

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000340-MR

MATT E. MINIARD

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-01110

KENTUCKY REAL ESTATE APPRAISERS BOARD,
COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, D. LAMBERT, AND J. LAMBERT, JUDGES.

CLAYTON, JUDGE: Matt E. Miniard, *pro se*, appeals the Opinion and Order of the Franklin Circuit Court affirming a decision of the Kentucky Real Estate Appraisers Board that disciplined Miniard under Kentucky Revised Statutes (KRS) 324A.050 for violating the Uniform Standards of Professional Appraisal Practice (hereinafter “USPAP”). After careful consideration, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Matt Miniard is a general real estate appraiser certified to practice real estate appraisal in the Commonwealth of Kentucky under KRS Chapter 324A.

Because Miniard is certified by the Kentucky Real Estate Appraisers Board (hereinafter the “KREAB”), he is subject to the Board’s review and discipline.

The underlying facts of the matter are related to two real estate appraisals completed by Miniard in Franklin County, Kentucky. The first appraisal was prepared by him on April 2, 2010, for a residence located at 1220 Deerwood Drive in Frankfort, Kentucky. In the appraisal, Miniard stated that the house was built in 2001. In his testimony at the Board hearing, Miniard stated that he relied on the date stamp on a commode lid to obtain the date that the house was built. Miniard used this date because he was unable to find any date on the electric box or water heater. However, at the KREAB hearing, the Board’s contract investigator testified that the house was built in 1986 and was, therefore, twenty-four years old when Miniard appraised it. The discrepancy in the estimate of the house’s age resulted in Miniard miscalculating the depreciation based on the home’s age.

Further, Miniard in his appraisal wrote that the house had a slab foundation when, in fact, it had a crawl space. According to Miniard, he was unable to discern that the home had a crawl space because the seller concealed it. After these two discrepancies were brought to Miniard’s attention, he prepared a second, revised appraisal, dated April 15, 2010, correcting these two inaccuracies.

But in revising the appraisal, Miniard did not analyze the current sale agreement for the house, appropriately review comparable properties, or correct the depreciation calculation.

The prospective homebuyers complained to the KREAB, which thereafter, investigated the allegations and issued a formal administrative complaint against Miniard. An administrative hearing was held on July 26, 2012. The issue before the KREAB was whether Miniard should be disciplined under KRS 324A.050(1)(j), that is, “[f]ailing to observe one (1) or more of the Uniform Standards of Professional Appraisal Practice[.]”

On August 9, 2012, the KREAB entered its final order. It found that Miniard had violated multiple provisions of USPAP, and consequently, disciplined him. The order suspended Miniard’s certificate for six months, levied a \$2,000.00 fine, and barred him from training any associates for a five-year period.

Additionally, before Miniard reactivates his certificate, the Board ordered that besides completing his regular continuing education credit, he must also take at least forty hours of board-approved course instruction and pass the requisite exams.

On August 23, 2012, Miniard appealed the order, pursuant to KRS Chapter 13B, to the Franklin Circuit Court. After submission of briefs by both parties, on January 30, 2014, the circuit court affirmed the Findings of Fact, Conclusions of Law, and Final Order. It held that the KREAB did not act arbitrarily or beyond its statutory authority. In the order, the circuit court

concluded that substantial evidence supported the actions of the KREAB and that the disciplinary action taken by KREAB was not excessive and within its statutory authority under KRS 324A.050. Miniard now appeals this decision to our Court.

STANDARD OF REVIEW

The purpose of judicial review of an appeal from an administrative agency is to ensure that the agency did not act arbitrarily. *Baesler v. Lexington–Fayette Urban County Government*, 237 S.W.3d 209 (Ky. App. 2007). If the reviewing court concludes that the agency applied the correct rule of law to the facts and that the facts are supported by substantial evidence, the final order of the agency must be affirmed. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky. App. 1994).

The standard for judicial review of the decisions of administrative agencies is codified in KRS Chapter 13B. Therein, it is directed that review of an agency's final order shall be conducted without a jury and be confined to the record. KRS 13B.150(1). The administrative body is the trier of fact and the exclusive judge of the factual evidence. KRS 13B.150(2). Hence, reviewing courts are bound by the administrative hearing officer's findings of fact, but they are not bound by the hearing officer's legal conclusions. *Board of Commissioners of City of Danville v. Davis*, 238 S.W.3d 132, 135 (Ky. App. 2007).

In general, this Court confines its review to: (1) whether the findings of fact are supported by substantial evidence of probative value; and (2) whether

the administrative agency applied the correct rule of law to the facts. *Id.* With these standards in mind, we turn to the issues of this case.

ANALYSIS

On appeal, Miniard maintains that the case should be dismissed since the KREAB's decision was in violation of constitutional or statutory provisions, in excess of its statutory authority, unsupported by substantial evidence on the record, and hence, arbitrary and capricious. *See* KRS 13B.150(2)(a – d). In particular, Miniard alleges that the complainants did not have legal standing to file the complaint, he was deprived of a speedy trial and a jury of his peers and his protection against double jeopardy was violated. These alleged deficiencies resulted in lack of due process and unnecessary delay. The KREAB counters that the circuit court did not address these issues, and hence, they are not preserved for our review. And, it proffers that the circuit court appropriately held that the Board's decision was supported by substantial evidence. Accordingly, the Board claims that both the agency's decision and the circuit court's order affirming it were not arbitrary or capricious.

I. Procedural deficiencies

Before addressing Miniard's specific arguments, we consider KREAB's contention that because Miniard failed to conform to the portion of KRS 13B.140(1), which states that "[t]he petition shall be accompanied by a copy of the final order," the circuit court should have dismissed the appeal.

KREAB cites several cases to support its argument that Miniard's failure to conform to this requirement necessitated automatic dismissal of the case. Yet, the cases cited are not cases where a copy of a final order was not attached. For example, in *Workers' Compensation Bd. v. Siler*, 840 S.W.2d 812 (Ky. 1992), the appellant failed to comply with the time requirements of the workers' compensation statutes for the filing of an appeal.

Further, with regard to KREAB's contention that the plain meaning of the statute must be followed, we point out that a reading of the actual language of KRS 13B.140(1) does not mandate an automatic dismissal for failure to attach a copy of the final order. And the only statute implicated in the judicial review of KRS 324A is KRS 13B.140. Because no additional statutes involving judicial review are promulgated, KRS 13B.140 is the guiding statute.

In the case at bar, the circuit court, while noting Miniard's failure to attach the petition, decided to review the petition. We concur with this decision. As explained in *Ready v. Jamison*, 705 S.W.2d 479, 482 (Ky. 1986), dismissal is not an appropriate remedy for certain defects on appeal if the appealed judgment still permits a complete review of the record, and no substantial harm or prejudice results to the opponent.

II. Procedural due process issues

On appeal, Miniard has contended that the complainants did not have legal standing to file the complaint, that he was deprived of a speedy trial, that he was not provided a jury of his own peers, and that his protection against double

jeopardy was violated. He maintains that these alleged deficiencies resulted in lack of due process and unnecessary delay. KREAB responds that because the circuit court did not address these issues, they are not preserved for our review, and we lack jurisdiction to review these issues.

The administrative hearing process for a complaint filed against a real estate appraiser is found in KRS 324A.052(2), which states that “[i]f the investigation reveals evidence supporting the complaint, the board shall set the matter for hearing in accordance with the provisions of KRS Chapter 13B. . . .” The statutory language gives the Board jurisdiction in such cases. Further, pursuant to Chapter KRS 13B, an appellate court reviews a circuit court’s decision via KRS 13B.160. Pursuant to KRS 13B.160, “[a]ny aggrieved party may appeal any final judgment of the Circuit Court under this chapter to the Court of Appeals in accordance with the Kentucky Rules of Civil Procedure.”

“It is well settled that failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review....” *Wilson v. Kentucky Unemployment Ins. Com’n*, 270 S.W.3d 915, 917 (Ky. App. 2008)(citation omitted). Clearly, a party may not raise an issue for the first time on appeal, and we may not consider any issue on its merits if it is in violation of this established rule. But, as noted, the method to preserve issues is to assert them to the administrative agency or the circuit court.

The KREAB asserts that the issues were not preserved because the circuit court did not rule on them. This characterization is inaccurate. For the

issues to be preserved Miniard must have presented them either to the administrative agency or to the circuit court. A review of Miniard's appellate brief to the circuit court discloses that he raised these issues. Therefore, we will consider Miniard's arguments concerning legal standing, a right to a speedy trial, the lack of a jury, deprivation of procedural due process, and protection from double jeopardy.

1. Legal Standing

Miniard maintains that the prospective home buyers did not have legal standing to file the original grievance, and hence, the case should have been dismissed. KRS 324A.052 allows any person, including the Board, to file a complaint. Here, the prospective homebuyers filed a grievance, which after investigation by the Board, resulted in the Board filing a formal complaint against Miniard. The plain meaning of the statute clearly authorizes such action. Unquestionably, KREAB has a substantial interest, and thus standing, to discipline credential holders when they violate mandated appraisal standards.

2. Right to a speedy trial

Miniard contends that he was deprived of the right to a speedy trial, and thus, the case should be dismissed. He asserts that a hearing should have been held within twelve months of the filing of the complaint. But, other than mentioning the Appraisal Subcommittee, Miniard cites no authority to support this

argument including supporting legal authority in either KRS 324A.010 through 324A.090 or Kentucky Administrative Regulations (KAR) Chapter 30.

The Appraisal Subcommittee furnishes federal oversight of state appraiser regulatory programs. 12 U.S. Code § 3332. Therein it is stated that “[t]he Appraisal Subcommittee shall monitor and review the practices, procedures, activities, and organizational structure of the Appraisal Foundation.” 12 U.S. Code § 3332(b). In essence, the function of the Appraisal Subcommittee related to the appraisal boards of states is to monitor and provide a best practice narrative.

The right to a speedy trial is guaranteed by both the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution. However, this constitutional guarantee, pursuant to its language, extends only to criminal defendants and not respondents in administrative hearings. Finally, as noted in a footnote of the circuit court’s order, the record reflects that Miniard sought multiple continuances of the administrative proceedings and did not establish any prejudice when the hearing was ultimately held. Hence, his constitutional right was not violated.

3. Lack of a jury

Miniard declares that his constitutional right to a trial by a jury of his peers was violated. Again, he provides no legal support for this proposition. A look at KRS 324A.052(2) indicates that “[i]f the investigation reveals evidence supporting the complaint, the board shall set the matter for hearing in accordance with the provisions of KRS Chapter 13B before fining, reprimanding, suspending,

revoking, refusing to renew, or any combination thereof.” Nowhere in KRS Chapter 13B is a jury trial guaranteed for an administrative hearing. Again, a person’s right to a jury trial appends only to a criminal defendant and not to an administrative litigant. *See Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981). Hence, Miniard’s argument is wrong, and the lack of a jury was not an error.

4. Deprivation of procedural due process

Procedural due process requires that all affected parties be given “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (internal citation and quotation omitted). In addition, procedural due process in the administrative setting encompasses “a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, if the party’s constitutional rights are involved, a judicial review of the administrative action.” *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005)(internal citations omitted).

In this instance, there was a hearing, evidence was taken and weighed, and the findings of fact were based on the evidence. (A discussion of whether substantial evidence supported the order will be discussed separately below.) Concerning the other issues, including the allegedly involved constitutional rights, we conclude that Miniard was afforded procedural due process.

5. Double Jeopardy

Miniard suggests that he has been subjected to double jeopardy because one penalty imposed by the KREAB in this administrative action had also been imposed in a different disciplinary proceeding by the Board. Similar to his previous allegation of deprivation of constitutional claims, he provides no legal support.

Double jeopardy is defined in Black's Law Dictionary (9th ed. 2009) as "[t]he fact of being prosecuted or sentenced twice for substantially the same offense." Here, Miniard is not claiming that he was prosecuted twice for the same offense but rather that he received the same penalty. The receipt of a similar penalty for a different offense is not double jeopardy. Moreover, double jeopardy does not apply to civil administrative proceedings. *Fankhauser v. Cobb*, 163 S.W.3d 389, 398 (Ky. 2005). Again, Miniard's rights were not violated by the administrative process.

III. Substantial evidence

Miniard proffers that the circuit court erred in affirming the decision of the KREAB since the Board did not prove that his alleged violations were in contravention of KRS Chapter 324A nor of USPAP, and thus, because the Board did not prove its case, the decision was arbitrary.

The three-part test for determining the arbitrariness of an administrative agency's decision concerns whether the agency's action was within the scope of its granted powers, whether the agency provided procedural due process, and whether the decision was supported by substantial evidence. *See Commonwealth, Revenue Cabinet v. Liberty Nat'l Bank of Lexington*, 858 S.W.2d 199, 201 (Ky. App. 1993), citing *American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964). If the decision of the administrative agency fails to meet any of these standards, it must be considered to be arbitrary. *Liberty National*, 858 S.W.2d at 201.

Arbitrary means clearly erroneous, and "clearly erroneous" means "unsupported by substantial evidence." *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988). Substantial evidence is defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [persons]." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). If it is determined that the Board's findings are supported by substantial evidence, the next step is to ascertain whether the agency correctly applied the law to the facts. *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Commission*, 437 S.W.2d 775, 778 (Ky. 1969). Our review of legal issues is *de novo*. *See Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998).

The administrative process involved in this action is based in KRS Chapter 324A and KRS Chapter 13B. Miniard is a general real estate appraiser

who is certified to practice the appraisal of real estate in the Commonwealth under KRS 324A. Consequently, he is subject to review and disciplinary action by the KREAB. KRS Chapter 13B governs the appellate process for administrative decisions. Indisputably, KREAB acted within the scope of its authority in the original proceeding and in responding to Miniard's appeal. In addition, we have already evaluated whether Miniard's procedural due process rights were violated and concluded that they were not. Next, we address whether substantial evidence supported the agency's decision.

Pursuant to KRS 13B.090(7), the burden of proof at the administrative level is borne by KREAB to prove the charges and proposed penalties against Miniard by a preponderance of the evidence. Further, under KRS 324A.050(1)(j), the Board had the authority to "refuse to issue, refuse to renew, suspend, or revoke a certificate or license, reprimand, admonish, place on probation, or impose a fine up to two thousand dollars (\$2,000) . . . on a certificate holder or licensee, or any combination thereof, for [. . .] [f]ailing to observe one (1) or more of the Uniform Standards of Professional Appraisal Practice."

Substantial evidence in the record supports KREAB's factual findings. At the administrative hearing, it was conclusively established that Miniard in his April 2, 2012 appraisal stated that the home was built in 2001 by the use of a date stamp on the lid of a commode when, in fact, the home was built in 1986. This significant discrepancy resulted in Miniard's depreciation calculation, which is based on the age of the home, to be incorrect. And at the administrative

hearing, it was shown that in the original appraisal of this home, Miniard declared that the house had been built on a slab foundation rather than constructed on a crawl space. This conclusion was also incorrect. Then, even after being apprised of these inaccuracies, in Miniard's revised April 15, 2012 appraisal, he did not provide an evaluation of the home's sales agreement, review comparable properties, or correct his depreciation calculation.

Given these facts, the issue before the Board was whether Miniard violated the USPAP, which under KRS 324A.050(1)(j), is grounds for disciplinary action. After its investigation and hearing, the KREAB found that Miniard violated USPAP Standard Rule ("SR") 1-1(a),¹ USPAP SR 1-1(b), USPAP SR 1-5(a), USPAP SR 2-1(a), and USPAP SR 2-2(b)(viii).

Miniard contends that the Board did not satisfy the burden of proof by a preponderance of the evidence to establish that he violated USPAP SR 1-1(a). The standard rule necessitates that a real estate appraiser, in developing an appraisal, be aware, understand, and correctly employ recognized methods and techniques in producing an appraisal. The Board decided that he failed to follow USPAP SR 1-1(a) because he did not make an age adjustment when comparing Sale 1 and Sale 2.

Miniard maintains that the Board's findings that he violated USPAP SR 1-1(b) and 2-1(a) were arbitrary, that is, without substantial evidence. He

¹ All references to USPAP are found in the *Uniform Standards of Professional Appraisal Practice* (2010-2011).

believes that because no comparable homes (sales) existed in the market for him to conclusively establish market trends, his actions were not inappropriate.

USPAP SR 1 guides appraisers in the substantive aspects of developing a reliable real estate appraisal practice. And USPAP SR 1-1(b) requires that an appraiser not commit a substantial error of omission or commission that significantly affects an appraisal. The Board found that Miniard violated this standard based on his failure to accurately determine the home's age or that it had a crawl space and in not correcting the depreciation of the home on its second appraisal.

USPAP SR 2 addresses the content of the real estate appraisal and requires that an appraiser's communication be made in a way that is not misleading. In particular, USPAP SR 2-1(a) mandates that written or oral real estate appraisal reports have sufficient information to enable the intended users to understand the report. The Board ascertained that Miniard violated USPAP SR 2-1(a) because in his initial report, he misidentified both the home's age and also its foundation, incorrectly calculated depreciation by using the incorrect age, and by not adjusting the depreciation in the second appraisal.

Miniard claims that the Board's decision that he violated USPAP SR 1-5(a) should not be considered since, according to him, it was not part of the original complaint. But a purview of the complaint confirms that in paragraph 7(b) a charge under this standard rule was included, and therefore, he had notice and an opportunity to prepare his defense. This contention is meritless.

USPAP SR 1-5(a) holds that when developing a value opinion for market value an appraiser must, if such information is available in the normal course of business, analyze all current agreements of sale, options, and listings of the subject property as of the effective date of the appraisal. Miniard contravened this standard rule by not analyzing the current sale agreement in either appraisal.

Finally, in his appellate brief to our Court, Miniard argues that the Board failed to prove a violation of USPAP SR Rule 2-2(b)(vii). In fact, the Board never found that Miniard violated this standard rule, so his argument is unnecessary and without impact.

Miniard also proffers that the Board did not provide substantial evidence to satisfy its burden of proof that he violated USPAP SR 2-2(b)(viii). This standard rule requires that the content of a Summary Appraisal Report must be consistent with the intended use of the appraisal and, at a minimum, list the appraisal methods and techniques employed; summarize the analyzed information, appraisal methods, and techniques; provide the reasoning that supports the analysis, opinions, and conclusions; and, explains the exclusion of the sales comparison approach, cost approach, or income approach. The Board's decision that Miniard breached the standard was based on his failure to analyze the property's current sale agreement in both appraisals and his lack of an explanation in the second appraisal about the rationale for not making an age adjustment when comparing Sale 1 to Sale 2.

When assessing whether substantial evidence exists, a reviewing court determines whether evidence exists that “when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men.” *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)(citing *Blankenship v. Lloyd Blankenship Coal Company, Inc.*, 463 S.W.2d 62 (Ky. 1970)). Additionally, the KREAB, as trier of the facts, is given great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. KRS 13B.150(2). Here, after the KREAB thoroughly investigated the complaint, reviewed all the evidence, heard the witness testimony, and considered both parties’ defenses at the hearing, it determined that substantial evidence existed that Miniard violated KRS 324A.050(1)(j). Specifically, the Board held that he breached the five aforementioned provisions of USPAP multiple times. We are cognizant that it is extremely important for the public to trust the appraisal process. This rationale underlies the enforcement of USPAP by KREAB.

Our review of the record supports the circuit court’s conclusions that the Board’s factual findings were supported by substantial evidence, and hence, not arbitrary. Moreover, our *de novo* review of the Board and the circuit court’s construction and application of the pertinent statutes shows that the reasoning was legally valid. Hence, the decision of the circuit court was not in error.

CONCLUSION

We concur with the circuit court's decision that substantial evidence supported the KREAB and that the KREAB was within its statutory authority under KRS 324A.050 to discipline Miniard. Furthermore, as recognized by the circuit court, KREAB was within the scope of its authority in imposing the sanctions and penalties. Thus, the decision of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matt Miniard, *pro se*
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Brian T. Judy
Assistant Attorney General
Frankfort, Kentucky