

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

KENNETH WIGHTMAN :
 :
APPELLANT, : **CASE NO. 15 CVF 10548**
 :
vs. : **JUDGE KIMBERLY COCROFT**
 :
OHIO REAL ESTATE :
COMMISSION, OHIO DEPARTMENT :
OF COMMERCE, DIVISION OF :
REAL ESTATE & PROFESSIONAL :
LICENSING :
 :
APPELLEE. :

DECISION AND ENTRY

Cocroft, J.

This case involves the R. C. 119.12 administrative appeal filed by Appellant, Kenneth Wightman, from an Ohio State Real Estate Commission (“Commission”) Adjudication Order mailed November 10, 2015. The Commission adopted the findings of fact and conclusions of law of the Hearing Officer, and concluded, in relevant part, that Appellant “Kenneth Wightman is found to have violated R.C. 4735.18 as set forth in Schedule A of the Notification of Formal Hearing and the penalty imposed is as follows:

Count (1)(A): Completion of 3 hours of Ethics and Completion of 3 hours of Core Law.”

November 10, 2015 Adjudication Order.

On November 24, 2015, Appellant filed a Notice of Appeal. On January 27, 2016, the Court granted the Agreed Entry and Order of Stay submitted by the parties.

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

Appellant sets forth the following issues and errors in his brief:

- A. The Ohio Real Estate Commission and the Ohio Division of Real Estate and Professional Licensing were without jurisdiction to proceed with an administrative hearing and issuance of an adjudication order in the proceedings below.
- B. The administrative proceedings below violated Mr. Wightman’s substantive and procedural due process rights.

1. The charge at issue fails to provide due notice of the charge and facts upon which it is based, and is insufficient as a matter of law to support a violation of R.C. 4735.18, based upon R.C. 4735.67(A).
 2. The Ohio Division of Real Estate and Professional Licensing failed to comply with the time limits within R.C. 4735.051(D) thereby resulting in a loss of jurisdiction to proceed.
 3. The Ohio Real Estate Commission failed to review the matter within the time set forth in R.C. 4735.051, following issuance of the hearing examiner's report.
 4. The legal advocate arguing against Mr. Wightman before the hearing examiner and the Ohio Real Estate Commission in the proceedings below also served as legal counsel for the hearing examiner and the Ohio Real Estate Commission in then pending legal proceedings between them in (sic) Mr. Wightman.
- C. Action taken by the Ohio Real Estate Commission in this matter was the product of discussions and deliberations pertaining to the subject matter which took place at a time and place other than that set forth in notice of hearing, which were not open to the public and/or Mr. Wightman; in violation of R.C. 121.22 and is therefore invalid pursuant to R.C. 121.22(H).
- D. The Ohio Real Estate Commission's November 10, 2015, Adjudication Order was not supported by reliable, probative and substantial evidence as there was no defect in the Property that would support a violation of R.C. 4735.18, predicated upon R.C. 4735.67(A).

LAW AND ARGUMENT

A. Appellant's Jurisdictional Argument.

The pertinent facts are as follows:

1. Dick and Carolyn Montgomery ("Sellers") listed their condominium with Appellant, a licensed real estate sales person and a licensed real estate broker, and subsequently entered into a contract with the buyer, Rochelle Boggs, in February 2013.
2. On or about March 21, 2013, several weeks prior to the April 5, 2013 closing, the sellers sent Appellant an email disclosing their history of problems with the condominium's plumbing and suggesting that the new owner would appreciate any information that

- might save her money, trouble and/or a big mess. Appellant edited the note and did not have the sellers review the edited copy. Tr. 160-161. In summarizing the sellers' note, Mrs. Boggs was informed that all of the pipes were connected, and if you use the washing machine or are draining the bathtub or sink, you must keep an eye on the toilet or you may have a big mess in your kitchen.
3. On April 4, 2013, the sellers emailed Appellant again and asked what he thought about letting the buyers know about the bathroom piping and drainage problems. Appellant's Exhibit 13.
 4. On the date of the closing, after all the papers had been signed and the AmeriTitle officer left the room, Appellant stood up, looked at the purchaser, slid a piece of paper across the table, and said "You need to know about this." Tr. 14-16.
 5. Mrs. Boggs contacted the sellers, who told her that they had given Appellant the note about the plumbing issues several weeks before the closing, and thought Appellant would have disclosed this information prior to the closing. Tr. 54, 93.
 6. On May 8, 2013, Rochelle Boggs filed a complaint against Appellant with the Ohio Division of Real Estate.
 7. In a letter dated May 9, 2013, Appellant was notified that he was the subject of a complaint filed through the Division of Real Estate & Professional Licensing. Appellant was provided a copy of the narrative portion of that complaint. Appellant was informed that the division's investigative staff would review the allegation and determine whether further action under Ohio Real Estate Licensing Law was necessary.
 8. On January 20, 2015 Appellee issued a Notification of Formal Hearing to Appellant which included an exhibit stating the alleged misconduct. Commission Case No. 2013-

317. The notice alleged that Appellant failed “to timely disclose to the subject’s purchaser a material fact you had knowledge of regarding the subject’s second bathroom.” Appellant was notified that a formal hearing was scheduled for March 23, 2015 and that he had a right to appear in person and be represented by counsel.
9. On March 17, 2015, Appellee notified Appellant that the charges in Case No. 2013-317 were withdrawn. Appellant was also notified that the case would “be returned to legal for additional review and follow-up.”
 10. On June 11, 2015, Appellee issued a second Notification of Formal Hearing, notifying him that a hearing was now scheduled for August 10, 2015. Again he was notified of his right to appear in person and be represented by counsel. Appellant was also notified that in the event that the violations were proved, his real estate license may be disciplined, including but not limited to, suspension or revocation. Commission Case No. 2013-317. This notice alleged a failure “to timely disclose to the subject’s purchaser information that you had regarding the subject’s second bathroom.”
 11. On July 28, 2015, Appellant filed a complaint in the Tenth District Court of Appeals seeking a Writ of Prohibition. Appellant asserted that following the March 17, 2015 Notice of Withdrawal of Charges, the Commission lacked jurisdiction to take any further proceedings against Appellant that were related to the Boggs complaint. On August 6, 2015, the Tenth District Court of Appeals denied Appellant’s request for a stay of the administrative proceedings.
 12. On August 10, 2015, the administrative hearing was conducted by Hearing Officer Frank Cellura. Assistant Attorney General Jennifer Croskey represented the Division of Real Estate and Professional Licensing, and Attorney Kevin Humphreys represented

Appellant.

13. On September 1, 2015, the Hearing Officer issued a Report and Recommendation.

14. On September 21, 2015, Appellant filed objections to the Report and Recommendation.

15. After review, Appellee issued an Adjudication Order on November 10, 2015 adopting the Report and Recommendation.

16. On November 24, 2015, Appellant filed a notice of appeal.

17. On January 13, 2016, Appellant filed a notice of dismissal of the Writ of Prohibition in the Tenth District Court of Appeals.

Appellant asserts that “no permissible process was undertaken pursuant to the provisions of R.C. 4735.051(D) to allow the administrative matter to be reinstated in conformity with law.” Appellant’s Brief. Appellant asserts that the “re-docketing” of the matter was contrary to law. Appellant asserts that the Commission lost jurisdiction when it withdrew the original notice of hearing.

R.C. 4735.051 is titled “Investigations of complaints; informal mediation meeting of formal meeting; review by commission; sanctions” and sets forth the statutory process that the Commission must follow. Appellant asserts that there was no permissible process pursuant to R.C. 4735.051(D) to allow the administrative matter to be reinstated, and thus there was no jurisdiction to proceed.

However, case law does not support Appellant’s interpretation of R.C. 4735.051(D). The time frames set forth in R.C. 4735.051(D) fall within the general rule for construing a statute’s time frames as directory for the properly, orderly and prompt conduct of public business. The statute does not include any expression of legislative intent to restrict the Commission’s jurisdiction for untimeliness in performing its acts under the statute. If the Ohio General Assembly intended the time frames set forth in R.C. 4735.051(D) to be jurisdictional in nature, it could have explicitly

stated so, as it did in R.C. 4735.32. *Boggs v. Ohio Real Estate Comm.*, 2009-Ohio-6325; see also *Wightman v. Ohio Real Estate Comm.*, 2011-Ohio-1816.

Upon review, this Court concludes as a matter of law that Appellee had jurisdiction, and adjudicated Appellant's case within the statutory time frames. R.C. 4735.051; R.C. 4735.32. Accordingly, Appellant's argument(s) as to the jurisdiction issue is not well-taken, and this assignment of error is hereby **OVERRULED**.

B. Appellant's Constitutional Arguments.

Appellant is arguing that Appellee violated his substantive and due process rights.

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.

R.C. 4735.67 provides:

(A) A licensee shall disclose to any purchaser all material facts of which the licensee has actual knowledge pertaining to the physical condition of the property that the purchaser would not discover by a reasonably diligent inspection, including material defects in the property, environmental contamination, and information that any statute or rule requires be disclosed. For purposes of this division, actual knowledge of such material facts shall be inferred to the licensee if the licensee acts with reckless disregard for the truth.

(B) A licensee is not required to discover latent defects in the property or to advise on matters outside of the scope of the knowledge required for real estate licensure, or to verify the accuracy or completeness of statements made by the seller, unless the licensee is aware of information that should reasonably cause the licensee to question the accuracy or completeness of such statements.

(C) Nothing in this section limits any obligation of a seller to disclose to a purchaser all material facts known by the seller pertaining to the physical condition of the property, nor does it limit the obligation of the prospective to inspect the physical condition of the property.

(D) Nothing in this section limits any obligation of a purchaser to disclose to a seller all material adverse facts known by the purchaser pertaining to the purchaser's financial ability to perform the terms of the transaction.

(E) No cause of action shall arise on behalf of any person against a licensee for disclosing information in compliance with this section, unless the information is materially inaccurate and the disclosure by the licensee was made in bad faith or was made with reckless disregard for the truth.

In asserting that the Commission violated his substantive and due process rights, Appellant has not identified in his brief, specifically, what article/section of the United States and/or Ohio Constitutions were violated. Thus, this Court will address these arguments in a general sense, as set forth by Appellant. Appellant's Brief, pgs. 8-9.

Appellant asserts that the charge at issue fails to provide notice of the charge and facts upon which it is based, and is insufficient as a matter of law to support a violation of R.C. 4735.18, based upon R.C. 4735.67(A). The June 11, 2015 Notification of Formal Hearing provides, in pertinent part:

You, Kenneth A. Wightman, currently an Ohio real estate salesperson, (License # 0000334501), did the following in 2013 with respect to the property located at 539 West 1st Avenue, Unit 202, Columbus, Ohio (hereinafter referred to as the "subject"):

1. In the course of representing the seller of the subject, you failed to timely disclose to the purchaser information that you had regarding the subject's second bathroom.

This constitutes a violation of one or more of the following:

- A. Ohio Revised Code Section 4735.18(A)(9) as it incorporates Ohio Revised Code Section 4735.67(A);
- B. Ohio Revised Code Section 4735.18(A)(6), misconduct, as that section incorporates Section I, Article I of the Canons of Ethics for the Real Estate Industry;
- C. Ohio Revised Code Section 4735.18(A)(6), misconduct, as that section incorporates Section II, Article 7 of the Canons of Ethics for the Real Estate Industry.

The record demonstrates that at the April 5, 2013 closing, after all the papers had been signed and the AmeriTitle officer left the room, Appellant stood up, looked at the purchaser (Mrs. Boggs), slid a piece of paper across the table, and said "You need to know about this." Tr. 48. The record is undisputed that Appellant had been in possession of this information/note from the sellers

for several weeks prior to the April 5, 2013 closing. Moreover, Appellant admitted to editing the note. Tr. 160-161. The “Note For The New Buyers” stated as follows:

We had occasional problems with the drain in the second bathroom. We had plumbers out a number of times. They could find nothing to explain why the drains had stopped up. They would snake the drains and that would free them up but the snake was always clean. The developers stepped in once, even worked on the drain pipe in the condo below but that still didn’t fix the problem. But we figured out a work around to possibly keep the plumbers away.

If, when draining the bath tub or sink, and you hear and see the toilet start to gurgle/bubble them **immediately stop draining the tub or sink.** (The second bathroom drains and utility closet are all connected so it could back up to the utility closet drain. I believe the clothes washer is in the mix too.) We kept a heavy duty plunger in the second bathroom. Take the plunger and plunge the toilet until it flushes smoothly. The tub or sink should then drain fine (but to be safe keep an eye on the utility closet drain while the tub or sink drains). Thought we better tell you about this situation before you call a plumber or have a big mess to clean.

Based on the evidence, Appellant’s arguments that “[T]he charge at issue fails to provide due notice of the charge and facts upon which it is based” is disingenuous. Appellant’s own testimony before the Hearing Officer refutes this argument. Tr. 112-113, 114-135, 139, 159, 160-161. During his *direct* testimony, Appellant described **in detail** the configuration of the plumbing, and the drainage and back-up issues the Montgomerys dealt with, and that were not resolved. The sellers wanted the buyers to be forewarned about the potential for plumbing issues. Tr. 86-89, 114-135. This Court concludes as a matter of law that the information the sellers wanted Appellant to convey to the buyers regarding the plumbing issues that was set forth in the note, were material facts. R.C. 4735.67(A). This Court will note that Appellant has not addressed and/or assigned as legal error anything regarding the issue as to whether the information the sellers wanted Appellant to convey to the buyers was a material fact, and thus, Appellant has waived that argument.

Moreover, Appellant’s argument regarding the issue of Appellee having to prove that there was a “material defect” and/or “defect,” is a red herring. The January 20, 2015 Notification of

Formal Hearing included such language. However, this original Notification was withdrawn by Appellee, which is akin to a Civ. R. 41 dismissal in a civil case. The June 11, 2015 Notification of Formal Hearing omitted language regarding a “material defect” and/or “defect” and states as follows, in relevant part: “[I]n the course of representing the seller of the subject, you failed to timely disclose to the purchaser information that you had regarding the subject’s second bathroom.”

Thus, the charge(s) set forth in the June 11, 2015 Notification of Formal Hearing do not assert that the plumbing issue was caused by a material defect and/or defect. The June 11, 2015 Notification of Formal Hearing clearly sets forth that the conduct at issue before the Commission is *Appellant’s conduct*, specifically his failure to timely disclose to the buyer information about the second bathroom, information that the sellers gave to Appellant on or about March 21, 2013, which was several weeks prior to the April 5, 2013 closing.

Appellant cleverly focuses the issue away from his own conduct, (his not timely disclosing the information about the plumbing issues to the buyers), and wants this Court to focus on the non-issue as to whether the plumbing configuration in the subject property is a material defect and/or defect. This Court is focused on *Appellant’s conduct*, which is the determinative issue before this Court.

Appellant also asserts that his due process rights were violated when the “legal advocate” representing the Division of Real Estate and Professional Licensing before the Hearing Officer, presumably the August 10, 2015 hearing, also served as legal counsel for the Hearing Officer and the Ohio Real Estate Commission in proceedings at the Tenth District Court of Appeals, wherein Appellant was seeking a writ of prohibition in *State ex rel. Kenneth A. Wightman v. Ohio Real Estate Commission*, Case No. 15 AP 718. A review of the record demonstrates that

Appellant's counsel never asserted this issue to the Tenth District Court of Appeals in the writ of prohibition case. However, Appellant did raise this issue before the Hearing Officer prior to the August 10, 2015 hearing. August 5, 2015 email.

This Court is in agreement with the legal analysis of the Hearing Officer in response to Attorney Humphries objection to his presiding over the August 10, 2015 hearing. The logical conclusion, based on Attorney Humphries argument, is that the Governor of Ohio would have to appoint a new Commission to hear Appellant's case since Attorney Croskey defended not only Hearing Officer Frank Cellura, but also the Ohio Real Estate Commission and the Department of Commerce Division of Real Estate & Professional Licensing in that action. Moreover, a writ of prohibition is an order from a superior court to a lower court or tribunal directing the judge and the parties to cease the litigation because the lower court does not have proper jurisdiction to hear or determine the matters before it. *A writ of prohibition is an extraordinary remedy that is rarely used.*

The record demonstrates that the Tenth District Court of Appeals denied Appellant's request for a stay in an August 6, 2015 Journal Entry. Clearly the Tenth District Court of Appeals was not persuaded by Appellant's arguments regarding the Commission's alleged lack of jurisdiction.

Additionally, Appellant's filing a request for a writ of prohibition was *not* an adjudication upon the merits of this case. Upon review, Appellant has the burden of proof and must demonstrate legal error to this Court. In essence, he is asking this Court to review a denial of a stay issued by a superior court, the Tenth District Court of Appeals. Appellant has not provided this Court with any legal authority to support the remedy he requests or a legal basis for this

Court to exercise jurisdiction in reviewing a decision by a superior court. Furthermore, Appellant's argument is not supported by law.

Additionally, Ohio case law has allowed agencies to withdraw and reissue charges within the statutory time frames. *Yoder v. State Bd. of Educ.*, 40 Ohio App.3d 111, 112 (1988). In the case *sub judice*, Appellant has not demonstrated prejudice.

The record reflects that throughout the administrative process, and at the administrative hearing, Appellant was represented by counsel. Appellant asserts that he has a property interest in his occupational license that is protected under the United States and Ohio Constitutions, again, not citing to any specific section or article.

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 statutory violation. 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.

Upon review, the record demonstrates that once Appellant was placed on notice, he was given an opportunity to request a hearing. The record reflects that Appellant had an opportunity to be heard at an August 10, 2015 hearing. The record reflects that Appellant was represented by counsel at the August 10, 2015 hearing, and that counsel actively participated in the examination of witnesses. The record demonstrates that Defendant submitted Exhibits 1 through 19. Clearly, there is no issue regarding procedural due process because the record demonstrates that Appellant had notice, an opportunity to be heard, and was represented by counsel. Moreover, the record demonstrates that Appellee complied with the jurisdictional time frame set forth in R.C. 4735.32.

Substantive due process is a principle that allows courts to protect rights deemed fundamental from government interference. Thus, substantive due process aims to protect individuals against policy enactments that exceed the limits of governmental authority. Appellant seems to be asserting that he has a fundamental right to an Ohio real estate license, but has not provided any legal authority to support that argument. However, case law demonstrates that obtaining and maintaining a real estate license in Ohio is a privilege, not a right, and clearly not a fundamental right. *Kiko*, supra.

Accordingly, this Court is not persuaded by Appellant’s vague constitutional arguments asserting violations of procedural and substantive due process. Thus, these assignments of error are hereby **OVERRULED**.

C. There is reliable, probative and substantial evidence supporting the Ohio Real Estate’s November 10, 2015 Adjudication Order.

Appellant asserts that the “November 10, 2015 Adjudication Order was not supported by reliable, probative and substantial evidence as there was no defect in the Property that would support a violation of R.C. 4735.18, predicated upon R.C. 4735.67(A).” As previously discussed, a review of the record demonstrates that the undisputed fact is that this case does not involve the issue

of a “material defect” and/or “defect.” This case involves *Appellant’s conduct* and whether that conduct warrants a sanction pursuant to applicable statutes. Thus, this Court concludes as a matter of law that there is reliable, probative and substantial evidence to support that Appellant violated R.C. 4735.18, as set out in the Revised Schedule A of the June 11, 2015 Notification of Formal Hearing. Tr. 6, 44-48, 52, 54, 86-89, 93, 112-113, 139, 159-161.

Appellant asserts that the action taken by the Commission in this matter was the product of discussions and deliberations pertaining to the subject matter which took place at a time and place other than that set forth in the notice of hearing, which were not open to the public and/or Mr. Wightman, in violation of R.C. 121.22 and is therefore invalid pursuant to R.C. 121.22(H). A review of the Commission’s November 4, 2015 Minutes shows that a hearing was held and that Attorney Humphries, representing Appellant, presented copies of documents and argued on behalf of his client. There being no further discussion, President Giller concluded the hearing. Thus, what remained was the disposition of the matter.

Also, the minutes show that after several recesses, and other cases presented, the Commission reconvened. The minutes provide, in relevant part:

Boggs vs. Kenneth A. Wightman (Case #2013-317)

President Giller began deliberations by discussing the testimony and evidence in the record, as well as timely presentation of the subject note. The Commissioners discussed and debated the responsibility of the respondent to disclose the note prior to closing. At this time, Division Counsel Kimberley Wells clarified the hearing officer’s findings for the Commission and the scope of the Commission’s authority. The Commissioners then continued to work through their thoughts and beliefs as to misconduct, the findings of the hearing officer relative to the charges and the Commission’s authority to adopt, modify, or reject said report. Thereupon, AAG Henry Appel from the Health and Human Services section of the Attorney General’s office spoke to the Commission as to their authority in modifying the report. He further read the findings and any underlying discipline. With the Commission agreeing to adopt the report, President Giller then discussed penalty for Count 1. He suggested additional education as 3 hours in Ethics and 3 hours in Core Law, and commented that he did not believe the conduct rose to the level of suspension or civil penalty.

President Giller then moved to adopt the Findings of Fact and Conclusions of Law of the

hearing examiner. For Count 1 of the Schedule A of the Notification of Formal Hearing, President Giller moved the penalty be established as 3 hours in the area of Ethics and 3 hours of Core Law. Proof of completion shall be in the form of the education certificate and shall be submitte to the division within 90 days. Commissioner Carnes seconded the motion, and President Giller called for a vote:

AYE CARNES
COMBS
GILLER
TAYLOR
NAY None

November 4, 2015 Minutes.

Upon review, Appellant has not met his burden of proof. The Commission's deliberations were quasi-judicial in nature and not subject to R.C. 121.22. The evidence overwhelmingly demonstrates that the Commission did not violate R.C. 121.22 or R.C. 121.22(H). Moreover, the Commission memorialized its disposition of Appellant's case in the November 10, 2015 Adjudication Order.

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. Accordingly, this Court concludes as a matter of law that Appellant's arguments related to the issue as to whether the November 10, 2015 Adjudication Order is supported by reliable, probative and substantial evidence are not well-taken and are hereby **OVERRULED**.

Accordingly, Appellant's legal arguments and assignments of error are not well-taken and are hereby **OVERRULED**. This Court concludes as a matter of law that the November 10, 2015 Adjudication Order of the Department of Commerce, Division of Real Estate & Professional Licensing is supported by reliable, probative and substantial evidence. The November 10, 2015 Adjudication Order is hereby **AFFIRMED**.

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. The Agreed Order of Stay issued by this Court on January 27, 2016 is hereby lifted.

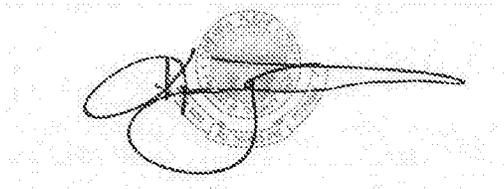
IT IS SO ORDERED.

Copies to all parties registered for e-filing

Franklin County Court of Common Pleas

Date: 05-19-2016
Case Title: KENNETH A WIGHTMAN -VS- OHIO STATE REAL ESTATE
COMMISSION
Case Number: 15CV010548
Type: ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read 'Kimberly Cocroft', is written over a light gray, textured rectangular background.

/s/ Judge Kimberly Cocroft

Court Disposition

Case Number: 15CV010548

Case Style: KENNETH A WIGHTMAN -VS- OHIO STATE REAL
ESTATE COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes