

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO  
GENERAL DIVISION

WILLIAM MARSHALL :  
 :  
 APPELLANT, : CASE NO. 15 CVF 3650  
 :  
 vs. : JUDGE KIMBERLY COCROFT  
 :  
 OHIO REAL ESTATE :  
 COMMISSION, :  
 :  
 APPELLEE. :

DECISION AND ENTRY

**Cocroft, J.**

This case involves the R. C. 119.12 administrative appeal filed by Appellant, William Marshall, from an Ohio State Real Estate Commission (“Commission”) Adjudication Order mailed April 15, 2015. The Commission adopted the findings of fact and conclusions of law of the hearing examiner and concluded that appellant violated R.C. 4735.18 as set forth in Schedule A. The Commission revoked appellant’s real estate license. The Commission specified in its order that appellant’s license revocation would be effective on May 7, 2015.

On April 29, 2015, appellant filed a Notice of Appeal. Additionally, appellant filed a “Motion Pursuant to Revised Code 119.12 For Suspension of the Order of the Ohio Real Estate Commission Entered On the Journal April 8, 2015.” Appellee’s April 15, 2015 Adjudication Order demonstrates that appellant was convicted of a third degree felony offense on October 25, 2013 in Athens County, in Case No. 12 CR 0009, which is in violation of R.C. 4735.18. On May 18, 2015, this Court denied appellant’s April 29, 2015 motion for a stay.

## STANDARD OF REVIEW

R.C. § 119.12 sets forth the standard of review a common pleas court must follow when reviewing an administrative appeal. R.C. 119.12 provides, in pertinent part:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law.

In *Our Place* the Ohio Supreme Court provided the following definition of reliable, probative and substantial evidence as:

(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.

*Our Place, Inc. v. Ohio Liquor Comm.*, 63 Ohio St.3d 570, 571, (1992).

Once the common pleas court has determined that the administrative agency’s order is supported by reliable, probative and substantial evidence, the court must then determine whether the order is in accordance with law. See R.C. § 119.12. The reviewing court cannot substitute its judgment for the agency’s decision where there is some evidence supporting the decision. See *Harris v. Lewis*, 69 Ohio St. 2d 577, 579, (1982); see also *University of Cincinnati v. Conrad*, 63 Ohio St. 2d 108 (1980).

## APPELLANT’S ASSIGNMENTS OF ERROR

Although not labeled as assignments of error, appellant sets forth the following legal arguments in his brief:

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

C. The Commission's decision to revoke Marshall'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 rights by focusing on facts that were not part of the ultimate felony plea.

D. The Commission's decision to revoke Marshall'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.

In his first legal argument, appellant appears to assert that R.C. 4735.18(A) violates his due process rights by mandating a disciplinary action. R.C. 4735.18(A) provides:

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:

(1) Knowingly making any misrepresentation;

(2) Making any false promises with intent to influence, persuade, or induce;

(3) A continued course of misrepresentation or the making of false promises through agents, salespersons, advertising, or otherwise;

(4) Acting for more than one party in a transaction except as permitted by and in compliance with section 4735.71 of the Revised Code;

(5) Failure within a reasonable time to account for or to remit any money coming into the licensee's possession which belongs to others;

(6) Dishonest or illegal dealing, gross negligence, incompetency, or misconduct;

(7)(a) By final adjudication by a court, a violation of any municipal or federal civil rights law relevant to the protection of purchasers or sellers of real estate or, by final adjudication by a court, any unlawful discriminatory practice pertaining to the purchase or sale of real estate prohibited by Chapter 4112. of the Revised Code, provided that such violation arose out of a situation wherein parties were engaged in bona fide efforts to purchase, sell, or lease real estate, in the licensee's practice as a licensed real estate broker or salesperson;

(b) A second or subsequent violation of any unlawful discriminatory practice pertaining

to the purchase or sale of real estate prohibited by Chapter 4112. of the Revised Code or any second or subsequent violation of municipal or federal civil rights laws relevant to purchasing or selling real estate whether or not there has been a final adjudication by a court, provided that such violation arose out of a situation wherein parties were engaged in bona fide efforts to purchase, sell, or lease real estate. For any second offense under this division, the commission shall suspend for a minimum of two months or revoke the license of the broker or salesperson. For any subsequent offense, the commission shall revoke the license of the broker or salesperson.

(8) Procuring a license under this chapter, for the licensee or any salesperson by fraud, misrepresentation, or deceit;

(9) Having violated or failed to comply with any provision of sections 4735.51 to 4735.74 of the Revised Code or having willfully disregarded or violated any other provisions of this chapter;

(10) As a real estate broker, having demanded, without reasonable cause, other than from a broker licensed under this chapter, a commission to which the licensee is not entitled, or, as a real estate salesperson, having demanded, without reasonable cause, a commission to which the licensee is not entitled;

(11) Except as permitted under section 4735.20 of the Revised Code, having paid commissions or fees to, or divided commissions or fees with, anyone not licensed as a real estate broker or salesperson under this chapter or anyone not operating as an out-of-state commercial real estate broker or salesperson under section 4735.022 of the Revised Code;

(12) Having falsely represented membership in any real estate professional association of which the licensee is not a member;

(13) Having accepted, given, or charged any undisclosed commission, rebate, or direct profit on expenditures made for a principal;

(14) Having offered anything of value other than the consideration recited in the sales contract as an inducement to a person to enter into a contract for the purchase or sale of real estate or having offered real estate or the improvements on real estate as a prize in a lottery or scheme of chance;

(15) Having acted in the dual capacity of real estate broker and undisclosed principal, or real estate salesperson and undisclosed principal, in any transaction;

(16) Having guaranteed, authorized, or permitted any person to guarantee future profits which may result from the resale of real property;

(17) Having advertised or placed a sign on any property offering it for sale or for rent without the consent of the owner or the owner's authorized agent;

- (18) Having induced any party to a contract of sale or lease to break such contract for the purpose of substituting in lieu of it a new contract with another principal;
- (19) Having negotiated the sale, exchange, or lease of any real property directly with a seller, purchaser, lessor, or tenant knowing that such seller, purchaser, lessor, or tenant is represented by another broker under a written exclusive agency agreement, exclusive right to sell or lease listing agreement, or exclusive purchaser agency agreement with respect to such property except as provided for in section 4735.75 of the Revised Code;
- (20) Having offered real property for sale or for lease without the knowledge and consent of the owner or the owner's authorized agent, or on any terms other than those authorized by the owner or the owner's authorized agent;
- (21) Having published advertising, whether printed, radio, display, or of any other nature, which was misleading or inaccurate in any material particular, or in any way having misrepresented any properties, terms, values, policies, or services of the business conducted;
- (22) Having knowingly withheld from or inserted in any statement of account or invoice any statement that made it inaccurate in any material particular;
- (23) Having published or circulated unjustified or unwarranted threats of legal proceedings which tended to or had the effect of harassing competitors or intimidating their customers;
- (24) Having failed to keep complete and accurate records of all transactions for a period of three years from the date of the transaction, such records to include copies of listing forms, earnest money receipts, offers to purchase and acceptances of them, records of receipts and disbursements of all funds received by the licensee as broker and incident to the licensee's transactions as such, and records required pursuant to divisions (C)(4) and (5) of section 4735.20 of the Revised Code, and any other instruments or papers related to the performance of any of the acts set forth in the definition of a real estate broker;
- (25) Failure of a real estate broker or salesperson to furnish all parties involved in a real estate transaction true copies of all listings and other agreements to which they are a party, at the time each party signs them;
- (26) Failure to maintain at all times a special or trust bank account in a depository located in this state. The account shall be noninterest-bearing, separate and distinct from any personal or other account of the broker, and, except as provided in division (A)(27) of this section, shall be used for the deposit and maintenance of all escrow funds, security deposits, and other moneys received by the broker in a fiduciary capacity. The name, account number, if any, and location of the depository wherein such special or trust account is maintained shall be submitted in writing to the superintendent. Checks drawn on such special or trust bank accounts are deemed to meet the conditions imposed by

section 1349.21 of the Revised Code. Funds deposited in the trust or special account in connection with a purchase agreement shall be maintained in accordance with section 4735.24 of the Revised Code.

(27) Failure to maintain at all times a special or trust bank account in a depository in this state, to be used exclusively for the deposit and maintenance of all rents, security deposits, escrow funds, and other moneys received by the broker in a fiduciary capacity in the course of managing real property. This account shall be separate and distinct from any other account maintained by the broker. The name, account number, and location of the depository shall be submitted in writing to the superintendent. This account may earn interest, which shall be paid to the property owners on a pro rata basis.

Division (A)(27) of this section does not apply to brokers who are not engaged in the management of real property on behalf of real property owners.

(28) Having failed to put definite expiration dates in all written agency agreements to which the broker is a party;

(29) Having an unsatisfied final judgment or lien in any court of record against the licensee arising out of the licensee's conduct as a licensed broker or salesperson;

(30) Failing to render promptly upon demand a full and complete statement of the expenditures by the broker or salesperson of funds advanced by or on behalf of a party to a real estate transaction to the broker or salesperson for the purpose of performing duties as a licensee under this chapter in conjunction with the real estate transaction;

(31) Failure within a reasonable time, after the receipt of the commission by the broker, to render an accounting to and pay a real estate salesperson the salesperson's earned share of it;

(32) Performing any service for another constituting the practice of law, as determined by any court of law;

(33) Having been adjudicated incompetent for the purpose of holding the license by a court, as provided in section 5122.301 of the Revised Code. A license revoked or suspended under this division shall be reactivated upon proof to the commission of the removal of the disability.

(34) Having authorized or permitted a person to act as an agent in the capacity of a real estate broker, or a real estate salesperson, who was not then licensed as a real estate broker or real estate salesperson under this chapter or who was not then operating as an out-of-state commercial real estate broker or salesperson under section 4735.022 of the Revised Code;

(35) Having knowingly inserted or participated in inserting any materially inaccurate term in a document, including naming a false consideration;

(36) Having failed to inform the licensee's client of the existence of an offer or counteroffer or having failed to present an offer or counteroffer in a timely manner, unless otherwise instructed by the client, provided the instruction of the client does not conflict with any state or federal law;

(37) Having failed to comply with section 4735.24 of the Revised Code.

R.C. 4735.18(A) is a comprehensive list of unacceptable conduct which places a licensee on notice. It describes the unacceptable conduct in detail, and mandates the Commission to impose a disciplinary sanction for such conduct. The conviction of a felony is set forth in the first paragraph of R.C. 4735.18(A), and places a licensee on notice that this conduct will be sanctioned.

Appellant is arguing that it is unconstitutional for a licensee, who is convicted of a felony, to be automatically subject to discipline, regardless of the crime or the circumstances. Appellant asserts that any hearing before the Commission becomes merely an opportunity for mitigation, and an appeal for a lesser sanction. Appellant asserts that this is prejudicial to any licensee whose livelihood depends on his/her having a valid license. Appellant does not address the fact that he failed to self-report the felony conviction as required by R.C. 4735.13(C).

The undisputed facts are as follows:

The record demonstrates that appellant pled guilty to a third degree felony of possession. He was arrested with 2,243 grams of marijuana and \$460.00 U.S. currency. He was charged with a third degree trafficking offense, but pled guilty to a third degree charge of possession. This conduct violates R.C. 4735.18(A). January 16, 2015, Tr. 1-22; see also Administrative Hearing Officer's Report and Recommendation issued February 10, 2015 and April 8, 2015, Tr. 1- 32.

The record reflects that at the administrative hearing, appellant was represented by counsel, and that he stipulated to the evidence which was admitted at the hearing. The record reflects that Appellant is to remain on community control (probation) through 2018. April 8, 2015, Tr. 1-32. Thus, there is reliable, probative and substantial evidence that appellant violated R.C. 4735.18(A), and this evidence is undisputed. January 16, 2015, Tr. 1-24: Stipulated Exhibits A through E.

Appellant challenges the constitutionality of R.C. 4735.18(A). Under Ohio law, a statute enacted by the General Assembly enjoys a strong presumption of constitutionality. *Coldwell Banker Residential Real Estate Services, Inc. v. Bishop*, 26 Ohio App 3d 149 (1985). Real estate licensees, like attorneys and physicians, are subject to government regulation. The state has a valid interest in promoting character, honesty, and intellectual competence of real estate licensees. The General Assembly established the Ohio Real Estate Commission, and it is comprised of experts with the responsibility of regulating the industry and adopting canons of ethics. R.C. 4735.03. Like other professionals, a person holding a real estate license is held to a higher standard of competency and fairness than is a lay member of the public in the market place.

Thus, obtaining and maintaining a real estate license in Ohio is a privilege, not a right. *Kiko v. Ohio Dept. of Commerce*, 48 Ohio St.3d 74 (1990). It is well established that the state has a valid interest in licensing and maintaining the licenses of realtors who are not involved in criminal behavior; and promoting the character, honesty and intellectual competence of persons holding real estate licensees.



R.C. 4735.18(A) provides that a sanction shall be imposed for any licensee convicted of a felony. A reviewing court may not modify a sanction authorized by statute. The available sanctions that the Commission shall impose are set forth in R.C. 4735.051(I):

The commission may impose the following sanctions upon a licensee for a violation of section 4735.18 of the Revised Code:

- (1) Revoke a license issued under Chapter 4735. of the Revised Code;
  - (2) Suspend a license for a term set by the commission;
  - (3) Impose a fine, not exceeding two thousand five hundred dollars per violation;
  - (4) Issue a public reprimand;
  - (5) Require the completion of additional continuing education course work. Any continuing education course work imposed pursuant to this section shall not count toward the continuing education requirements set forth in section 4735.14 of the Revised Code
- All fines imposed pursuant to division (I)(3) of this section shall be credited to the real estate recovery fund, which is created in the state treasury under section 4735.12 of the Revised Code.

As stated, there is a strong presumption of constitutionality that cloaks legislative acts. Moreover, any assertion of a legislative act’s incompatibility with a constitutional provision must be established beyond a reasonable doubt before the legislation is deemed as unconstitutional. See *Pack v. Cleveland*, 1 Ohio St. 3d 129, 134 (1982); see also *State ex rel Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St. 3d 354 (1992). The phrase “due process” expresses the requirement of “fundamental fairness.” In defining the process necessary to ensure “fundamental fairness,” the United States Supreme Court has recognized that the clause does not require that the procedures used to guard against an erroneous deprivation be so comprehensive as to preclude any possibility of error, and in addition, the Supreme Court has emphasized that the marginal gains from affording an additional procedural safeguard may be outweighed by the societal cost of providing such a safeguard. Thus, an appellant must make a showing of “identifiable prejudice.” See *Ghassan Haj-Hamed v. State Medical Board*, 2007 Ohio App. LEXIS 2335.

The record demonstrates that once the appellant was placed on notice, he was given an

opportunity to request a hearing. The record reflects that the appellant had an opportunity to be heard in the hearing that was held on January 16, 2015 and before the Commission on April 8, 2015. The record reflects that at both of these hearings, appellant was represented by counsel. Clearly, there is no issue regarding procedural due process since the appellant had notice and an opportunity to be heard.

Moreover, the record demonstrates that appellant's counsel stipulated to the evidence admitted into the record at the hearing. The appellant is asserting that it is unconstitutional for the state of Ohio to mandate that convicted felons holding real estate licenses be automatically disciplined. The appellant has not met his burden of proof and thus, the record demonstrates that he has not provided any legal authority to support this argument, nor has he demonstrated an identifiable prejudice. Accordingly, appellant's first legal argument is not well-taken and is hereby **OVERRULED.**

In his second legal argument, appellant asserts that the Commission's decision to revoke his license pursuant to 4735.13(C) is not supported by reliable, probative and substantial evidence and is contrary to law in that it violates the Respondent's rights by focusing on facts that were not part of the ultimate felony plea.

R.C. 4735.13(C) provides as follows:

(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.
- (3) The licensee is found to have violated any federal, state, or municipal civil rights law pertaining to discrimination in housing.
- (4) The licensee is found to have engaged in a discriminatory practice pertaining to

housing accommodations described in division (H) of section 4112.02 of the Revised Code.

(5) The licensee is the subject of an order by the department of commerce, the department of insurance, or the department of agriculture revoking or permanently surrendering any professional license, certificate, or registration.

(6) The licensee is the subject of an order by any government agency concerning real estate, financial matters, or the performance of fiduciary duties with respect to any license, certificate, or registration.

If a licensee fails to notify the superintendent within the required time, the superintendent immediately may suspend the license of the licensee.

Any court that convicts a licensee of a violation of any municipal civil rights law pertaining to housing discrimination also shall notify the Ohio civil rights commission within fifteen days of the conviction.

The record reflects that appellant was indicted for a trafficking offense, a third Degree felony. The record also reflects that appellant was in possession of 2,245 grams of marijuana and \$460.00 when he was arrested in January 2012. In October 2013, he was represented by counsel when he pled guilty to possession of marijuana, a third degree felony. Appellant did not report this felony conviction to the Commission as required by R.C. 4735.13(C). Appellant was represented by counsel at his January 16, 2015 hearing and before the Commission on April 8, 2015. These facts have not been disputed by appellant.

A common pleas court's review of an administrative order in an R.C. 119.12 appeal involves some deference to the trier of facts determinations. The common pleas court should normally defer to the determination of the administrative agency as to the weight to be given the evidence and the credibility of the witnesses. In the case *sub judice*, appellant never disputed the facts, and he has not provided any legal authority to substantiate his argument. The fact that appellant was indicted for trafficking, and subsequently pled guilty to possession, does not change the ultimate fact that he was convicted of a felony. Moreover, the fact is undisputed that

appellant will remain on community control (probation) until 2018. Accordingly, appellant's second legal argument is not well-taken and is hereby **OVERRULED**.

In his third legal argument, appellant asserts that the Board's Order violates his constitutional guarantees afforded by equal protection. Appellant seems to assert that he was denied equal protection under the law since he was treated differently from other "similarly situated" applicants. Assumably, the "class" that appellant defines as "similarly situated" are persons who have felony convictions and hold real estate licenses in the state of Ohio. Appellant has not provided any case law or other legal authority to support his contention that this "class" of individuals is afforded 14<sup>th</sup> amendment protection.

A thorough review of the record demonstrates that Appellant was not denied equal protection under the law. The 14<sup>th</sup> amendment equal protection clause requires the states to give similarly situated persons or classes of people similar treatment under the law. Equal protection does not require that all persons be dealt with identically, but it does require that any distinction made have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold* 383 U.S. 107, 111 (1966). Equal protection means that legislation that discriminates must have a rational basis for doing so. If the legislation affects a fundamental right or involves a suspect classification, then the Court would be required to apply a strict scrutiny test.

Under the facts *sub judice*, Appellant has not asserted a fundamental right nor has he asserted that he belongs to a suspect class requiring a strict scrutiny analysis or an intermediate level of scrutiny. Therefore the rational basis analysis would apply. When the rational basis analysis is applied, great deference is paid to the state, with the only requirement being that the state show that the differential treatment is rationally related to some legitimate state interest. See *Conley v. Shearer*, 64 Ohio St. 3d 284, 289 (1992).

Under the facts before the Court, it is clear that the state has a legitimate interest in protecting the public from licensed realtors with felony convictions. Additionally, the Commission only grants licenses to persons who, in its discretion, are qualified, have met all the statutory requirements for such licensure, and adhere to all regulations.

The record demonstrates the Commission’s primary concern was that appellant would be on community control (probation) until 2018. Appellant has not provided any evidence indicating that any other licensee was treated differently under a similar fact pattern. Thus, his assertion lacks any basis in fact demonstrating that the Board intentionally discriminated against him because of his membership in a particular class. *Meyers v. Columbus Civil Serv. Comm.*, 2008-Ohio-3521.

Accordingly, Appellant’s third legal argument is not well-taken and is hereby **OVERRULED**.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

**(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

**THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY. THIS IS A FINAL APPEALABLE ORDER.** Pursuant to Civil Rule 58, the Clerk of Court shall serve notice upon all parties of this judgment and its date of entry.

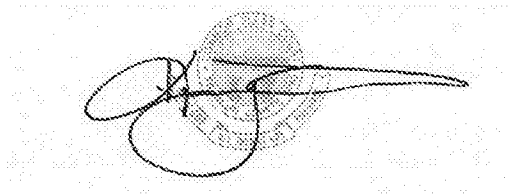
IT IS SO ORDERED.

Copies to all parties registered for e-filing

Franklin County Court of Common Pleas

**Date:** 09-16-2015  
**Case Title:** WILLIAM MARSHALL -VS- OHIO REAL ESTATE COMMISSION  
**Case Number:** 15CV003650  
**Type:** ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read 'K. Cocroft', is written over a circular, textured stamp. The signature is fluid and cursive.

/s/ Judge Kimberly Cocroft

Court Disposition

Case Number: 15CV003650

Case Style: WILLIAM MARSHALL -VS- OHIO REAL ESTATE  
COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes