

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Chaba M. Pallaghy, :
 :
 Petitioner :
 :
 :
 v. : No. 749 C.D. 2011
 : Submitted: September 23, 2011
 Bureau of Professional and :
 Occupational Affairs, :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: December 20, 2011

Chaba M. Pallaghy (Licensee) petitions for review of the order of the Bureau of Professional Occupational Affairs, State Real Estate Commission (Commission) imposing a one-year suspension of Licensee's real estate broker's license, of which three months would be active and the remainder stayed in favor of probation, imposing a \$2,000.00 civil penalty to be paid during the active suspension period, and requiring Licensee to complete the Commission-approved broker office management course during the suspension period, pursuant to the provisions of the Real Estate Licensing and Registration Act (Act).¹ We affirm.

On April 4, 2006, Licensee received a \$2,000.00 check from a buyer as a deposit on several undeveloped lots in Pike County, Pennsylvania. The check was

¹ Act of February 19, 1980, P.L. 15, as amended, 63 P.S. § 455.101 – 455.902.

deposited in Licensee's escrow account. On April 21, 2006, the buyer entered into separate sales agreements with two unrelated sellers. Licensee was the broker of record and subagent for the sellers, representing the sellers.

Subsequently, disputes arose between the buyer and the sellers. The buyer requested the return of the escrow deposit, and at least one of the sellers requested that the escrow be released to them.

On April 18, 2007, Licensee wrote a check for \$2003.64 from the escrow account closing that account and leaving a zero ending balance. That same day, Licensee then deposited the same amount, \$2,003.64, into his management account. At some time following the transfer of the buyer's escrow funds into the management account, the Internal Revenue Service levied upon the management account removing all of the funds.

The buyer never authorized the release of the funds from Licensee's escrow account, never signed a release for the money, was never presented with a release for the money, was not aware that either of the sellers claimed the money, was never involved in a court action for the return of the money, and has never received a return of the escrow funds. In addition, Licensee never obtained a signed release for the escrow money from either the buyer or the sellers, and never released the escrow money to either the buyer or the sellers.

Based on the foregoing, on September 3, 2009, the Commonwealth filed an order to show cause which alleged that Licensee had committed nine total violations comprised of violations of the former Section 604(a)(5)(iii) and (iv), (15), and (20) of the Act, 63 P.S. § 455.604(a)(5)(iii), (iv), (15), (20)^{2,3}, and violations of

² The former Section 604(a)(5)(iii) and (iv), (15), and (20) of the Act provided, in pertinent part:

(Continued....)

Section 35.326(a) of the Commission's regulations, 49 Pa. Code § 35.326(a).⁴ On November 5, 2009, Licensee filed an answer to the order to show cause.

(a) [T]he commission shall have power ... to suspend or revoke a license ... or to levy fines up to \$1,000, or both, ... where a licensee ... in performing or attempting to perform any of the acts mentioned herein, is found guilty of:

* * *

(5) Failure to comply with the following requirements:

* * *

(iii) a broker shall not commingle the money or other property of his principal with his own;

(iv) every broker shall immediately deposit such moneys, of whatever kind or nature, belonging to others, in a separate custodial or trust fund account maintained by the broker with some bank or recognized depository until the transaction involved is consummated or terminated, at which time the broker shall account for the full amount received. Under no circumstances shall a broker permit any advance payment of funds belonging to others to be deposited into the broker's personal or business account, or to be commingled with any funds he may have on deposit....

* * *

(15) violating any rule or regulation promulgated by the commission in the interest of the public and consistent with the provisions of this act.

* * *

(20) Any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness, or incompetency.

³ The former Section 604(a)(5) of the Act was deleted by the Act of July 6, 2009, P.L. 58, effective September 4, 2009, and replaced by Section 604(a)(5.1), 63 P.S. § 455.604(a)(5.1).

⁴ Section 35.326 of the Commission's regulations provides:

(a) Except as provided in subsection (b), a broker may not commingle money that is required to be held in escrow—or interest earned on an escrow account—with business, personal or other funds.

(b) A broker may deposit business or personal funds into an

(Continued....)

On April 12, 2010, a hearing was held before a Commission hearing examiner. On May 11, 2010, the hearing examiner issued a Proposed Adjudication and Order which made findings of fact, conclusions of law, and recommended that Licensee's license be suspended for three months, such suspension immediately stayed in favor of probation, and assessed a \$2,000.00 civil penalty. See Reproduced Record (RR) at 25a.

On May 13, 2010, the Commission issued an Order of Intent to Review pursuant to Section 35.226(a)(2) of the General Rules of Administrative Practice and Procedure (GRAPP), 1 Pa. Code § 35.226(a)(2)⁵, stating that it “[m]ay substitute its

escrow account to cover service charges assessed to the account by the bank or depository where the account is located or to maintain a minimum balance in the account as required by the regulations of the bank or depository.

(c) A broker may not misappropriate money that is required to be held in escrow—or interest earned on an escrow account—for business, personal or other purposes.

⁵ Section 35.226(a)(2) of the GRAPP provides:

(a) Adjudications of an agency head shall be final orders, subject only to application for rehearing, if any, provided for by the statute under which the proceeding is initiated and conducted, except proposed regulations that may be issued in rulemaking. Final orders shall include:

* * *

(2) Adjudications by the agency head upon appeal of proposed reports by participants, by filing exceptions in the manner and time provided by § 35.211 (relating to procedure to except to proposed report), or upon review initiated by the agency head within 10 days next following the expiration of the time for filing exceptions under the section, or another time as the agency head may fix in specific cases.

In turn, Section 35.211 of the GRAPP provides, in pertinent part:

A participant desiring to appeal to the agency head shall, within 30

(Continued....)

findings for those of the hearing examiner, and/or may impose a greater or lesser sanction than that imposed by the hearing examiner, without regard to the relief requested or the position argued by any party....” Supplemental Reproduced Record (SRR) at 3b. On May 19, 2010, the Commonwealth filed exceptions to the Proposed Adjudication and Order.

On March 24, 2011, the Commission issued its Final Adjudication and Order adopting the hearing examiner’s findings of fact and conclusions of law. Final Adjudication and Order at 4; SRR at 9b. However, the Commission determined that the hearing examiner’s recommended sanction should be increased. Final Adjudication and Order at 8; SRR at 13b. Accordingly, the Commission imposed the instant sanction, a one-year suspension of Licensee’s real estate broker’s license, of which three months would be active and the remainder stayed in favor of probation, a \$2,000.00 civil penalty to be paid during the active suspension period, and requiring Licensee to complete the Commission-approved broker office management course during the suspension period. Licensee then filed the instant petition for review.⁶

days after the service of a copy of a proposed report or such other time as may be fixed by the agency head, file exceptions to the proposed report or part thereof in a brief....

1 Pa. Code § 35.211.

⁶This Court’s scope of review is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact were unsupported by substantial evidence. Campo v. State Real Estate Commission, 723 A.2d 260 (Pa. Cmwlth. 1999). In matters concerning a professional real estate license, the Commission is the ultimate finder of fact. Cannizzaro v. Department of State, 564 A.2d 564 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 525 Pa. 605, 575 A.2d 570 (1990). As the fact-finder, the Commission is the exclusive arbiter of conflicts in the evidence and credibility, and is free to accept or reject the testimony of any witness, in whole or in part, even if it is uncontradicted. Barran v. State Board of Medicine, 670 A.2d 765 (Pa. Cmwlth. 1996); Benford v. State Real Estate Commission, 300 A.2d 922 (Pa. Cmwlth. 1973). If the Commission’s findings are supported by substantial evidence, they are binding on appeal. Cannizzaro. Further, where substantial evidence

(Continued...)

In this appeal, Licensee claims: (1) the Commission erred as a matter of law or capriciously disregarded competent evidence in rendering such an indurate penalty for Licensee’s first offense; (2) the Commonwealth was estopped from objecting to the hearing officer’s proposed penalty because it did not recommend any specific sanction at the hearing; and (3) the Commission erred in altering the penalty imposed by the hearing officer because the hearing officer was in a better position to assess the competency and credibility of the evidence introduced against him.

However, Licensee has failed to adequately develop these arguments supporting these claims in his appellate brief as required by Pa.R.A.P. 2119(a). As this Court has recently noted:

[R]ule 2119(a) of the Pennsylvania Rules of Appellate Procedure ... states:

The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, *followed by such discussion and citation of authorities as are deemed pertinent.*

Pa.R.A.P. 2119(a) (emphasis added). Additionally, this Court has held, “[w]hen issues are not properly raised and developed in briefs, when the briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof.” *Commonwealth v. Feineigle*, 690 A.2d 748, 751 n. 5 (Pa. Cmwlth. 1997). “Mere issue spotting without analysis or legal citation to support an assertion precludes our appellate review of [a] matter.”

supports a particular finding, it is irrelevant the record contains evidence that would support a contrary finding; the relevant inquiry is whether the record contains substantial evidence to support the findings actually made. Grabish v. Workmen’s Compensation Appeal Board (Trueform Found., Inc.), 453 A.2d 710 (Pa. Cmwlth. 1982).

Commonwealth v. Spontarelli, 791 A.2d 1254, 1259 n. 11 (Pa. Cmwlth. 2002). The additional issues [raised by appellant and] cited above are conclusory statements with no supporting analysis or citation to legal authority. Therefore, we decline to address these issues.

Boniella v. Commonwealth, 958 A.2d 1069, 1072 n. 8 (Pa. Cmwlth. 2008) petition for allowance of appeal denied sub nom. In re Handgun, 600 Pa. 376, 966 A.2d 551 (2009). See also Rapid Pallet v. Unemployment Compensation Board of Review, 707 A.2d 636, 638 (Pa. Cmwlth. 1998) (“[A]rguments not properly developed in a brief will be deemed waived by this Court....”) (citation omitted).

Likewise, in the instant case, Licensee’s argument in support of the foregoing claims of error is entirely composed of conclusory statements with absolutely no supporting analysis or citation to legal authority. See Brief for Appellant at 8-9. As a result, we decline to address these allegations of error in the instant appeal. Boniella; Rapid Pallet.

Moreover, even if we were to address these claims, “in the interest of justice”⁷, it is clear that they are patently without merit. Although Licensee styles his arguments as the Commission’s capricious disregard of evidence and the Commission’s purported abuse of its discretion, he essentially asks this Court to reweigh the mitigating evidence presented by him. However, it is not the function of this Court to reweigh the evidence or to second guess the Commission’s credibility

⁷ See, e.g., Commonwealth v. Lyons, 833 A.2d 245, 252 (Pa. Super. 2003), petition for allowance of appeal denied, 583 Pa. 695, 879 A.2d 782 (2005) (“In the instant case, the defects in Appellant’s brief are substantial. The statement of the twelve ‘Questions Involved’ bears no relation to the eight sections of the argument or the divisions within the argument. *See* Pa.R.A.P. 2116, 2119. Appellant’s forty-six page argument is rambling, repetitive and often incoherent. *See* Pa.R.A.P. 2119. Nonetheless, in the interest of justice we address the arguments that can be reasonably discerned from this defective brief.”).

determinations. Cannizzaro. In short, as Licensee's arguments invite this Court to exceed its limited standard of review, we will not accede to Licensee's request.

Moreover, Licensee's argument that the Commission erred in imposing the chosen sanctions because they are excessive and arbitrary is likewise without merit. The Act authorizes the Commission to impose sanctions for violating its provisions, or a lawful regulation promulgated by the Commission. Section 604 of the Act, 63 P.S. § 455.604. When the Commission determines that a violation has occurred, it is free to revoke a licensee's professional real estate license under Section 604, and to impose a civil penalty of up to \$1,000.00 for each violation under Section 305 of the Act, 63 P.S. § 455.305. Moreover, the hearing examiner's proposed sanction did not restrict the Commission's discretion in imposing a more severe sanction that is authorized under the Act. See Telang v. State Board of Medicine, 561 Pa. 535, 751 A.2d 1147 (2000) (holding that the licensing board was authorized to impose an otherwise permissible sanction without regard to the sanction proposed by a hearing examiner).

While this Court is duty bound to correct abuses of discretion in the imposition of a penalty by the Commission, we will not substitute our own discretion for that of the Commission, absent a clearly unreasonable exercise of judgment by that administrative body. Shenk v. State Real Estate Commission, 527 A.2d 629 (Pa. Cmwlth. 1987). Here, in deciding to suspend Licensee's license and impose a civil penalty, the Commission explained:

While the Commission agrees with the Commonwealth that the recommended sanction must be increased, it also agrees with the hearing examiner and [Licensee] that revocation or a lengthy suspension is not warranted given the specific facts of this case. In light of [Licensee]'s intentional transfer of the escrow funds and his commingling of them in his business account, albeit

without an evil intent, the Commission believes that an appropriate sanction is the imposition of a one year suspension, of which three months shall be active and the remainder stayed in favor of probation, the assessment of a \$2,000.00 civil penalty to be paid during the active suspension period and the requirement that [Licensee] complete the Commission-approved broker office management course during the suspension period. In the event that [Licensee] does not pay the civil penalty within the active suspension period, the Commission will not lift the active suspension on [Licensee]'s license until it is paid in full. Additionally, if [Licensee] does not complete the required remedial education within the suspension period, [Licensee]'s license shall be automatically suspended until the documentation evidencing completion of remedial education is received. The Commission believes that this combination of penalties will retrain [Licensee] so that he is aware of proper office responsibilities in the future, as well as alert him, and similarly situated licensees, to the paramount importance of strictly complying with the escrow requirements.

Final Adjudication and Order at 8.

As the Commission acted within its statutory authority in imposing the foregoing sanctions, and there is nothing in the record indicating the penalties were motivated by anything other than the Commission's sound discretion, Licensee has failed to prove the Commission abused its discretion by imposing the sanctions in this case. See Pivrotto v. State Real Estate Commission, 554 A.2d 179, 182 (Pa. Cmwlth. 1989) (holding that the Commission did not abuse its discretion in revoking a broker's licenses where the evidence showed that he was involved in the misuse of funds entrusted to him by investors which resulted in great financial loss to those investors); Pastorius v. Pennsylvania Real Estate Commission, 466 A.2d 780 (Pa. Cmwlth. 1983) (holding that the Commission did not abuse its discretion in revoking a broker's license where the evidence showed a commingling of earnest money deposit with the broker's personal funds, a failure to return a down payment upon the

termination of the real estate transaction, a failure to maintain escrow accounts for inspection, and the failure to produced such records for review by the Commission).

Accordingly, the Commission's order is affirmed.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Chaba M. Pallaghy, :
Petitioner :
 :
v. : No. 749 C.D. 2011
 :
Bureau of Professional and :
Occupational Affairs, :
Respondent :

ORDER

AND NOW, this 20th day of December, 2011, the order of the Bureau of Professional Occupational Affairs, State Real Estate Commission, dated March 24, 2011 at No. 1641-56-09, is AFFIRMED.

JAMES R. KELLEY, Senior Judge