

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
REAL ESTATE APPRAISAL BOARD,)
)
Petitioner,)
)
vs.) Case No. 97-3556
)
JAMES M. MILLIKEN, JR.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 9, 1998, in Inverness, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven W. Johnson, Esquire
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondent: J. Murray Milliken, Esquire
Post Office Box 174
Floral City, Florida 34436-0174

STATEMENT OF THE ISSUE

The issue is whether Respondent's license as a state certified general real estate appraiser should be disciplined for the reasons cited in the Administrative Complaint filed on March 5, 1997.

PRELIMINARY STATEMENT

This matter began on March 5, 1997, when Petitioner, Department of Business and Professional Regulation, Real Estate Appraisal Board, issued an Administrative Complaint alleging that Respondent, James M. Milliken, Jr., had operated as a registered appraiser without being the holder of a valid and current registration, in violation of Section 475.626(1)(a), Florida Statutes. Respondent denied the allegation and requested a formal hearing under Section 120.569, Florida Statutes, to contest the charges. The matter was referred by Petitioner to the Division of Administrative Hearings on August 5, 1997, with a request that an Administrative Law Judge be assigned to conduct a formal hearing.

By Notice of Hearing dated August 15, 1997, a final hearing was scheduled on November 21, 1997, in Inverness, Florida. At Respondent's request, the matter was continued to January 29, 1998. The matter was then abated while the parties attempted to reach a settlement. After a settlement stipulation was rejected by the agency, the hearing was rescheduled to November 9, 1998, at the same location.

At final hearing, Petitioner presented the testimony of Beverly Ridenaur, a consumer complaint analyst; Brian Lee, an agency investigator; and Alan C. Plush, a certified real estate appraiser. Also, it offered Petitioner's Exhibits 1-7. All

exhibits were received in evidence. Respondent testified on his own behalf.

There is no transcript of hearing. At Respondent's request, the time for filing proposed findings of fact and conclusions of law was extended to December 21, 1998. The same were timely filed by Petitioner, and they have been considered by the undersigned in the preparation of this Recommended Order. None were filed by Respondent.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In 1994, Respondent, James M. Milliken, Jr., was licensed as a state registered appraiser, having been issued license no. RI-0001148 by Petitioner, Department of Business and Professional Regulation, Real Estate Appraisal Board (Board). As such, Respondent could perform appraisal services under the supervision of a licensed or certified appraiser. When the events herein occurred, Respondent was employed as a registered appraiser by Gulf/Atlantic Valuation Services, Inc., in Sarasota, Florida. His supervisor was Alan C. Plush, a state certified general appraiser. After the events herein occurred, Respondent obtained his licensure as a certified general appraiser. His most recent license number is 0002351, also issued by the Board. Respondent also held a real estate license during this period of time, but it was inactive when the alleged misconduct occurred.

2. Pursuant to a change in state law, all registered appraiser licenses automatically expired on November 30, 1994. Renewal notices were sent by the Board to each licensee approximately sixty to ninety days before that date. Unless a licensee renewed his license by the expiration date, he was unable to lawfully "operate" as an appraiser.

3. The evidence shows that Respondent's registration expired on November 30, 1994, and it was not renewed until March 9, 1995, after Respondent had sent a check and application to the Board, and his registration was then renewed. Therefore, between December 1994 and when the license was renewed, he was not authorized to have his name appear on an appraisal report or operate as an appraiser.

4. Respondent later applied for licensure as a certified general appraiser. As a part of that process, he was required to provide evidence of appropriate experience obtained as a registered appraiser. To establish his experience, Respondent provided, among other things, copies of two appraisals he performed in December 1994. Those appraisals have been received in evidence as Petitioner's Exhibits 4 and 5. Respondent's name is found on both documents as being one of the appraisers preparing the reports.

5. As a part of a routine, random audit to verify Respondent's experience to qualify as a certified general appraiser, a Board analyst reviewed his file and discovered that

the above two appraisals had apparently been performed when Respondent's registration had expired. This prompted an investigation.

6. During the course of the Board investigation, a Board investigator interviewed Respondent, who acknowledged that he had performed the two appraisals in question, one dated December 9, 1994, and the other dated December 15, 1994. Thereafter, an administrative complaint was issued.

7. At hearing, Respondent indicated that when his registration expired on November 30, 1994, he was attempting to secure a date from the Board on when he could be examined for licensure as a certified general appraiser. Because he did not want to pay a fee for both his current registration and the new licensure, he delayed sending in his registration renewal application and check. When Respondent could not get a satisfactory date for the examination, he forwarded a check to the Board in February 1995 to renew his registration.

9. Respondent contended that he was under the impression that there was a grace period in which he could renew his registration without having his license expire. Testimony at hearing established, however, that no such grace period existed.

10. Respondent also contended that the Board failed to prove that he prepared the reports since his signature does not appear on either document copy. However, his name, title, and license number are typed on the front page of each report, and

witness Plush established that Respondent's signature would only appear on the original copy sent to the client, while copies retained by the appraiser's office are customarily unsigned. Further, his supervisor confirmed that Respondent actively participated in the two projects, and as noted above, Respondent acknowledged to an investigator that he worked on both reports. Finally, in seeking a new license, Respondent represented to the Board that he had prepared the two reports.

11. It can be reasonably inferred from the evidence that at least a portion of the appraisal work for the two reports in question was performed by Respondent prior to November 30, 1994, when his registration was still active. Even so, the remainder of the work was completed after his registration had expired. By doing so, Respondent operated as an appraiser without being registered.

12. Both reports make reference to the fact that they were prepared in conformity with "all regulations issued by the appropriate regulatory entities, regarding the enactment of Title XI of the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA)." It is fair to assume, then, that the two matters are federally related transactions within the meaning of the law. Each of the two evaluations exceeded one million dollars. Without offering a specific citation, the Board analyst "believed" that the threshold under the federal law in 1994 was \$150,000.00, and that any federally related transaction exceeding

that value required the use of a state licensed appraiser. If this is correct, Respondent had to be licensed in order to perform appraisal services on the two subject properties.

13. In mitigation, it is noted that this is the first time Respondent has ever been subject to disciplinary action by the Board. In addition, no member of the public or user of the reports suffered harm by virtue of the violation. The violation also appears to be somewhat minor, and there is only one count in the complaint. Finally, Respondent is presently a law student attending school on student loans, and he will suffer financial hardship as a result of the imposition of a fine.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

15. Because Respondent is subject to penal sanctions, including the loss of his license and the imposition of an administrative fine, Petitioner bears the burden of proving by clear and convincing evidence that the allegations in the complaint are true. See, e.g., Osborne Stern & Co., Inc., v. Dep't of Banking and Finance, 670 So. 2d 932, 933 (Fla. 1996).

16. The complaint alleges that Respondent "is guilty of operating as a registered, licensed, or certified appraiser without being the holder of a valid and current registration, license or certification in violation of s. 475.626(1)(a), Fla.

Stat." That provision makes it unlawful for a person to "operate . . . as a registered . . . appraiser without being the holder of a valid and current registration."

17. The factual allegations underpinning this charge are that Respondent's registration expired on November 30, 1994, and that "[b]etween November 30, 1994 and March 9, 1995, the Respondent's name appeared on two appraisals, dated December 9, 1994 and December 15, 1994 as a 'state registered appraiser.'"

18. By clear and convincing evidence, Petitioner has established that Respondent operated as a registered appraiser while preparing a part of the two appraisal reports in December 1994. Therefore, the charge that Respondent violated Section 475.626(1)(a), Florida Statutes (1993), has been sustained.

19. In reaching this conclusion, the undersigned has given careful consideration to Respondent's contention, made at final hearing, that under Section 475.612(2), Florida Statutes (1993), he was authorized to perform the work in question under a real estate salespersons' license he then held. But Respondent's real estate license was inactive in December 1994, and in any event, the statutory exception applies only when the realtor does "not represent [himself] as certified or licensed under [Part II, Chapter 475]." On the cover sheets of both reports, Respondent is represented as being a licensed appraiser.

20. In its proposed order, Petitioner has argued that even if Respondent's real estate license was active in December 1994, and this could arguably sanction his activities under Section 475.612(2), the two reports were "federally related transactions," and "Respondent's valuations exceed the FIERREA [sic] de minimus level," and thus they cannot qualify as an exception. In making this argument, Petitioner has cited no provision within the federal law which preempts state law on this matter, or any provision in Part II, Chapter 475 or the federal law itself, which holds that federally related transactions in excess of a certain valuation require the use of a state licensed appraiser. An independent review of FIRREA by the undersigned, however, has revealed that "a State certified appraiser shall be required for all federally related transactions having a value of \$1,000,000.00 or more." See 12 U.S.C.S. s. 3342(1). Because the two properties in question had a valuation in excess of that threshold, the appraisal had to be performed by a State certified appraiser.

21. Respondent also contended at final hearing that his activities were sanctioned under Section 475.612(1), Florida Statutes (1993). That subsection provides that "the work upon which an appraisal report is based may be performed by a person who is not a certified, licensed, or registered appraiser if the report is approved and signed by a certified or licensed

appraiser." But that part of the statute must be read in pari materia with the other language in the section which states that a person may not use the title "registered real estate appraiser, . . . or words to that effect" unless he is actually registered. Here, both reports in question reflect that they were prepared by "James M. Milliken, Associate, State-Registered Appraiser 0001148."

22. At hearing, Respondent further contended that if a violation occurred, the infraction involved Section 475.612, Florida Statutes (1993), and not Section 475.626(1)(a), Florida Statutes (1993), as alleged in the complaint. He further argued that the agency's disciplinary guidelines do not contain a suggested penalty for a violation of Section 475.612, thus implying that no penalty should be imposed. However, the language in Section 475.626(1)(a) is very specific and makes it unlawful for a person to "operate as a registered, licensed, or certified appraiser without being the holder of a valid and current registration, license, or certification." Respondent's conduct clearly fits within the parameters of this statute. In addition, the statute itself provides that a violation of its terms may be the basis for disciplinary action under Chapter 120, Florida Statutes. Specifically, Subsection (2) provides that "a denial, revocation, or suspension proceeding may arise out of [a violation of Subsection (1)(a)]," which is the essence of this proceeding. Therefore, the suggestion that the conduct here

cannot equate to a violation of Section 475.626(1)(a) has been rejected.

23. Finally, at hearing, Respondent cited to an opinion prepared by an Assistant Attorney General and published in a trade publication which ostensibly authorized his conduct. The opinion, however, was not made a part of this record, and therefore it has not been considered.

24. Section 475.624, Florida Statutes, provides that the Board may "reprimand, fine, revoke, or suspend, for a period not to exceed 10 years, the registration, license, or certification of any such appraiser" who violates the law.

25. Rule 61J1-8.002(3), Florida Administrative Code, provides the penalty guidelines that the Board must follow in disciplinary actions such as this. For a violation of Section 475.626(1)(a), "[t]he usual action of the Board shall be to impose a penalty from a 5 year suspension to revocation and an administrative fine of \$1000." However, Paragraph (4) of the same rule authorizes the Board "to deviate from the above guidelines" when aggravating or mitigating circumstances are shown.

26. As noted in Finding of Fact 13, mitigating circumstances are present which clearly justify a deviation from the disciplinary guidelines. The licensee has a previously unblemished record; the offense does not appear to be severe since much of the work on the two reports would have been

completed prior to November 30, 1994, or before the registration expired; no member of the public or user of the reports was harmed by the offense; the complaint contains but a single count; as a law student on student loans Respondent will suffer financial hardship if a monetary penalty is imposed; and Respondent operated under the erroneous impression that he could continue working during a grace period until his registration was renewed.

27. Given the foregoing circumstances, a reprimand is appropriate.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Real Estate Appraisal Board enter a Final Order finding that Respondent violated Section 475.626(1)(a), Florida Statutes, and that he be given a reprimand.

DONE AND ENTERED this 24th day of December, 1998, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
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this 24th day of December, 1998.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Division of Real Estate.