

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paul R. Giba, :
 :
 Petitioner :
 :
 v. :
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 Bureau of Professional and :
 Occupational Affairs, State :
 Real Estate Commission, : No. 294 C.D. 2009
 Respondent : Argued: October 15, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: January 29, 2010

Paul Giba (Giba) appeals from the order of the Bureau of Professional and Occupational Affairs, State Real Estate Commission (Commission) which suspended his real estate license for two years.

Suspension of Giba’s License to Practice Law

On March 23, 2005, the Disciplinary Board of the Supreme Court of Pennsylvania (Disciplinary Board) recommended the suspension of Giba’s license to practice law for two years for misappropriation of escrowed client funds in excess of \$170,000. The Disciplinary Board’s recommendation was based on its finding that Giba had engaged in “the systematic misrepresentation of entrusted funds” in 15 different client matters from December 1999 to September 2002. The Disciplinary Board, however, recommended a two-year suspension, as opposed to disbarment, based on credible mitigating evidence. The most significant was Giba’s major depression that resulted in his inability to carry out his duties as an

attorney. Report and Recommendation of the Disciplinary Board of the Supreme Court of Pennsylvania, March 23, 2005, at 11; Reproduced Record (R.R.) at 18a.

On June 16, 2005, upon consideration of the Report and Recommendation of the Disciplinary Board, the Supreme Court suspended Giba from the Bar of Pennsylvania for a period of two years effective July 16, 2005.

Giba's Application for License to Sell Real Estate

On June 27, 2005, Giba applied for, and was issued, a license to sell real estate. From that date and at all times relevant to these proceedings, he transacted the business of a real estate agent with Howard Hanna without incident.

On April 18, 2006, Giba filed his first annual on-line application to renew his real estate salesperson's license. Giba answered "No" to following questions:

1. Are you submitting a name change with this renewal?
2. Are you licensed in another licensing jurisdiction, in this profession, (in any status)?
3. **Since your last renewal, has a licensing jurisdiction taken any disciplinary action against you?**
(Emphasis added).

myLicense Renewal Question Responses, April 18, 2006, at 1; R.R. at 23a.

On December 8, 2006, the Bureau of Professional and Occupational Affairs filed a three-count complaint in the nature of an order to show cause why Giba's real estate license should not be suspended or revoked. Count I alleged that

Giba obtained his real estate license renewal by false representation when he failed to disclose the disciplinary sanction against him imposed by the Supreme Court. Count II alleged that Giba did not bear a good reputation for honesty, trustworthiness, integrity and competence to transact the business of a salesperson as required by Section 501 of the Real Estate Licensing and Registration Act (RELRA), 63 P.S. §455.501.¹ Count III alleged that Giba “knowingly” failed to provide accurate and truthful information on his renewal application when he failed to disclose the Supreme Court’s disciplinary sanction in response to Question #3.

A hearing was held. Before the Hearing Examiner Giba testified that when he read question #3, he answered “No” because (1) he did not believe the question applied since it included the phrase “since your last renewal” and this was his first renewal; (2) no disciplinary action was taken against his real estate license; (3) he did not believe the question included a separate and distinct professional licensing agency or body; and (4) he did not believe Question #3 applied to the unrelated suspension of his law license.

The Hearing Examiner concluded that Giba did not provide inaccurate information in response to Question #3 and dismissed Counts I and III. However, the Hearing Examiner sustained Count II, because the Giba’s misconduct as an attorney was incompatible with holding a real estate license under Section 501(a) of the RELRA, 63 P.S. §455.501(a). He found that Giba’s conduct “called into question” his ability to deal honestly with Pennsylvania citizens. Proposed Report

¹ Act of February 19, 1980, P.L. 15, as amended. Section 501 of the RELRA, 63 P.S. §455.501, provides: “Licenses shall be granted only to and renewed only for persons who bear a **(Footnote continued on next page...)**”

of Hearing Examiner, June 27, 2007, at 9. The Hearing Examiner issued a proposed order and recommended that Giba's license be suspended for two years.

On review, the Commission concluded², contrary to the Hearing Examiner, that Giba's answer to Question #3 was "untrue." Final Adjudication and Order of the Commission, January 30, 2009, at 9. The Commission also found, based on the Supreme Court's disciplinary action, that Giba did not bear "a good reputation for honesty, trustworthiness, integrity and competence to transact the business of a salesperson as required by Section 501(a) of the RELRA, 63 P.S. §455.501(a)." Final Adjudication and Order of the Commission, January 30, 2009, at 6. The Commission concurred with the Hearing Examiner's recommended sanction and suspended Giba's real estate license for two years.

On appeal³, Giba asserts (1) the Commission erred as a matter of law when it held that his answer to Question #3 was "untrue"; and (2) that the Commission's finding that he did not bear a good reputation for honesty, trustworthiness, integrity and competence was not supported by substantial evidence.

(continued...)

good reputation for honesty, trustworthiness, integrity and competence...."

² The Commission is the ultimate trier of fact in these cases. Perez-Rocha v. Commonwealth Bureau of Professional and Occupational Affairs, 933 A.2d 1102 (Pa. Cmwlth. 2007).

³ This Court's standard of review is limited to whether the Hearing Examiner or Commission committed an error of law, abused their discretion or made findings of fact not supported by substantial evidence. Smith v. Real Estate Commission, 450 A.2d 301 (Pa. Cmwlth. 1982).

Answer to Question #3

First, Giba contends that he had no affirmative duty to disclose the Supreme Court's disciplinary sanction on the on-line renewal application. He asserts that he answered the question truthfully and that his interpretation of the question was entirely consistent with the RELRA and the regulations which require real estate agents to affirmatively disclose only whether they have been convicted of a crime or if disciplinary action has been taken by a real estate licensing authority of another jurisdiction.

Giba relies on Section 604 of the RELRA, 63 P.S. §455.604(30) governing prohibited acts, and the Commission's regulations governing the ethical responsibilities of licensees. 49 Pa. Code §35.290. Section 604 of the RELRA, 63 P.S. §455.604(30), prohibits a licensee from obtaining a license by false representation and authorizes the Commission to revoke or suspend a license when a licensee was "disciplined under a real estate licensing law of another jurisdiction." (Emphasis added). Similarly, 49 Pa. Code §35.290 obligates a licensee to notify the Commission (1) when he has been convicted of a felony or misdemeanor; or (2) upon being disciplined by "a real estate licensing authority of another jurisdiction." (Emphasis added).

As pointed out by Giba, neither the regulations nor the RELRA require a real estate agent to disclose whether his license was suspended or revoked in any other profession or occupation other than the real estate profession. This Court must agree that Giba, therefore, had no affirmative duty to disclose the attorney disciplinary action against him. Clearly, the questionnaire was designed to elicit information which might constitute grounds for sanctions under the RELRA and its regulations; namely, whether the agent was convicted of a crime or

disciplined by another real estate jurisdiction. The Commission's interpretation of Question #3 to include the disciplinary action taken by the Supreme Court Disciplinary Board was erroneous because the disclosure of such information, under the clear wording of the RELRA and regulations, was not required.

Based on the Commission's erroneous interpretation of Question #3 and the imposition of a requirement not mandated by the RELRA or regulations, this Court must reverse the Commission's order which sustained Count I.

Reputation for Honesty, Trustworthiness, Integrity and Competence

Next, Giba contends that evidence of the Supreme Court's 2005 sanction alone was insufficient to establish that he did not bear a good reputation for honesty, trustworthiness, integrity and competence on January 30, 2009, the date of the Commission's Final Adjudication and Order.

Other than a copy of the Disciplinary Board's Report adopted by the Supreme Court, there was no other evidence, testimonial or otherwise, that Giba had, *during the time relevant to real estate license proceedings*, a bad reputation for dishonesty or untrustworthiness. The Commission's finding was based entirely on the Supreme Court's suspension of Giba's attorney license in July of 2005, based on conduct that occurred prior to September 2002.

This Court agrees with Giba that evidence of the Supreme Court's 2005 disciplinary action was not dispositive of the issue, especially since the period of suspension had long expired and Giba was eligible to return to the practice of law. In essence, it was water over the dam. The Supreme Court issued its punishment. The punishment was served. The suspension period expired in

2007. By the time the Commission imposed *its* two-year suspension in January of 2009, Giba was eligible to resume the practice law. Giba's reputation was not indefinitely tarnished based solely on the fact he was disciplined. Critically, the Supreme Court Disciplinary Board noted that Giba deserved suspension instead of disbarment because of mitigating evidence of his major depression which "impaired his judgment and caused his mishandling of funds." Report and Recommendation of the Disciplinary Board of the Supreme Court of Pennsylvania, March 23, 2005, at 8; R.R. at 15a

To revoke or suspend a license under Section 501 of the RELRA, 63 P.S. §455.501, there must be evidence that the licensee bears a bad reputation for honesty, trustworthiness, integrity or competence. Reputation is defined in Black's Law Dictionary, 8th Ed. At 1331 (2000), as "the esteem in which a person is held by others." Clearly, reputation evidence must be current and reflect existing opinion, otherwise it is not probative. Here, a great deal of time elapsed between the Supreme Court's sanction and the Commission's Final Adjudication and Order. No witness ever testified that Giba had a bad reputation for trustworthiness or dishonesty. To the contrary, the evidence established that Giba took the time during the suspension for personal reform. After he was suspended from that practice of law, Giba conducted business as a licensed real estate agent from 2005 until the Real Estate Commission suspended his license in 2009. Giba underwent extensive psychological counseling, his depression was in remission, and he was gainfully employed as a real estate agent. Giba violated no statute, rule or regulation during that period. The instant proceedings were commenced because the Commission erroneously believed that Giba had lied on his renewal application, not because he engaged in any wrongdoing connected with his real estate license.

That is not to say that a disciplinary action by the Supreme Court could never be evidence of a reputation for dishonesty or untrustworthiness. However, where, as here, the Supreme Court's disciplinary sanction was remote and because Giba had long before served his suspension and the lack of substantial evidence that Giba had a bad reputation for honesty or trustworthiness, suspension of his real estate license was error.

Based on the foregoing, the order of the Commission suspending Giba's real estate license is reversed.

BERNARD L. McGINLEY, Judge

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Occupational Affairs, State	:	
Real Estate Commission,	:	No. 294 C.D. 2009
Respondent	:	

ORDER

AND NOW, this 29th day of January, 2010, the order of the Bureau of Professional and Occupational Affairs, State Real Estate Commission suspending the real estate license of Paul R. Giba for two years is hereby reversed.

BERNARD L. MCGINLEY, Judge