an informal meeting, the investigator shall so report to the superintendent and the parties and the complaint file shall be closed, unless the investigator finds evidence that the licensee has violated section 4735.18 of the Revised Code. If the parties fail to reach an accommodation or if the investigator finds evidence of a violation, the hearing examiner shall hold a formal hearing.

(C) Within twenty-five business days after the conclusion of formal hearings, the hearing examiner shall file a report of findings of fact and conclusions of law to the superintendent, the commission, and the parties.

(D) The commissioners shall review the hearing examiner's report and the parties' evidence at the next regularly scheduled commission meeting held at least fifteen business days after receipt of the hearing examiner's report. The commission shall hear the testimony of any party upon request. If the complainant is the Ohio civil rights commission, the complaint shall be reviewed by the commissioners directly upon request.

(E) The commission shall decide whether or not to suspend or revoke the license of the affected licensee for violation of section 4735.18 of the Revised Code within sixty days of the filing of the hearing examiner's report or within sixty days of the filing of an Ohio civil rights commission complaint. The commission shall maintain a transcript of the proceedings and issue a written opinion to all the parties citing its findings and grounds for any action taken. The commission shall notify the complainant and any other party who may have suffered financial loss because of the licensee's violations, that he may sue for recovery under section 4735.12 of the Revised Code.

R.C. 119.07 provides, in pertinent part, as follows:

Except when a statute prescribes a notice and the persons to whom it shall be given, in all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing him of his right to a hearing. Such notice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for such proposed action, the law or rule directly involved, and a statement informing the party that he is entitled to a hearing if he requests it within thirty days of the time of mailing the notice.

. . . .

Whenever a party requests a hearing in accordance with this section and section 119.06 of the Revised Code, the agency shall immediately set the date, time, and place for such hearing and forthwith notify the party thereof. The date set for such hearing shall be within fifteen days, but not earlier than seven days, after the party has requested a hearing, unless otherwise agreed to by both the agency and the party. (Emphasis added.)

Initially, it is a well-settled principle of statutory construction that a specific legislative enactment will prevail over a more general one. State ex rel. Hyter v. Teater, 52 Ohio App. 2d 150, 368 N.E. 2d 854 (1977); Cincinnati v. Bossert Machine Co., 16 Ohio St. 2d 76, 243 N.E. 2d 105 (1968), cert. denied, 394 U.S. 998 (1969); State ex rel. Steller v. Zangerle, 100 Ohio St. 414, 126 N.E. 413 (1919). In fact, R.C. 119.07 specifically provides for an exception "when a statute prescribes a notice and the persons to whom it shall be given." R.C. 4735.051 does, indeed, prescribe notice and specify the persons to whom it shall be given. Since R.C. 4735.051 applies exclusively to real estate license hearings, its more specific language will prevail should its language conflict with the more general provisions of R.C. 119.07. See R.C. 1.51. R.C. 119.07, which sets forth procedures generally protective of due process rights, will apply in all other situations. See R.C. 119.01(A) ("[a]gency" includes "the licensing functions of any . . . department [or] division . . . of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses"); R.C. 119.06 ("opportunity for a hearing shall be given before making the adjudication order," with exceptions not relevant here).

Turning to R.C. 4735.051, I find it apparent that, by enacting this statute, the legislature sought to implement a two-tiered administrative system for the redress of grievances brought by consumers against real estate brokers or salesmen. After lodging the complaint, the consumer may, at his option, request either a formal hearing or an informal meeting. Should the parties fail to reach an accommodation at the informal meeting, or should evidence of a violation be discovered by the investigator, then a formal hearing must be scheduled. The distinction between the informal meeting and a formal hearing is clear; no sanctions may be imposed as a direct result of the informal meeting, but they may be a result of a formal hearing. Since such sanctions may include suspension or revocation of the license to practice, due process protections must be provided to the licensee at the formal hearing. The Supreme Court has consistently held that the right to follow a chosen profession is a liberty and property interest protected by due process. See Board of Regents v. Roth, 408 U.S. 564 (1972). In discussing the need for a hearing in Withrow v. Larkin, 421 U.S. 35, 46 (1975), a case involving the Wisconsin State Examining Board's authority to suspend or revoke licenses of practicing physicians, the Supreme Court stated: "[A] 'fair trial in a fair tribunal is a basic requirement of due process.' This applies to administrative agencies which adjudicate as well as to courts" (citations omitted). See also Hannah v. Larche, 363 U.S. 420, 422 (1960) ("when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process").

The due process safeguards concerning the right to a hearing appear at R.C. 119.07. In Division of Real Estate proceedings conducted pursuant to R.C. Chapter 4735, the general provisions of R.C. 119.07 will apply so long as they are not inconsistent with the specific requirements set forth in R.C. 4735.051. Should there be a conflict, then R.C. 4735.051 will take effect. See R.C. 119.07 (the section will apply "[e]xcept when a statute prescribes a notice and the persons to whom it shall be given. . ."). R.C. 4735.051, however, does not establish a complete procedural framework, and therefore a "binding" of the provisions of R.C. Chapters 4735 and 119 results. See State v. Foreman, 54 Ohio Misc. 31, 376 N.E.2d 987 (1978) (in proceedings conducted pursuant to R.C. Chapter 4509 to enforce Ohio's Financial Responsibility Law, since R.C. Chapter 4509 does not specify the manner of giving notice or the contents thereof, the notice required by R.C. 4509.13 must adhere to the standards set forth in R.C. 119.07, both as to content and manner of service).

R.C. 119.07 sets forth certain requirements for notice of a right to a hearing which must be met prior to the issuance of an agency order revoking or suspending a license.¹ By the terms of R.C. 119.07, failure to give the required notice will invalidate any other order entered pursuant to such a hearing. Therefore, a letter complying with the terms of R.C. 119.07 must be sent to the licensee prior to any formal hearing which the licensing agency convenes.

According to R.C. 119.07, the letter which provides notice of a right to a hearing "shall include the charges or other reasons for such proposed action, the law or rule directly involved, and a statement informing the party that he is entitled to a hearing if he requests it within thirty days of the time of mailing the notice." Once this request is made, the hearing must be held within fifteen but not sooner than seven, days following the request. R.C. 4735.051(B), however, provides that, in Division of Real Estate proceedings, the Division must, within five business days of receipt of the request for a formal hearing, notify the licensee and complainant of the date of the hearing, and that the hearing must be held within twenty business days after notice of hearing is given. The twenty-day period may be extended by fifteen business days for good cause shown. Since R.C. 4735.051 is a specific legislative enactment dealing with Division of Real Estate proceedings, it is my conclusion that, while the due process provisions of R.C. 119.07 regarding the contents of the notice of a right to a hearing must be adhered to, the longer time period allowed for a hearing under R.C. 4735.051 is applicable to proceedings of the Division of Real Estate.

Another apparent discrepancy between R.C. Chapters 119 and 4735 involves the time frame in which the hearing examiner's report must be submitted and reviewed by the agency making the final decision as to license revocation. R.C. 119.09 provides, in pertinent part, as follows:

The referee or examiner shall submit to the agency a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation. . . .

While R.C. 4735.051(C) provides that "[w]ithin twenty-five business days after the conclusion of formal hearings, the hearing examiner shall file a report of findings of fact and conclusions of law to the superintendent, the commission, and the parties," no specific time period for such a filing appears in R.C. 119.09; thus, the twenty-five day provision is clearly applicable. Once the report is filed, however, R.C. 119.09 requires that a copy be served on the licensee within five days, and grants the licensee ten days from the date of receipt to file written objections to the report and recommendation, which objections must be considered by the agency before it acts on the recommendation. R.C. 4735.051(D) states that the Commission must review the hearing examiner's report at its next regularly scheduled meeting held at least fifteen business days after receipt of the report,

¹ Exceptions to this general rule are set forth in R.C. 119.06; such exceptions are not relevant to the situation here under consideration.

and R.C. 4735.051(E) calls for a decision whether to suspend or revoke a real estate license within sixty days of the filing of the hearing examiner's report with the Commission. R.C. 119.09, on the other hand, provides that no recommendation of the hearing examiner shall be approved, modified, or disapproved until ten days after receipt of a copy of such report by the licensee, clearly allowing time for submission of objections by the licensee. I conclude that the requirements of R.C. 119.09 allowing the filing of written objections to the hearing examiner's report and recommendations are applicable to Division of Real Estate proceedings, since no conflicting provision appears in R.C. Chapter 4735. Thus, while the time periods established by R.C. 4735.051 are generally applicable to Division of Real Estate proceedings, the Commission must delay its decision on the hearing examiner's report until at least ten days after receipt of a copy of the report by the licensee, so that objections may be received and considered.

Accordingly, it is my opinion, and you are so advised, that as to complaints filed against licensees subject to regulation by the Ohio Division of Real Estate, the provisions of R.C. Chapter 4735 specifically governing Division of Real Estate proceedings prevail over any conflicting general hearing requirements of R.C. Chapter 119. In proceedings held pursuant to R.C. Chapter 4735, the more specific time provisions of R.C. 4735.051, as they apply to time of hearing and submission of hearing examiner reports, prevail over those articulated in R.C. Chapter 119; however, the due process protections of R.C. Chapter 119 regarding the contents of the letter providing notice of a right to a hearing and the filing and consideration of objections to the hearing examiner's report and recommendations are applicable, since R.C. Chapter 4735 does not speak specifically to those matters.