

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION, FLORIDA)	
REAL ESTATE APPRAISAL BOARD,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 96-0834
)	
BEVERLY J. MERCHANT,)	
)	
Respondent.)	
<hr/>)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case at Miami, Florida, on May 1, 1996, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven W. Johnson, Esquire
Department of Business and Professional
Regulation, Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802

For Respondent: Ms. Beverly J. Merchant, pro se
Merchant Associates, Inc.
5730 Southwest 74th Street, Suite 500
South Miami, Florida 33143-5381

STATEMENT OF THE ISSUES

This is a license discipline case in which the Petitioner, by means of a three count Administrative Complaint, seeks to take disciplinary action against the Respondent on the basis of alleged violations of subsections (2), (14), and (15) of Section 475.624, Florida Statutes.

PRELIMINARY STATEMENT

At the formal hearing on May 1, 1996, the Petitioner presented the testimony of two witnesses; Mr. Jack Katsikos (a state certified general appraiser) and Mr. Kenneth Rehm (an investigative supervisor for the Petitioner's Division of Real Estate). The Petitioner also offered six exhibits, all of which were received in evidence.

The Respondent testified on her own behalf and also presented the testimony of Mr. John Blazejack (a state certified general appraiser). The Respondent also offered seventeen exhibits, of which fourteen were received in evidence.

(Respondent's exhibits R-4, R-7, and R-14 were not received in evidence and are included in the record as rejected exhibits.)

At the conclusion of the formal hearing the parties were allowed twenty days from the filing of the transcript within which to file their proposed recommended orders. The transcript of the formal hearing was filed with the Hearing Officer on May 31, 1996. On June 20, 1996, both parties filed their respective proposed recommended orders. The parties' proposals have been carefully considered during the preparation of this Recommended Order. Proposed findings of fact are specifically addressed in the appendix to this Recommended Order.

The Respondent's proposed recommended order also incorporates a Motion For The Payment Of Respondent's Costs. That motion is addressed in the conclusions of law portion of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is a state government licensing and regulatory agency charged with the responsibility and duty to prosecute Administrative Complaints pursuant to the laws of the State of Florida, in particular Section 20.165, Florida Statutes, Chapters 120, 455, and 475, Florida Statutes, and the rules promulgated pursuant thereto.

2. Respondent Beverly J. Merchant is currently a Florida state certified general appraiser, having been issued license number 000141 in accordance with Chapter 475, Part II, Florida Statutes.

3. The last license issued to Respondent was as a state certified general appraiser with a home address of 548 San Esteban Avenue, Coral Gables, Florida 33146.

4. On January 14, 1994, Graimark/MIG Joint Venture and/or Crown Revenue, Inc., ordered Respondent to perform an appraisal of Sunrise Gardens, an adult congregate living facility (ACLF), in Miami, Florida.

5. On March 31, 1994, the Respondent completed the appraisal of the property.

6. The Respondent's appraisal report made several references to zoning "variances." The use of the term "variances" was reasonable under the circumstances of the subject appraisal.

7. The Respondent's appraisal report stated that the highest and best use of the property was not as an adult congregate living facility (ACLF), but as some other institutional use. Under the circumstances of the subject appraisal, the Respondent provided adequate support to indicate that under the applicable zoning provisions "another institutional use" was probably permissible by variance.

8. The Respondent's appraisal report included a cost approach that utilized a cost factor for "convalescent hospital space," even though the highest and best use was a use other than an ACLF. The use of that cost factor was reasonable under the circumstances of the subject appraisal.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

10. The nature of the standard of proof which must be met in a case of this type was addressed earlier this year by the Florida Supreme Court in Department of Banking and Finance v. Osborne Stern and Company, 21 Fla. L. Weekly S142 (Fla. March 28, 1996). There the court first reaffirmed its conclusion in Ferris v. Turlington, 510 So.2d 292 (Fla. 1987), that in cases involving the revocation of a professional license the clear and convincing evidence standard must be applied. It then went further and extended the clear and convincing evidence standard to cases involving the imposition of administrative fines. At page S143 the Osborne court concluded:

Unlike the denial of an applicant's registration, an administrative fine deprives the person fined of substantial rights in property. Administrative fines, like the ones imposed upon respondents in this case, are generally punitive in nature. See Santacroce v. State, Department of Banking and Finance, 608 So.2d 134, 137 (Fla. 4th DCA 1992). Because the imposition of administrative fines . . . , like license revocation proceedings, are penal in nature and implicate significant property rights, the extension of the clear and convincing evidence standard to justify the imposition of such a fine is warranted. Accordingly, we agree with the district court that, because the Department's final order imposing a \$5,000 fine for each of the four statutes respondents allegedly violated does not indicate that it was based upon a clear and convincing evidence standard, the case must be remanded for the application of the proper burden of proof.

Consistent with the foregoing, in a case of this nature the Petitioner must prove its charges by clear and convincing evidence. 1/

11. The nature of clear and convincing evidence has been described as follows in Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983):

We therefore hold that clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

See also, *Smith v. Department of Health and Rehabilitative Services*, 522 So.2d 956 (Fla. 1st DCA 1988), which, at page 958, quotes with approval the above-quoted language from *Slomowitz*. The *Smith* case also includes the following at page 958:

'Clear and convincing evidence' is an intermediate standard of proof, more than the 'preponderance of the evidence' standard used in most civil cases, and less than the 'beyond a reasonable doubt' standard used in criminal cases. See *State v. Graham*, 240 So.2d 486 (Fla. 2d DCA 1970).

12. Section 475.624, Florida Statutes (1993), reads as follows, in pertinent part:

The board may deny an application for registration, licensure, or certification; investigate the actions of any appraiser registered, licensed, or certified under this section; and may reprimand, fine, revoke, or suspend, for a period not to exceed 10 years, the registration, license, or certification of any such appraiser, or place any such appraiser on probation if it finds that the registrant, licensee, or certificateholder:

* * *

(2) Has been guilty of . . . culpable negligence, or breach of trust in any business transaction. . . . It is immaterial to the guilt of the registrant, licensee, or certificateholder that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the registrant, licensee, or certificateholder, or was an identified member of the general public.

* * *

(14) Has violated any standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice.

(15) Has failed or refused to exercise reasonable diligence in developing an appraisal or preparing an appraisal report.

13. The following statutory definition appears at Section 475.611(1)(m), Florida Statutes (1993):

(m) 'Uniform Standards of Professional Appraisal Practice' means the most recent standards approved and adopted by the Appraisal Standards Board of the Appraisal Foundation.

14. The allegations of misconduct which are asserted to form the factual basis for the three violations alleged in Counts I, II, and III of the Administrative Complaint are set forth in subparagraphs "a" through "e" of paragraph 6 of the Administrative Complaint. The allegations of two of those subparagraphs (subparagraph "a" and subparagraph "c") have been voluntarily withdrawn from the Administrative Complaint. (See page 107 of the transcript of the hearing.) With regard to the remaining subparagraphs of paragraph 6 of the Administrative Complaint, although there are conflicting expert opinions on some issues, the greater weight of the persuasive evidence is to the effect that the subject appraisal report prepared by the Respondent was reasonable under the circumstances. Specifically, the greater weight of the persuasive evidence is to the effect that the subject appraisal report did not suffer from the defects alleged in subparagraphs "b," "d," and "e" of paragraph 6 of the Administrative Complaint. Inasmuch as the evidence is insufficient to prove those defects, there is insufficient proof of the factual basis for the three violations charged in Counts I, II, and III of the Administrative Complaint. Accordingly, all three counts should be dismissed.

15. The Respondent's proposed recommended order incorporates a motion seeking payment for the costs incurred by the Respondent in the defense of this case. The motion is premature, because the Respondent has not yet achieved the status of "prevailing party" within the meaning of Section 57.111, Florida Statutes. Accordingly, the motion is denied without prejudice to the future filing of a petition seeking an award of costs pursuant to Section 57.111, Florida Statutes. 2/

RECOMMENDATION

On the basis of all of the foregoing, it is RECOMMENDED that a Final Order be entered in this case dismissing all charges against the Respondent.

DONE AND ENTERED this 5th day of September, 1996, at Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of September, 1996.

ENDNOTES

1/ Even if it were to be concluded that for some reason the holding in Osborne, supra, was not controlling in this case, the clear and convincing standard would still be applicable here for reasons discussed in the Recommended Order in Department of Professional Regulation, Board of Medicine v. James H. Sternberg, M.D., DOAH Case No. 91-5044, (Recommended Order issued January 20, 1993).

2/ In this regard, attention is directed to Rule 60Q-2.035, Florida Administrative Code, which sets forth the procedural requirements for seeking an award of attorney's fees and/or costs under Section 57.111, Florida Statutes. Inasmuch as the Respondent engages in business through an incorporated entity, attention is also directed to the Final Order in Stephen S. Spector, M.D. v. Agency For Health Care Administration, Board of Medicine, DOAH Case No. 93-7095F (Final Order issued Nov. 30, 1994), and the cases cited therein.

APPENDIX

The following are my specific rulings on all proposed findings of fact submitted by all parties.

Findings submitted by Petitioner:

Paragraphs 1, 2, 3, 4, and 5: Accepted, with the exception of the last sentence of paragraph 5. The subject report is not attached and incorporated as an exhibit to this Recommended Order. Paragraph 6: Rejected as subordinate and unnecessary background details.

Paragraph 7: The portion of this paragraph up to the word "appraisal" is rejected as subordinate and unnecessary background details. The portion of this paragraph regarding Mr. Katsikos' "determination" is rejected as irrelevant because, even though he expressed the opinion that the subject appraisal report did not meet minimum USPAP standards, there is no clear and convincing evidence to support that opinion. The opinion testimony of Mr. Katsikos was not found to be very persuasive. His testimony regarding the reasons for his opinions was, for the most part, somewhat sketchy and vague. Further, his testimony was tainted by his admitted "personal motivation against" the Respondent based on her earlier criticisms of one of his appraisal reports. (See transcript pages 54, 63-64.)

Paragraph 8: The first three sentences of this paragraph are rejected as subordinate and unnecessary background details. The last sentence is rejected as constituting an opinion which is contrary to the greater weight of the persuasive evidence.

Paragraph 9: Rejected as constituting an opinion which is not supported by clear and convincing evidence and which is, in any event, contrary to the greater weight of the evidence. The use of the term "variances" in the appraisal report was reasonable and sufficient under the circumstances.

Paragraph 10: The first two lines of this paragraph are accepted. The remainder of this paragraph is rejected as not supported by clear and convincing evidence and as, in any event, contrary to the greater weight of the evidence.

Paragraph 11: Rejected as irrelevant because there is nothing alleged in the Administrative Complaint regarding any failure to address the feasibility of the conversion.

Paragraph 12: Rejected as not supported by clear and convincing evidence and as, in any event, contrary to the greater weight of the evidence.

Paragraph 13: Rejected as irrelevant because there is nothing alleged in the Administrative Complaint regarding any conflict arising from the use of the cost approach. In any event, the Respondent adequately explained why the cost approach was included in the subject appraisal report.

Paragraphs 14 and 15: Rejected as irrelevant because there is nothing alleged in the Administrative Complaint regarding any confusion in the appraisal report. Also rejected because the testimony on this subject was not clear and convincing and appeared to be tainted by the witness's admitted "personal motivation against" the Respondent.

Paragraph 16: Rejected as subordinate and unnecessary details.

Findings submitted by Respondent:

Pages 3 through 10 of the Respondent's proposed recommended order are captioned "Proposed Findings Of Fact." Nevertheless, those pages consist primarily of argument and discussion regarding insufficiencies in the evidence, and they contain very little in the way of actual proposed findings of fact. The few factual assertions on those pages are, for the most part, very intertwined with the arguments. The Hearing Officer has not attempted to identify and specifically rule on each of the proposed findings included on pages 3 through 10 of the Respondent's proposed recommended order. It appears sufficient to note that, on the issues raised by the Administrative Complaint, the Hearing Officer's findings of fact are, in general, in accord with the Respondent's view of the matter, although not necessarily for the same reasons as those argued by the Respondent.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.