

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VICTOR JESUS MONZON,)
)
 Petitioner,)
)
 vs.) Case No. 11-6007F
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
 DIVISION OF REAL ESTATE,)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on January 27, 2012, by telephone conference call at sites located in Fort Lauderdale, Orlando, and Tallahassee, Florida, before Claude B. Arrington, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Daniel Villazon, Esquire
Daniel Villazon, P.A.
1420 Celebration Boulevard, Suite 200
Celebration, Florida 34747

For Respondent: Jennifer Leigh Blakeman, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Petitioner, Victor Jesus Monzon (Mr. Monzon), should be awarded attorney's fees and costs pursuant to section 57.111, Florida Statutes (2011). Because of a stipulation reached by the parties, the only issues are (1) whether Mr. Monzon qualified as a "small business party," and (2) whether the Department of Business and Professional Regulation (the Department) was "substantially justified" in initiating the disciplinary proceedings against Mr. Monzon that culminated in DOAH Case No. 10-9926PL.

PRELIMINARY STATEMENT

On September 27, 2011, the Florida Real Estate Appraisal Board entered Final Order No. 2011-06623, adopting the Findings of Fact and Conclusions of Law contained in the Recommended Order entered by the undersigned in DOAH Case No. 10-9926PL (the disciplinary proceeding). That Recommended Order found that the Department had failed to prove by clear and convincing evidence that Mr. Monzon committed the violations that had been alleged in the Administrative Complaint.

On November 21, 2011, Mr. Monzon filed with DOAH "Petitioner's Florida Statute 57.111 Motion for Attorney Fees/Costs in DOAH Case No. 10-9926PL," which was assigned DOAH Case No. 11-6007F (the fee case). The parties stipulated that the disciplinary action against Mr. Monzon were instituted by a

state agency, that the state agency was not a nominal party, that Mr. Monzon was the prevailing party in disciplinary proceeding, that there are no circumstances that would make the award of fees and costs unjust, and that the amount of fees and costs (\$10,485.00 and \$237.00, respectively) being sought were reasonable.

At the formal hearing, the Department presented five consecutively-numbered exhibits, each of which was admitted without objection. Mr. Monzon testified on his own behalf, but presented no additional exhibits. Arthur Soule, an investigator employed by the Department, testified on behalf of the Department. Mr. Soule investigated the complaint that led to the disciplinary matter, compiled the materials submitted to the probable cause panel, and prepared an investigative report that was presented to the probable cause panel.

A Transcript of the proceedings consisting of one volume was filed on February 21, 2012. The parties timely filed Proposed Final Orders which have been duly considered by the undersigned in the preparation of this Final Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2011).

FINDING OF FACT

1. At the times relevant to this proceeding, Mr. Monzon has been a licensed real estate appraiser and the owner of a

business known as Heartland Appraisal Group, Inc. On February 11, 2009, the Department received a complaint from an employee of Chase Home Lending (Chase) about an appraisal report (the Report) that was at issue in the disciplinary proceeding. The Report was dated as of April 23, 2007, and is described by the Recommended Order entered in DOAH Case No. 10-9926PL.

2. On April 3, 2009, Mr. Soule provided Mr. Monzon a copy of the Chase complaint. Mr. Soule subsequently gathered documentation relevant to the complaint and obtained a complete copy of Mr. Monzon's work file for the Report.

3. The Administrative Complaint in the disciplinary proceeding was dated July 7, 2010, and filed with the Department on July 20, 2010. Mr. Monzon's Election of Rights Form appears to have been faxed to the Department on August 6, 2010, and filed with DOAH on October 27, 2010. The formal hearing in the disciplinary proceeding was held March 9, 2011.

4. At the hearing on fees and costs, Mr. Monzon was questioned as to his finances as of the date of the formal hearing in the disciplinary proceeding (March 9, 2011) and as of January 27, 2012. There was no evidence as to his finances or the number of his employees as of the date the Department initiated the disciplinary proceedings against him.

5. The Administrative Complaint against Mr. Monzon contained factual allegations as to the Report, which valued the

fair market value of condominium unit 1803 located at 1331 Brickell Bay Drive, Miami, Florida, as of April 23, 2007. In addition to references to Florida Statutes (2007), the Administrative Complaint cited certain Uniform Standards of Professional Appraisal Practice (USPAP).

6. Count One of the Administrative Complaint charged that Mr. Monzon violated section 475.624(2) by culpable negligence or breach of trust in a business transaction; or violated a duty imposed upon him by the terms of a contract, whether written, oral, express or implied, in an appraisal assignment, by certifying that he had complied with the above USPAP Standards when he did not.

7. Count Two alleged that Mr. Monzon engaged in fraud, misrepresentation, concealment, or dishonest conduct by concealing prior sales of the Subject Property; concealing or misrepresenting the true ownership of the Subject Property; acquiescing in the client's demand to conceal the true ownership of the Subject Property, and to alter the Report to reflect a 'change' in ownership; used a Comparable Sale 1 that sold under circumstances suggestive of fraud to arrive at a higher valuation for the Subject Property; and/or using other Comparable Sales located in a development noted for fraud, in violation of section 475.624(2).

8. Count Three alleged that Mr. Monzon violated section 475.624(15) by failing to practice appraisal with that level of care and skill which is recognized by a reasonably prudent appraiser as being acceptable under similar conditions and circumstances by failing to comply with the USPAP provisions governing the development and communication of the Report.

9. Count Four alleged that Mr. Monzon violated section 475.629 by failing to maintain a copy of the appraisal report submitted to the client. Count Four was dismissed by the Department at the outset of the formal hearing in DOAH Case No. 10-9926PL.

10. Mr. Soule completed an Investigative Report on August 21, 2009. His report was approved by his supervisor the same day. The report, which included the documentation he had gathered, consists of 430 pages.

11. On July 7, 2010, a probable cause panel consisting of two appraisers, voted to find probable cause after asserting that they had received Mr. Soule's Investigative Report.

12. Both panel members answered in the affirmative to the following question "Did you thoroughly read and review these materials and familiarize yourself with the information presented within?"

13. The panel members were also instructed by attorney Mary Ellen Clark as follows:

Panel members, you're not here to determine the guilt or innocence of the person who is the subject of each case, but to decide whether the facts disclosed by the record before you constitute probable cause for the prosecutor to proceed in bringing formal charges by way of an administrative complaint against that person.

14. The panel members were provided a draft of an administrative complaint that, after editing, became the Administrative Complaint filed in the disciplinary proceeding. The panel was also presented Mr. Monzon's rebuttal to the allegations against him.

15. After a review of the four counts in the administrative complaint presented to them by D. Chris Lindamood, Esquire, a senior attorney employed by the Department, the panelist discussed with counsel for the Department the allegations contained in the administrative complaint. That discussion demonstrated that each panelist had reviewed the material in the Investigative Report, including the attachments thereto. Those materials contained different iterations of the appraisal report and notations by Mr. Monzon which were sufficient, along with the other materials attached to the Investigative Report, to lead a reasonable person to conclude that there was probable cause to file the charges in the administrative complaint against Mr. Monzon.

CONCLUSIONS OF LAW

16. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 57.111(4)(b)1, 120.569, and 120.57(1).

17. Mr. Monzon has the burden of proving by a preponderance of the evidence that he is entitled to an award of attorney fees and costs. See Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) and Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

18. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

19. Section 57.111(4)(a), Florida Statutes, provides:

Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

20. Subsection 57.111(3)(b) and (c), provide:

(b) The term "initiated by a state agency" means that the state agency:
1. Filed the first pleading in any state or federal court in this state;

2. Filed a request for an administrative hearing pursuant to chapter 120; or
3. Was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency.

21. Section 57.111(3) (d) defines the term "small business party" as follows:

- (d) The term "small business party" means:
- 1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments;
 - b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than \$2 million; or
 - c. An individual whose net worth did not exceed \$2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade . . .

22. To prevail in this proceeding for an award of costs and fees, Mr. Monzon must first establish that he was a small business party at the time the Department initiated the disciplinary proceedings against him. While Mr. Monzon established that he met the definition of a small business party

at the time of the formal hearing in the disciplinary proceeding and at the time of the formal hearing in this costs and fees proceeding, he failed to prove that he met that definition at the time the Department initiated the disciplinary proceedings against him. Consequently, he failed to meet his burden of proof in this proceeding.

23. Substantial justification is defined in section 57.111(3)(e), as "a reasonable basis in law and fact at the time it was initiated by a state agency." Substantial justification requires that the probable cause panel had a "solid though not necessarily correct basis in fact and law for the position it took." Fish v. Dep't of Health, 825 So. 2d 421, 423 (Fla. 4th DCA 2002) (citing McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983)).

24. In arguing that the Department was not substantially justified in proceeding against Mr. Monzon, his attorney in his Proposed Final Order asserts that the probable cause panel did not comply with the portion of section 455.225(4), which provides "Any probable cause panel must include one of the board's former or consumer members, if one is available, willing to serve, and is authorized to do so by the board chair." Mr. Monzon has the burden of proving his untimely contention that the probable cause panel was improperly configured. While the evidence established that the two members of the probable cause

panel were licensed appraisers, there was no evidence presented that a consumer member was available or willing to serve. Consequently, Mr. Monzon's contention that the probable cause panel was improperly configured is rejected due to a lack of proof and because the contention was not timely raised.

25. The Department established that it was substantially justified in taking the action that it did in filing the Administrative Complaint in the disciplinary proceeding.

ORDER

Based on the foregoing, it is ORDERED that Mr. Monzon's Motion for Attorney's Fees and Costs is denied, and Mr. Monzon shall recover nothing in the action. The file of the Division of Administrative Hearings is closed.

DONE AND ORDERED this 30th day of March, 2012, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
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this 30th day of March, 2012.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.