

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

BARBARA G. PHILLIPS,	:	
	:	
Respondent-Below,	:	C.A. No. 03A-07-007 WLW
Appellant,	:	
	:	
v.	:	
	:	
DIVISION OF PROFESSIONAL	:	
REGULATION, COUNCIL ON	:	
REAL ESTATE APPRAISERS,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

Submitted: November 19, 2003
Decided: February 20, 2004

ORDER

Upon Appeal of Decision of Division of Professional
Regulation Council on Real Estate Appraisers. Affirmed.

John E. O'Brien, Esquire of Law Offices of John E. O'Brien, Dover, Delaware,
attorneys for Respondent-Below, Appellant.

C. Cullen Rooney, Esquire, Department of Justice, Wilmington, Delaware, attorneys
for Plaintiff-Below, Appellee.

WITHAM, J.

Introduction

Before this Court is Barbara Phillips' appeal of a decision by the Council on Real Estate Appraisers ("the Council") suspending her appraiser's license for three months and requiring additional education. The Council has answered the appeal. Based upon the information presented, the decision of the Council is ***affirmed***.

Background

Marcia and Edward Began ("Mr. and Mrs. Began" or "the Begans") filed a complaint with the Division of Professional Regulations on June 10, 2002, concerning an appraisal which was conducted on their home at 48 Saratoga Drive in New Castle, Delaware. The Begans were attempting to refinance their home through Dreamhouse Mortgage Company ("Dreamhouse") and needed the home to appraise for at least \$178,000.00 to secure the new mortgage. Dreamhouse hired TriState Appraisals to complete the appraisal report on the property. The Begans stated that a man who said he was working for TriState Appraisals visited their home and inspected the inside of the house for approximately one-half hour. Before he left, the Begans gave him a check for \$300.00 to pay for the appraisal. The man who inspected the home did not leave a business card and the Begans could not remember his name.

On January 9, 2002, TriState Appraisals issued an appraisal report to Dreamhouse indicating an appraised value of the Begans' home of \$156,000.00. When Dreamhouse informed the Begans that the appraisal was for less than \$178,000.00 and they would not qualify for the refinancing, the Begans requested

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a copy of the appraisal report. The Begans had to contact Dreamhouse several more times to request the appraisal report before they finally received it. When they looked over the report, the Begans noticed that the report was signed by Barbara Phillips certifying that she had personally inspected the interior and exterior of the home. The Begans thought there was a mistake with the appraisal, because Barbara Phillips had not been inside their home.¹ The Begans then filed a complaint with the Division of Professional Regulations in a letter dated June 10, 2002. The complaint was forwarded to the Council on Real Estate Appraisers for further action. On July 23, 2002, the Begans sent another letter to the Division of Professional Regulations indicating that they had received a check from Ms. Phillips refunding the \$300.00 they had paid to TriState for the appraisal.

On November 22, 2002, Deputy Attorney General Michael Miller filed a Complaint alleging that Ms. Phillips had violated Council Regulations and Professional Standards. Following an investigation by the Council, a disciplinary hearing was held on May 20, 2003. The Begans testified before the Council, essentially stating the facts as given above.

Samuel Nickerson, an investigator with the Division of Professional Regulation, testified at the hearing that he was only able to speak with Ms. Phillips over the phone, never in person. She told him that a Delaware licensee Harold

¹ In a letter sent to Valerie Watson at the Division of Professional Regulations dated June 10, 2002, the Begans identified what they believed to be additional errors in the appraisal report including use of incorrect comparables and incorrect square footage of living space. However, these alleged errors were not the basis of the action against Ms. Phillips.

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Herman, now deceased, conducted the interior inspection of the home. In addition, she told him there was a temporary employee working for her at the time, who she could identify only as Theresa. Finally, Mr. Nickerson testified that Ms. Phillips told him that Theresa affixed Ms. Phillips' electronic signature to the appraisal report using a password without Ms. Phillips' authorization.

The Council also heard the testimony of Joyce Teis, an appraiser who was a Council Member when she was designated the Council contact person for the complaint. Both parties stipulated to her qualifications as an expert witness. Ms. Teis testified that the appraised value of the home was within a reasonable range and the report was accurate. However, she did testify that she believed there were violations of the Uniform Standards of Professional Appraisal Practice (USPAP) because Ms. Phillips signed the report even though she did not conduct the inspection. In addition, she testified that she believed there was an ethical violation of Standard 2-3 because Ms. Phillips did not identify anyone else as having participated in the appraisal. Finally, on cross-examination, Ms. Teis agreed that someone other than the certifying appraiser may perform an inspection as long as the person was identified as doing so in the report.

The Council concluded that Ms. Phillips violated 24 Del. C. § 2938 (5) and

(8),² Council Regulations 4.1.7³ and 7.1.1,⁴ and the USPAP Standard 2-3 (2003)⁵ in preparation and certification of the appraisal.

Ms. Phillips filed this appeal, contending that her failure to identify the person who performed the interior inspection of the home was merely negligent and thus not in violation of the applicable statutes and regulations. In addition, Ms. Phillips argues that her due process rights were violated because the Complaint filed by the Attorney General's office recommended specific sanctions. The State answered the appeal, contending that the Court should uphold the decision of the Council because it was based upon substantial evidence. Further, the State asserts that the hearing was unbiased and impartial, thus affording Ms. Phillips her due process rights.

Discussion

A decision of the Council is reviewable to this Court upon appeal by the practitioner.⁶ No standard of review is specified by the statute, and the Council is not a listed agency within the Administrative Procedures Act.⁷ Therefore in the absence of statutory direction, the proper standard of review is whether the agency's

² See Appendix A.

³ See Appendix B.

⁴ See Appendix B.

⁵ See Appendix C.

⁶ 24 Del. C. § 2940(b) (2003).

⁷ 29 Del. C. § 10161 (2003).

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decision is supported by substantial evidence and is free from legal error.⁸ “Substantial evidence is evidence which affords a substantial basis of fact from which the fact in issue can be reasonably inferred.”⁹

Ms. Phillips argues that it was error for the Council to find that she violated 24 Del. C. § 2938(5) because she did not “materially benefit” from failure to identify Mr. Herman in the report. The Council found that Ms. Phillips signed the appraisal report which contained a misrepresentation in that Ms. Phillips certified that she had personally inspected the property. The Council went on to conclude that “Ms. Phillips had the requisite intent to substantially benefit from the misrepresentation.”¹⁰ Further the Council found that she received \$300 for the appraisal, plus she preserved her business relationship with Dreamhouse. It is not the role of this Court to second guess the Council. Therefore, as long as the decision of the Council is supported by substantial evidence and is free from legal error, the Court must affirm the decision. The evidence supports the Council’s decision, and, based upon a reading its findings, the Council appears to have applied 24 Del. C. § 2938 (5) properly to this situation.

Ms. Phillips further contends that the Council erred in finding that she

⁸ *Berchock v. Council on Real Estate Appraisers*, 2001 Del. Super. LEXIS 162, *9, *aff’d*, 787 A.2d 100 (Del. 2001).

⁹ *Down Under, Ltd. v. Delaware Alcoholic Beverage Control Commission*, 576 A.2d 675, 681 (Del. Super. Ct. 1989).

¹⁰ Decision of the Council on Real Estate Appraisers, Complaint No. 19-04-02, May 20, 2003.

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willfully disregarded or violated Council Regulations 4.1.7 and 7.1.1 in violation of § 2938(8). Ms. Phillips argues that her conduct was merely negligent, and did not rise to the level required to constitute willfulness. The Council found that willful means that the conduct that constitutes a violation is willful. The Council went on to conclude that Ms. Phillips' signature on the certification stating that she personally performed the inspection and her failure to identify in the report the person who inspected the property was willful conduct.

The meaning of "willful" was discussed by the Superior Court in *Berchock*. The Court stated,

[I]n order to conclude that an appraiser has wilfully disregarded or violated provisions of the USPAP rules. . . there must be evidence in the record to support a finding that the appraiser intended to commit the act or omission that, in turn, violated the rules. A finding of mere negligence would not be sufficient.¹¹

The Council found, despite the statement by Ms. Phillips to Mr. Nickerson, that there was no evidence of the unauthorized use of Ms. Phillips' electronic signature on the appraisal report. Therefore, the only other evidence before the Council was that Ms. Phillips' signature appeared on the appraisal report. The evidence presented supported the Council's conclusion that Ms. Phillips intended to place her signature on the appraisal report which, in turn, violated the rules. The only statement to the contrary was rejected by the Council. Therefore, the Council

¹¹ *Berchock*, 2001 Del. Super. LEXIS 162, *19-20.

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properly interpreted the meaning of the term willful, and the decision of the Council was supported by the evidence.

Finally, Ms. Phillips contends that the fact that Ms. Teis, a former Council member, assisted in the preparation of the Complaint and the Complaint set forth a request by the State for specific sanctions deprived her of a fair, unbiased and impartial hearing. The State argues that because the relief sought in the Complaint was merely a recommendation and not a requirement, there was no bias. In addition, the State points to the fact that the Council did not accept the recommendations; for example, the Complaint requested a 6 month suspension, but the Council ordered only a 3 month suspension.

Pursuant to 24 Del. C. § 2938, the Council receives and investigates complaints in accordance with 29 Del. C. § 8807(h), which establishes the procedure for investigating complaints against licensees of Councils regulated by the Division of Professional Regulation. Section 8807(h) specifically allows the Council to appoint one member to assist with the investigation of the complaint. The board member must maintain strict confidentiality about the facts and must not discuss any issues with other Council members or members of the public. The member assisting with the investigation must excuse himself or herself as a board member at the hearing but may otherwise assist in the presentation of the complaint to the Council. Based upon the statutory authority, it was entirely appropriate for Ms. Teis to be involved in the investigation, as she was assigned to do so while she was a member of the Council. The fact that she assisted in the preparation of the

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Complaint would have no basis on whether Ms. Phillips received a fair hearing. Ms. Teis did not participate at the hearing as a board member and there has been no allegation that she did not maintain the strict confidentiality required. Therefore, the Court finds that Ms. Phillips has not established that Ms. Teis' participation in the investigation resulted in a biased or unfair hearing.

In addition, Ms. Phillips has failed to establish how the recommendation of sanctions in the Complaint led to an unfair and biased hearing. She simply concludes that the requested sanctions "made the state of mind of the Council biased and partial prior to the evidentiary hearing as they already knew that the State thought the allegations serious enough to warrant suspension prior to the presentation of the facts."¹² However, there is nothing on the record to support such an allegation. The Council did not even accept the recommendations made in the Complaint, but determined its own sanctions pursuant to 24 Del. C. § 2939. Thus, this Court cannot conclude that Ms. Phillips was denied a fair, impartial and unbiased hearing.

Conclusion

Based upon the transcript of the proceedings and the briefs filed by the parties, this Court concludes that the decision by the Council was supported by substantial evidence and Ms. Phillips received a fair, impartial and unbiased hearing. Therefore, the decision of the Council finding that Ms. Phillips violated 24 Del. C. § 2938 (5) and (8), Council Regulations 4.1.7 and 7.1.1, and the USPAP

¹² Appellant's Opening Brief, p.6.

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Standard 2-3 in the preparation and certification of the appraisal of 48 Saratoga Drive is *affirmed*. In addition, the sanctions imposed by the Council are also *affirmed*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File

Appendix A

24 Del. C. § 2938 states, in relevant part:

The Council may investigate the actions of a state certified or licensed real estate appraiser, and may revoke or suspend the rights of a certified or licensed real estate appraiser, or otherwise discipline an appraiser for any of the following acts or omissions:

(5) An act or omission involving dishonesty, fraud or misrepresentation with the intent to substantially benefit the licensed or certified appraiser or another person or with the intent to substantially injure another person;

(8) Wilfully disregarding or violating any of the provisions of this subchapter or the regulations of the Council for the administration and enforcement of the provisions of this subchapter . . .

Appendix B

Council Regulation 4.1.7 states:

Each written appraisal report prepared by or under the direction of a State licensed or State certified real property appraiser shall bear the signature of the State licensed or State certified appraiser, the license or certificate number of the licensee or certificate holder in whose name the appraisal report is issued, and the appropriate title such as “State licensed appraiser trainee” (a co-signer only), “State licensed real property appraiser,” “State certified residential real property appraiser,” or the designation “State certified general real property appraiser,” or the approved abbreviations as specified in Rule 4.1.1. Said certified or licensed appraiser shall be fully responsible for the content of the report prepared under his or her direction. Where applicable, each appraisal report shall also indicate whether or not the State licensed or State certified appraiser has personally inspected the property, and shall identify any other person who assists in the appraisal process other than by providing clerical assistance.

Council Regulation 7.7.1 states:

In performing the acts and services of a state licensed or state certified real property appraiser, every appraiser trainee, state licensed and state certified real property appraiser shall comply with those appraisal practice standards known as the “Uniform Standards of Professional Appraisal Practice” and any subsequent amendments thereto, promulgated by the Appraisal Standards Board of the Appraisal Foundation or its successor organization, which standards are hereby adopted by reference.

Appendix C

USPAP Rule 2-3 states:

Each written real property appraisal report must contain a signed certification that is similar in content to the following form:

I certify that, to the best of my knowledge and belief:

- the statements of fact contained in this report are true and correct.
- the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no (or the specified) present or prospective interest in the property that is the subject of this report and no (or the specified) personal interest with respect to the parties involved.
- I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
- my engagement in this assignment was not contingent upon developing or reporting predetermined results.
- my compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- my analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.
- I have (or have not) made a personal inspection of the property that is the subject of this report. (If more than one person signs this certification, the certification must clearly specify which individuals did and which individuals did not make a personal inspection of the appraised property.)
- no one provided significant real property appraisal assistance to the person signing this certification. (If there are exceptions, the name of each individual providing significant real property appraisal assistance must be stated.)