

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

David E. Barlow,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-1050 (C.P.C. No. 09CVF05-7959)
Ohio State Department of Commerce, Division of Real Estate and Professional Licensing,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on August 17, 2010

Madison & Rosan, LLP, and Kristin E. Rosan, for appellant.

Richard Cordray, Attorney General, and *Theodore L. Klecker*,
for appellee.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Appellant, David E. Barlow, a licensed real estate broker, appeals from the judgment of the Franklin County Court of Common Pleas affirming the adjudication order of appellee, Ohio Real Estate Commission ("commission"), that issued sanctions against appellant's license for violations of R.C. 4735.18.

{¶2} Appellant had been a real estate salesperson with HER, Inc. ("HER"), from 2000 to 2004. In April 2006, over 700 licensees of HER received emails that were sent by appellant but were purported to be from "Herbie R. Jr." at

herbiejunior@insiderealliving.com. The emails contained disparaging comments about HER's Chief Executive Officer ("CEO"), Harley E. Rouda, Jr., and his business practices. Appellant also registered several other internet domain names that used variations of Mr. Rouda's name and that of his wife Kaira Sturdivant-Rouda.¹ When these internet sites were visited, the user would be diverted to appellant's Re/Max real estate brokerage website.

{¶3} On February 12, 2007, a complaint was filed against appellant with the Ohio Department of Commerce, Division of Real Estate and Professional Licensing ("division"), concerning appellant's use of internet domain names and email addresses. Eight days later, the division sent appellant a notice of complaint. After determining the existence of reasonable and substantial evidence of acts in violation of R.C. Chapter 4735, on October 16, 2008, the division sent appellant a notice of hearing ("NOH"), that included notice of four charges. A hearing examiner conducted an adjudication hearing on January 14, 2009, wherein the parties stipulated to the facts as alleged in the NOH. Thereafter, the hearing examiner issued her report and recommendation on February 24, 2009, concluding the conduct set forth in charges one, two, and four constituted misconduct, and the conduct in charge two also constituted misleading advertising. Additionally, the hearing examiner found the conduct in charge three did not constitute a violation of the licensing laws.

{¶4} At its May 6, 2009 meeting, the commission reviewed the evidence and adopted the findings of fact and conclusions of law of the hearing examiner. Based on

¹ CEO, Harley E. Rouda, Jr., received an injunction in the United States District Court for the Southern District of Ohio preventing appellant from continuing to register these domain names. Examples of the

the violations, the commission imposed \$7500 in civil penalties and a 90-day suspension against appellant's license and required appellant to complete additional educational requirements.

{¶5} Pursuant to R.C. 119.12, appellant appealed the commission's order to the Franklin County Court of Common Pleas. On October 9, 2009, the trial court rendered a decision overruling appellant's assigned errors and affirming the order of the commission. This appeal followed, and appellant brings the following four assignments of error for our review:

1. The Lower Court Erred As A Matter Of Law When It Failed To Reverse The Commission's Decision As A Result Of The Commission's Failure To Certify A Complete Record.

2. The Lower Court Erred As A Matter Of Law When It Failed To Reverse The Commission's Decision Because Such Decision Is Contrary To Law And Is Not Supported By Reliable, Probative And Substantial Evidence In That Barlow Was Not Provided Notice The Alleged Conduct Was A Violation Of R.C. 4735.01 *et seq.*

3. The Lower Court Erred As A Matter of Law When It Failed To Reverse The Commission's Decision Because Such Decision Is Contrary To Law And Is Not Supported by Reliable, Probative And Substantial Evidence In That It Purports To Impose Sanctions For A Violation Of The Canons of Ethics, Which Are Not A Properly Adopted Rule Pursuant To R.C. Chapter 119.

4. The Lower Court Erred As A Matter Of Law When It Failed To Reverse The Commission's Decision Because Such Decision Is Contrary to Law And Is Not Supported By Reliable, Probative And Substantial Evidence In That Barlow Was Denied His Due Process Rights When He Was Precluded From Reviewing Certain Documents Contained In The Confidential Investigative File And Cross-Examining A

Witness Relating To Such Documents When She Relied On
the Same In Her Direct Testimony.

{¶6} In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶7} Reliable, probative, and substantial evidence has been 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.* (1992), 63 Ohio St.3d 570, 571.

{¶8} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas' determination that the commission's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term abuse of discretion connotes more than an error of law or judgment; it implies that the

court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the commission's order was in accordance with law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶9} In his first assignment of error, appellant contends the commission's order must be reversed because the commission failed to certify a complete record to the trial court. Specifically, appellant asserts two items are missing from the certified record. One is a copy of Ohio Adm.Code 1305:5-1-02, which appellant's counsel provided to the commission and requested its inclusion in the record, and the other is a transcript of the commission's decision at its hearing.

{¶10} Indeed, R.C. 119.12 provides that within 30 days after receipt of a notice of appeal, "the agency shall prepare and certify to the court a complete record of the proceedings." Failure of the agency to comply within 30 days, "upon motion, shall cause the court to enter a finding in favor of the party adversely affected." *Id.* However, "[a]n agency's omission of items from the certified record of an appealed administrative proceeding does not require a finding for the appellant, pursuant to R.C. 119.12, when the omissions in no way prejudice him in the presentation of his appeal." *McGhee v. Ohio State Bd. of Psychology* (1993), 82 Ohio App.3d 301, 306, quoting *Lorms v. State* (1976), 48 Ohio St.2d 153, syllabus.

{¶11} Appellant makes no argument as to how he is prejudiced by the omission of the Ohio Administrative Code rule, and we fail to find any such prejudice. Therefore, appellant is not entitled to reversal on this basis. With respect to the transcript, we note

the certified record does contain a transcript of the hearing before the hearing examiner and a transcript of the arguments made before the commission. What is not included, inadvertently omitted as stated by the commission, is the transcript of the commission casting their votes. Appellant argues he is prejudiced by this omission because without the transcript it becomes impossible to determine whether the commission's order adequately reflects the commission's vote and actual decision.

{¶12} *Lorms*, supra, held that an agency's omission of items from a certified record of an appealed administrative proceeding does not require a finding for the appellant pursuant to R.C. 119.12 when the omission in no way prejudices him in the presentation of his appeal. *Id.* at syllabus. In *Lorms*, the Ohio Real Estate Commission rejected the appellant's application to become a licensed real estate broker because the appellant lacked sufficient experience. On appeal, two letters regarding the appellant's sales ability were omitted from the certified record. However, because the letters were adequately summarized in the record, the Supreme Court of Ohio affirmed the trial court's determination that *Lorms* was not prejudiced by the omission of the letters.

{¶13} Here, the commission's May 13, 2009 order reflects the five members that were present at the May 6, 2009 meeting and that all five of the members voted in favor of adopting the hearing examiner's findings of fact and conclusions of law and imposing the previously described sanctions. Thus, the record adequately reflects the commission's vote, even listing how each member voted, and we fail to see how appellant is prejudiced in this instance. See *Gahm v. Ohio State Bd. of Cosmetology* (Dec. 10, 1992), 4th Dist. No. 92CA2074 (finding that although neither the minutes of the board's adoption of the

order suspending the appellant's license nor a transcript thereof was included in the certified record, no prejudice was found).

{¶14} There is nothing before us to suggest the trial court was in any way inhibited from rendering a decision given the omission, nor does appellant allege that the outcome would have been any different had the transcription of the vote been included. Because appellant has failed to establish he was prejudiced by the omissions in the certified record, we find no merit to the arguments contained in his first assignment of error and, accordingly, overrule the same.

{¶15} Appellant's remaining assignments of error contend the commission's order must be reversed because it is not supported by reliable, probative, and substantial evidence and is contrary to law. Specifically, in his second assignment of error, appellant contends this is so because he was not provided with notice that his conduct was a violation of R.C. 4735.01 et seq.

{¶16} Appellant was found to have violated R.C. 4735.18, which provides in relevant part:

(A) * * * Subject to section 4735.32 of the Revised Code, the Ohio real estate commission * * * shall, pursuant to section 4735.051 [4735.05.1] of the Revised Code, 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:

* * *

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

* * *

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

{¶17} As indicated in the NOH, appellant was alleged to have violated the above-mentioned provisions by engaging in the following:²

1. Sent and/or facilitated the sending of an email, subject "Inside Real Living," to licensees affiliated with HER from an email address herbie@insiderealliving.com that contained a message from "Herbie R Jr" misleading recipients as to the origin and content of said email[.]

2. Employed the use of internet domain names with names of, or similar to licensed, real estate agents not affiliated with your brokerage. When a user visited those sites that user was diverted to the website of RE/MAX First Choice, LLC, the company with which your license was affiliated. * * *

* * *

4. Registered and used the internet domain name "www.insiderealliving.com" and/or sent or facilitated the sending of emails from addresses using "@insiderealliving.com" when your license was not affiliated with that company or doing business as HER Real Living.* * *

{¶18} According to appellant, the conduct alleged in the NOH "boils down to (i) the registration and (ii) use of internet domain names." (Appellant's brief at 8.) Because the registration and use of internet domain names is not expressly prohibited by law and does not constitute inherently dishonest, illegal, grossly negligent or incompetent conduct, appellant contends he was not provided with notice that the conduct set forth in the NOH was forbidden. In support, appellant relies on *Hughes v. Ohio Div. of Real Estate* (1993), 86 Ohio App.3d 757.

² Because no violation was found pertaining to the conduct alleged in charge three, we refer only to charges one, two, and four.

{¶19} *Hughes* concerned a real estate broker that had his license suspended for returning an earnest money deposit to a man selling a house. In that case, the Barkers and Mr. Wheeler contracted for the sale of real estate, and Mr. Wheeler deposited \$500 as earnest money with Hughes. After the deal fell through, Hughes, on the advice of an attorney, refunded the \$500 to Mr. Wheeler; however, Hughes failed to inform the Barkers of the refund. A complaint was filed, and Hughes was found to have committed misconduct in violation of R.C. 4735.18(A)(6) and received a 30-day suspension of his real estate license.

{¶20} The Second District Court of Appeals noted Hughes's conduct was not inherently wrong in and of itself or illegal from the very nature of the transaction, i.e., *malum in se*, nor was Hughes's conduct prohibited or expressly forbidden by positive law, i.e., *malum prohibitum*. Nonetheless, because the Supreme Court of Ohio in *Richard T. Kiko Agency, Inc. v. Ohio Dept. of Commerce, Div. of Real Estate* (1990), 48 Ohio St.3d 74, had upheld the discipline of a real estate broker for precisely the same conduct in which Hughes engaged, the Second District upheld the sanction against Hughes's license.

{¶21} Persons holding real estate licenses are held to a higher standard of competency and fairness than are lay members of the general public in the market place. *Kiko Agency* at 75. Moreover, regulatory agencies, such as the commission, may rely on their own expertise in deciding whether certain conduct violates professional standards. *Boggs v. Ohio Real Estate Comm., Div. of Real Estate & Professional Licensing*, 186 Ohio App.3d 96, 2009-Ohio-6325, ¶33, citing *Kiko Agency*. As discussed by the Eighth District Court of Appeals in *Hughes v. Ohio Real Estate Comm.* (July 22, 1999), 8th Dist.

No. 74480, "It would be impossible for lawmakers and rulemakers to spell out in detail every type of conduct that constitutes misconduct by a real estate broker. This is the precise reason why the Commission must be given considerable discretion in determining whether certain conduct is violative of the standard of practice in the industry." *Id.*

{¶22} Appellant contends he merely registered and used internet domain names, which is neither *malum in se* nor *malum prohibitum*. To some extent we agree with appellant as the hearing examiner recognized that the registration of a website domain name ordinarily would not itself constitute a chargeable offense under R.C. Chapter 4735. However, appellant's contention that he merely registered and used internet domain names is mischaracterization of what is at issue here. Appellant, a licensed real estate broker, used the domain names to send emails to over 700 licensees of HER, where appellant was a former salesperson. The emails contained the subject heading "Inside Real Living and the truth shall set you free" and a message from "Herbie R. Jr." As characterized by the hearing examiner, the email purported to be an "insider's prospective" of HER's practices and leadership, specifically referencing CEO Harley Rouda, Jr. and his wife Kaira. Appellant registered the domain name with "the admitted intention to use that domain name to the detriment of his competitor." (Report and Recommendation at 15.)

{¶23} Appellant also registered five other internet domain names that were the same as the personal names of the Rouda's. Internet users who visited these sites would then be diverted to a Re/Max website of appellant's. Again, as noted by the hearing examiner, appellant admitted these actions were directed to the public as he admitted he registered the domain names with the intention that the public would search their names.

{¶24} Misconduct, as it relates to real estate brokers, "includes unprofessional conduct or that conduct involving any breach of duty which is prohibited under professional codes of ethics, or conduct which is contrary to law." *Kiko Agency*, paragraph two of the syllabus. The state of Ohio has an interest in promoting the character, honesty, and intellectual competence of real estate licensees and has charged the commission with the responsibility of regulating the same. *Boggs* at ¶31. The commission, relying on its own expertise, is accorded deference in its determination that a licensee's conduct is contrary to laws, rules, or a standard of practice. *Id.* at ¶33. Given the record before us, we cannot agree with appellant's contention that the conduct alleged is not malum in se, such that a person of ordinary intelligence would require reasonable notice that the conduct is forbidden. *Hughes*, supra. Accordingly, appellant's second assignment of error is overruled.

{¶25} In his third assignment of error, appellant contends the commission's order must be reversed because it imposes sanctions for a violation of the canons of ethics ("canons"), that are not properly adopted rules pursuant to R.C. Chapter 119. According to appellant, because the canons are uniformly applied, but have never been formerly promulgated as a rule, and R.C. 4735.18(A)(6) lacks any "substantive text" establishing the canons are a rule enforced by the commission, the canons are unenforceable.

{¶26} The right to engage in the real estate business is a privilege granted by the state. *Kiko Agency* at 76. Thus, "the General Assembly established the Ohio Real Estate Commission, comprised of experts with the responsibility of regulating the industry and adopting the canons of ethics." *Id.*; R.C. 4735.03 (stating that the commission shall "adopt canons of ethics for the real estate industry"). As noted by this court in *Boggs*,

supra, the canons have been adopted by the commission pursuant to R.C. 4735.03(A). Id. at ¶32. There is no requirement that the canons be promulgated administrative rules pursuant to R.C. Chapter 119. Accordingly, we find no merit to appellant's argument and overrule his third assignment of error.

{¶27} In his fourth assignment of error, appellant argues his due process rights were violated when he was precluded from reviewing documents contained in a confidential investigative file and cross-examining a witness about such documents. At the hearing, the division presented the testimony of its investigator that the superintendent's decision to issue charges was made on October 9, 2008. On cross-examination, appellant attempted to place this testimony in question. According to appellant, this testimony is crucial to determine whether the superintendent complied with R.C. 4735.051.

{¶28} There are two flaws with appellant's argument. First, contrary to appellant's assertion, appellant did not "request" any documents from the commission's investigative file. The record reflects that on cross-examination, appellant's counsel asked the investigator how she knew the date upon which the superintendent decided to proceed with charges, and the investigator indicated she obtained the date from the computer. When further questioned about how the date comes to be placed in the computer, the division objected on the basis of "delving into the realm of confidential information." (Jan. 21, 2009 Tr. 24.) Appellant argued that if the state was going to offer a particular date to prove jurisdiction then he was entitled to cross-examine the witness and determine whether or not the date was accurate. Counsel stated: "There is no documentary evidence that's been offered to substantiate the date. Respondent has not

been given the opportunity to either review any evidence or review any file and review whether or not this is the actual date. So we believe we should be able to at least cross-examine the witness to determine whether or not it's a credible date that the Superintendent – that the Hearing Officer can use in establishing jurisdiction." (Tr. 24-25.) Thereafter, the following exchange took place:

[Appellant's counsel]: Okay. I guess the question – just so I have clarification my question was whether the Superintendent makes a note in the file or elsewhere so that the secretary that enters the date knows what date to enter. That was my question so I am not sure whether or not that's within the limitation or not.

[Hearing examiner]: And you are saying that it's within the limitation that that's confidential, Mr. Kleckler?

[Appellee's counsel]: My response would be she can testify that she reviewed the file and gleaned the date from that file. As far as having those documents released or provided to opposing counsel, those documents remain confidential.

[Hearing examiner]: I think [appellant's counsel] is asking how is that information conveyed. Is it by memo? Is it by – I am not going to allow anyone to see the memo but –

[Appellee's counsel]: I have no objection to that form of question.

(Tr. at 25-26.)

{¶29} Questioning continued and the investigator testified that the superintendent prepared a memo containing the date, and, according to the memo she reviewed, the date was October 9, 2008, which was the same date that appeared on the computer. The record belies appellant's argument that he sought the production of documents and was thereafter denied the same. In fact, the transcript demonstrates the hearing examiner even clarified that appellant was asking only about how the information was

conveyed and was not requesting the actual memo. At no time during the hearing did appellant contend otherwise.

{¶30} More importantly, however, appellant appears to argue before us that the memo at issue is imperative because the superintendent's compliance with R.C. 4735.051 determines the commission's jurisdiction over this matter. Indeed, R.C. 4735.051(D) provides, in relevant part:

Within sixty business days after receipt of the complaint, or, if an informal meeting is held, within sixty days of such meeting, the investigator shall file a written report of the results of the investigator's investigation with the superintendent. Within fourteen business days thereafter, the superintendent shall review the report and determine whether there exists reasonable and substantial evidence of a violation of section 4735.18 of the Revised Code by the licensee. If the superintendent finds such evidence exists, within seven business days of the determination, the superintendent shall notify the complainant and licensee of the date of a hearing to be held by a hearing examiner pursuant to Chapter 119. of the Revised Code within fifteen days but not prior to seven days thereafter, except that either the superintendent or the licensee may request an extension of up to thirty business days for good cause shown.

{¶31} Recently, in *Boggs*, supra, this court held that "the time frames set forth in R.C. 4735.051(D) are not mandatory or jurisdictional, but instead are directory, to encourage the 'proper, orderly and prompt conduct of public business.'" *Id.* at ¶28, quoting *State ex rel. Jones v. Farrar* (1946), 146 Ohio St. 467, 473. Hence, the commission does not lose jurisdiction for failing to act within those statutory time periods. *Id.* As a result, in claiming reversible error for the commission's failure to meet the statutory time limitations, appellant must demonstrate prejudice. *Id.* In the case sub judice, even assuming the October 9, 2008 date is incorrect, appellant has neither alleged

nor demonstrated any prejudice resulting from any delay in this matter. As a result, we find no merit to appellant's argument that his due process rights were violated, and, accordingly, overrule his fourth assignment of error.

{¶32} Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and BROWN, J., concur.
