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2015 NOV -3 AM 9:11
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IN THE COMMON PLEAS COURT OF FAIRFIELD COUNTY
FAIRFIELD COUNTY, OHIO

JACOB D. FLORA,	:	
	:	
Appellant,	:	**Case No. 14CV879**
	:	
v.	:	**Judge Berens**
	:	
OHIO REAL ESTATE COMMISSION,	:	**ENTRY REGARDING APPEAL OF ADJUDICATION ORDER**
	:	
Appellee.	:	

STATEMENT OF THE CASE

This matter is before the Court on Appellant Jacob D. Flora's Appeal of the Order of the Ohio Real Estate Commission filed April 23, 2015. Appellee Ohio Real Estate Commission filed a Motion to Extend Time to File Appellee's Brief. On May 12, 2015 the Court granted Appellee's extension and ordered that (1) Appellee file its merit brief no later than May 27, 2015 and (2) Appellant file its reply brief no later than seven days thereafter, to wit, June 3, 2015. Appellee filed its Brief on May 27, 2015. Appellant did not file its Reply Brief until June 10, 2015,[1] and Appellant provided no reason why the Court should accept its seven-day late Reply in contravention of the Court's May 12, 2015 Order.[2] Therefore, the Court does not consider Appellant's Reply.

Following a hearing by the Ohio Real Estate Commission (the "Commission") on December 10, 2014, the Commission revoked Appellant's real estate license.[3] Appellant filed his Notice of Appeal on December 29, 2014. The Court finds that all issues have been fully briefed and are ripe for review.

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[1] Appellant filed a second Reply Brief, which appears to be identical to the first, on June 15, 2015.
[2] *See also* Civ.R. 6(C) stating in part "unless otherwise provided by these rules, by local rule, or by order of the court . . . a movant's reply may be served within seven days after service of the response to the motion."
[3] The decision was reached on December 10, 2014 and mailed to Appellant on December 17, 2014. Therein, Appellant's real estate license was scheduled to be revoked on January 8, 2015.

LAW AND ANALYSIS

R.C. 119.12 permits any party, who is adversely affected by an order of an agency issued pursuant to an adjudication revoking that person's license, to appeal the order to the court of common pleas of the county where the licensee's place of business is located or the licensee is a resident. R.C. 119.12 sets forth the procedure to be followed regarding any appeal.

> *The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.*

R.C. 119.12.

> *The evidence required by R.C. 119.12 can be defined 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.*

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 589 N.E.2d 1303, 1305 (1992).

The General Assembly authorizes the Commission to oversee the sanctioning of licensed real estate brokers and salespersons. The Commission consists of four licensed real estate brokers, with ten or more years of experience, and one person from the general public. As such, "[c]ourts must give due deference to interpretation of the technical and ethical requirements of a profession provided by its administrative body." (Citations omitted.) *Riffe v. Ohio Real Estate Appraiser Bd.*, 9th Dist. Summit No. 18966, 130 Ohio App. 3d 46, 719 N.E.2d 587, 589 (1998); *Pons v. Ohio State Med. Bd.*, 1993-Ohio-122, 66 Ohio St. 3d 619, 614 N.E.2d 748, 749.

The 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." R.C. § 4735.18(A). Pursuant to R.C. § 4735.051(I)(1), a commission has the authority to revoke a license issued under R.C. 4735.

> *R.C. 119.12 requires a reviewing common pleas court to conduct two inquiries: a hybrid factual/legal inquiry and a purely legal inquiry. As to the first inquiry, the common pleas court must give deference to the agency's resolution of evidentiary conflicts, but the findings of the agency are by no means 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, and necessary to its determination, the court may reverse, vacate*, or modify the administrative order. (Citations omitted.)

Bartchy v. State Bd. of Edn., 2008-Ohio-4826, ¶ 37, 120 Ohio St. 3d 205, 212-13, 897 N.E.2d 1096, 1106. "As to the second, legal part of the common pleas court's inquiry, [a]n agency adjudication is like a trial, and while the reviewing court must defer to the lower tribunal's findings of fact, it must construe the law on its own." (Citation omitted.) *Id.* at ¶ 38; *Wells v. Ohio Dept. of Job and Family Serv.*, 5th Dist. Fairfield No. 2005-CA-86, 2006-Ohio-4443, ¶ 18. (The trial court conducts a de novo review of questions of law.).

Appellant was a licensed realtor for over 26 years. This was Appellant's first time before the Commission for any alleged misconduct. Appellant readily acknowledges that he was convicted of a felony, to wit, tampering with evidence, a felony of the third degree. Appellant pled guilty and was sentenced to five years of community control. There is no dispute that the felony arose out of actions unrelated to Appellant's position as a realtor. Nor is there any dispute that the Commission has authority to revoke a license pursuant to R.C. 4735.18.

Appellant asserts that the penalty, to wit, license revocation, is not supported by substantial, probative, and reliable evidence because (1) the Assistant Attorney General never

requested revocation of Appellant's license; (2) this I was Mr. Flora's first time before the Commission for discipline; (3) the actions involved in the felony were unrelated to his position as a realtor; and (4) Mr. Flora cooperated with the process and took the proactive step of informing his clients about the situation. Moreover, Appellant asserts that the Commission inappropriately conflated Appellant's actions on the night of the felony with his role as a realtor by expressing feelings and inferences that were not supported by the record. He asserts that the Commission improperly failed to weigh Appellant's mitigating evidence and testimony in meting out the penalty. Appellant also asserts that the Commission failed to consider any alternatives to license revocation despite doing so when other realtors were convicted of felonies.

Finally, Appellant raises challenges under the Equal Protection Clause and Due Process Clause. Appellant alleges that there is no rational basis to uphold this differential treatment by the Commission and his due process rights were violated because the Commission did not provide Mr. Flora the opportunity to have his evidence fairly considered because he had already been found to have been in violation—the hearing was merely to determine what sanction to apply.

Appellee counters that R.C. 4735.18 requires the Commission to impose disciplinary sanctions, regardless of whether the accused was acting in his capacity as a licensed realtor, because Appellant was convicted of a felony. R.C. 4735.051(I)(1) specifically authorizes the Commission to revoke an individual's license upon a finding of a violation. Next, Appellee asserts that Appellant waived his arguments regarding due process and equal protection because he did not raise them during the administrative process. Appellee contends that even if the Court considered Appellant's claims, a rational basis review shows that his equal protection rights were not violated: the State has a valid interest in promoting the character of real estate brokers and

other individuals with felonies had their licenses revoked. Appellee further contends that Appellant's due process arguments are without merit as there is nothing in the record to show that the Commissioners failed to consider other sanctions. Appellee asserts that although Appellant was given only fifteen minutes to present his case before the Commission, he had the opportunity to present whatever evidence he chose to before the hearing examiner.

1. The Commission Did Not Lack Reliable, Probative, And Substantial Evidence To Impose A Sanction

Although this was Appellant's first disciplinary issue in 26 years of practice and the felony was unrelated to the real estate profession, R.C. 4735.18—the section governing disciplinary actions of real estate brokers—clearly states that the Commission "shall impose disciplinary sanctions upon any licensee . . . found to have been convicted of a felony." The statute does not require that the felony be committed in the licensee's professional capacity. Additionally, R.C. 4735.18 uses the word *shall*, so the Commission is required to impose some disciplinary sanction.

Appellant readily admits to having pled guilty to the offense of tampering with evidence, a felony of the third degree. The Commission was required to impose a disciplinary sanction, and the Commission had the authority, under R.C. 4735.051(I)(1), to revoke Appellant's real estate license. Therefore, because Appellant was convicted of a felony, the Commission's decision to revoke Appellant's license was supported by reliable, probative, and substantial.

The Commission had the authority to revoke Appellant's license and was required by law to impose some disciplinary sanction. However, Appellant asserts that the sanction—Appellant's real estate license revocation—was not supported by reliable, probative, and substantial evidence based upon the mitigating evidence presented and the inaccurate comments made by the Commission about Appellant's felony. Appellant appears to argue that the language of R.C.

119.12—"[t]he court may affirm the *order* of the agency"—should be read in a manner so as to require that the Court make two independent findings: (1) a finding of violation under R.C. 4735.18(A) that is supported by reliable, probative, and substantial evidence; and (2) a finding that the sanction be supported by reliable, probative, and substantial evidence.

Appellant provides no support for the assertion that the Commission's sanction is subject to review by the Court. Appellant provides no support for the assertion that the Court must make a finding that the sanction must be independently reviewed by the Court to ensure the sanction is supported by reliable, probative, and substantial evidence. Appellant's reading of the statute—that an *order* refers to both the violation as well as well as the sanction imposed—is simply not supported by Ohio law.

The Court finds that the Commission's order—e.g. its "verdict" as to whether a violation occurred—was supported by reliable, probative, and substantial evidence: Appellant was convicted of a felony so the Commission must impose some sanction. However, the Court "is precluded from interfering or modifying the penalty which the agency imposed, so long as such penalty is authorized by law." *O'Wesney v. State Bd. of Registration For Prof'l Engineers & Surveyors*, 5th Dist. Stark No. 2009-CA-00074, 2009-Ohio-6444, ¶ 72; *DeBlanco v. Ohio State Medical Bd.*(1992), 78 Ohio App.3d 194, 604 N.E.2d 212, 217 (citing *Henry's Cafe, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233, 10 O.O.2d 177, 163 N.E.2d 678).[4]

"[C]ourts have no power to review penalties meted out by the commission. Thus, we have little or no ability to review a penalty even if it seems on the surface to be unreasonable or

[4] "Unquestionably, the Court of Common Pleas may reverse, vacate or modify an order of an agency unless it finds that the order is supported by reliable, probative and substantial evidence, but, where it makes such a finding, it can only affirm and cannot reverse, vacate or modify." (Footnote omitted.) *Henry's Cafe, Inc.* at 680.

unduly harsh." (Citation omitted.) *O'Wesney* at ¶ 73.[5] Moreover, courts of common pleas are "not empowered to modify an order of the board on the ground of abuse of discretion. . . . The power of the Common Pleas Court to modify an order of an agency . . . is limited to the grounds set forth in Section 119.12." *Henry's Cafe, Inc.* at 681. Therefore, while the Court understands Appellant's argument regarding the harshness of the sanction, the Court is without authority to modify the sanction and finds that the Commission's order was supported by reliable, probative, and substantial evidence.

2. The Commission Did Not Violate Appellant's Equal Protection Rights

The Court next examines Appellant's equal protection challenge. As an initial matter, Appellant did not waive his right to raise this argument The Commission had not yet issued its order at the time of the hearing so any allegations of a violation would have been premature: no alleged injury occurred until the adjudication order was issued.

"Under an equal protection analysis, an administrative code section is subject to a rational basis analysis, and distinctions are invalidated only where they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." (Citation omitted.) *LTV Steel Co. v. Indus. Comm'n*, 10th Dist. Franklin No. 00AP-469, 140 Ohio App. 3d 680, 748 N.E.2d 1176, 1184-85 (2000).

> *In general, a person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual. . . . A 'class of one,' however, may appropriately maintain an equal protection claim where the plaintiff alleges both that the state treated the plaintiff differently from others similarly situated and that no rational basis exists for such difference in treatment. . . .[A] plaintiff must produce evidence that the relevant comparison employees are similarly situated in all relevant respects. [Once a showing is*

[5] "Perhaps the time to reconsider *Henry's Café* has arrived, but the Supreme Court of Ohio must be the court to do that reconsideration. We, as an intermediate appellate court, are required to follow the syllabus of *Henry's Café* unless or until such reconsideration occurs." (Citation omitted.) *O'Wesney* at ¶ 73.

> *made], a plaintiff carries that burden either by negating every conceivable basis which might support the government action or by demonstrating that the challenged government action was motivated by animus or ill-will.*

(Citations omitted.) *Meyers v. Columbus Civ. Serv. Comm.*, 10th Dist. Franklin No. 07AP-958, 2008-Ohio-3521, ¶¶ 18-19.

Because felony status is not a suspect or quasi-suspect class and the right to hold a realtor's license is not a natural or fundamental right, Appellant's challenges are subject to the rational basis test and the burden is on Appellant to show that the Commission's application of R.C. 119 is not rationally related to a legitimate government purpose. Appellant asserts that the Commission's authority to conduct a case-by-case analysis as to whether it will revoke the license of an individual convicted of a felony violates the Equal Protection Clause. Specifically, Appellant contends that the differential sanctioning of those who are convicted of different felonies is not rationally related to a legitimate government purpose. Because Appellant does not assert that his class—convicted felon—caused him to be treated differently, Appellant raises a "class of one" Equal Protection Clause claim whereby he asserts that he was treated differently than other similarly situated convicted felons.

Appellant's equal protection arguments are without merit because he fails to show that he was similarly situated to others sanctioned by the Commission. Appellant fails to identify a single case where the Commission failed to revoke a realtor's real estate license after being convicted of a third degree felony under similar circumstances. In fact, the only other third degree felony cited by Appellant involved a situation in which the individual was convicted of a felony prior to receiving his real estate license. In the matter *sub judice*, Appellant had his real estate license when he committed the felony. Therefore, Appellant has not shown that he was similarly situated to the only other realtor convicted of a third degree felony cited by Appellant.

Moreover, Appellee identified over a dozen individuals in which the Commission had revoked their respective realtor's license[6] thereby demonstrating that license revocation is not an uncommon sanction.

Although Appellant fails to show that he was similarly situated to other realtors who did not have their license revoked, he further fails to either "negate every conceivable basis which might support the government action" or demonstrate that the "government action was motivated by animus or ill-will." *Meyers* at ¶ 19. First, Appellant only argues the sanction is excessive without making any attempt to negate any conceivable bases upon which the Commission could have based its decision. Second, Appellant has not shown, or even argued, that the Commission's decision was motivated by animus or ill-will, as required by a class of one equal protection claim. *See Meyers* at ¶ 19. Therefore, Appellant's equal protection arguments are not well-taken.

3. The Commission Did Not Violate Appellant's Due Process Rights

To comport with due process, an individual must be afforded notice and a hearing before a license to practice a profession may be revoked. *Jewell v. McCann* (1917), 95 Ohio St. 191, 116 N.E. 42. "Thus, to comport with due process requirements, R.C. Chapter 119 requires effective notice and a meaningful opportunity to be heard." (Citation omitted.) *Chirila v. Ohio State Chiropractic Bd.*, 10th Dist. Franklin No. 00AP-633, 145 Ohio App. 3d 589, 763 N.E.2d 1192, 1196 (2001). "There is no doubt that due process requires administrative hearings to be conducted in a fair and impartial manner." *Baughman v. Dept. of Pub. Safety Motor Vehicle Salvage,* 4th Dist. No. 96CA2410, 118 Ohio App.3d 564, 693 N.E.2d 851, 856.

> *In the absence of evidence to the contrary, public officers, administrative officers and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully.*

[6] The Court notes that Appellee did not specifically identifying the factual situations of these revocations so these revocations are presumed to be under different circumstances than Appellant.

State ex rel. Skaggs v. Brunner, 2008-Ohio-6333, 120 Ohio St. 3d 506, 515, 900 N.E.2d 982, ¶ 51.

Appellant contends that he did not have the opportunity to have his evidence considered by the Commission and the Commission did not consider any penalties apart from revocation. Appellant asserts that the fifteen-minute hearing was insufficient to present all of his evidence. Appellee counters that Appellant was advised of his rights and the potential penalties. Appellee notes that nothing prevented Appellant from making a record before the hearing examiner, and Appellant chose to submit his case to the hearing examiner based on stipulated facts and exhibits.

Appellant was given a second opportunity to present his case before the Commission. Although this opportunity lasted only fifteen minutes and limitations were placed on his presentation of evidence (e.g. he was not permitted to present the live testimony of Marianne Urse "Ms. Urse") Appellant himself was given the opportunity to be heard. The Commission considered the hearing examiner's report and all exhibits submitted in advance of the hearing, including a letter from Ms. Urse illustrating her thoughts on the situation and Appellant's sanction.[7]

Appellant does not dispute that he was given the opportunity for a formal hearing before a hearing examiner. He does not dispute that he had the opportunity to speak before the Commission. Although the hearing examiner was not tasked with recommending a penalty to the Commission, Appellant was free to present whatever relevant matters he wanted on the record.

[7] The Court notes that Ms. Urse's letter reflects upon the night for which Appellant was charged with a felony. In the letter, which was read at Appellant's felony sentencing hearing, she makes several comments relating to Appellant's anger and her wish that he be granted leniency: "[I] exaggerated the threat that Dave made to me;" "there was a reason why Dave was so angry with me that evening;" Appellant "may have overacted and the fight was quite wicked;" and Appellant should be granted "leniency." Exhibit R., pp. 1-3.

Appellant chose to submit his case to the hearing examiner without objection, based upon stipulated facts and exhibits and without any additional briefing or argument.

Appellant fails to cite any authority for the proposition that due process requires that he be permitted to present witness testimony at the commission hearing when he already had the opportunity for a full hearing before the hearing examiner. Appellant was given the opportunity to be heard during his testify before the Commission. Moreover, Appellant was permitted to enter into evidence 20 letters in support of his character, including letters from Appellant's friends, wife, daughter, long-time acquaintances, business associates, and the victim in his criminal case—Ms. Urse. Thus, while Ms. Urse was not given the opportunity to testify in person, the record reveals that the Commission had the opportunity to hear her thoughts on the matter, in addition to the many others who provided letters. Transcript, pp. 7 and 10.

The Court notes that Appellant's attorney, Kort Gotterdam, ("Mr. Gatterdam") informed the Commission that he told Ms. Urse that it was not necessary for her to come to the hearing as the Commission already received her letter discussing the incident. *Id.* at 10. Moreover, Mr. Gatterdam inquired whether "the Panel would like to hear from Ms. Urse . . . or, if not, Mr. Flora would be happy to make a statement. . . ." *Id.* at 11. Not only did the Commission have the opportunity to consider Ms. Urse's written thoughts on the matter, they also heard Mr. Gotterdam's assertion that Ms. Urse "would be mortified if she though David Flora would lose his real estate license." *Id.* Additionally, Mr. Gotterdam never insisted that Ms. Urse be permitted to speak, he only inquired if the Commission wished to hear more from Ms. Urse. In fact, Mr. Gotterdam told Ms. Urse that she did not need to be at the hearing because the Commission already had a letter explaining her position.

After reviewing the record and the exhibits submitted therein, the Court finds that Appellant has failed to provide evidence that either the hearing held by the Commission or the hearing before the hearing examiner was conducted in an unlawful manner. Moreover, Appellant failed to demonstrate that either hearing was conducted in an unfair and partial manner. For the reasons stated above, Appellant has failed to show that his due process rights were violated.

CONCLUSION

After considering the entire record and the arguments exhibits of the parties, the Court finds that the order is supported by reliable, probative, and substantial evidence. Therefore, the Court **AFFIRMS** the Adjudication Order of the Ohio Real Estate Commission. The record supports the Commission's finding that Appellant pled guilty to a felony, thus, authorizing the Commission to sanction Appellant through an approved sanction, to wit, license revocation. Therefore, the Court **OVERRULES** Appellant's request that the Court conduct a hearing for the presentation of additional evidence.

IT IS SO ORDERED.

Judge Richard E. Berens

Copies to:

Kort Gatterdam, Esq., 280 Plaza, Suite 1300, 280 North High St., Columbus, OH 43215
Ohio Division of Real Estate and Professional Licensing, 77 South High St., 20th Fl., Columbus, OH 43215-6133
Summer Moses, Esq. Attorney General's Office, 30 East Broad St., 26th Fl., Columbus, OH 43215