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NO. COA06-809

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

GILBERT L. BOGER,
Petitioner-Appellant,

v.

Davie County
No. 05 CVS 300

PHILIP HUMPHRIES,
Executive Director, North
Carolina Appraisal Board and
The North Carolina Appraisal
Board,
Respondents-Appellees.

Appeal by Petitioner from order and decision on judicial review entered 3 April 2006 by Judge Susan C. Taylor in Superior Court, Davie County. Heard in the Court of Appeals 8 February 2007.

Randolph and Fischer, by J. Clark Fischer; and Melvin and Powell, by Edward L. Powell, for Petitioner-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Roberta Ouellette, for Respondents-Appellees.

McGEE, Judge.

The North Carolina Appraisal Board (the Board) found probable cause that Gilbert L. Boger (Petitioner) violated the Standards of Practice applicable to residential real estate appraisers and sent Petitioner a complaint status report and probable cause summary on 22 July 2003. The Board issued a notice of hearing dated 24 November 2004 to Petitioner. The notice of hearing stated:

In accordance with G.S. Chapter 150B, the Administrative Procedures Act, you are hereby notified that the . . . Board has received information which, if true, may warrant disciplinary action against you including the revocation or suspension of your certification as a residential real estate appraiser pursuant to G.S. 93E-1-12(a)(8), (9) and (11); NCAC 57A.0501(a); and the following Rules and Standards of the Uniform Standards of Professional Appraisal Practice: The Ethics Rule, Competency Rule, and Standard 1 and Standard 2.

The notice of hearing also included two pages of factual allegations against Petitioner. The Board alleged the following:

1. In Case Number 2001-0055, [Petitioner] appraised a 39.95 acre tract of land located in Woodleaf, North Carolina in May 2000, estimating a final value of \$295,125[.00], or \$7,500[.00] an acre.

2. The purpose of the appraisal was to appraise the fee simple market value of the property.

3. [Petitioner] used only the Sales Comparison Approach to value the subject property, as he stated the Cost Approach and Income Approach were not considered appropriate to appraise vacant land.

4. [Petitioner] used four sales in his Sales Comparison Approach.

5. . . . [Petitioner] stated the sales price per acre of the four sales was \$6,076[.00], \$5,423[.00], \$6,434[.00] and \$6,314[.00]. The appraisal report contained MLS sheets showing the sales data, but it did not contain any analysis of those sales that would indicate how he arrived at the per acre value for the subject property, which was higher than any of his sales.

6. One such MLS sheet, regarding a sale in December 1999 of a property located on Green Road in Salisbury, NC stated that the property was listed for \$123,000[.00], sold for \$167,000[.00] and contained 30.79 acres, for a

sales price of \$5,423[.00] per acre. Public records indicate that when this property was sold it contained an additional tract of 38.68 acres, thus the sales price per acre was \$2,404[.00].

7. Another such MLS sheet, regarding a sale in August 1998 of a property located on Mooresville Road, stated that the property sold for \$450,000[.00] and contained 71.27 acres. Public records indicate that there were approximately \$194,000[.00] in improvements included with the sale. Adjusting for the improvements on this sale would have lowered the sale price per acre to approximately \$3,589[.00] per acre.

8. [Petitioner] stated in the appraisal report that five acres of the subject are a floodplain when there are actually ten or more acres in the floodplain.

9. [Petitioner] does not state in the appraisal report whether any of his comparable sales contained similar floodplain.

10. [Petitioner] appears to give value to the timber on the subject property in his final estimate of value, but he does not state the actual value of the timber.

11. In the appraisal report, [Petitioner] did not disclose to the client and any intended users of the appraisal the scope of work used to develop the appraisal.

12. In the appraisal report, [Petitioner] did not state the highest and best use of the subject property. The workfile he sent in to the Board did not include any discussion of the highest and best use of the property.

13. In Case Number 2003-0076, [Petitioner] appraised a property located in High Point, North Carolina in June 2002, finding a value of \$149,000[.00].

14. The purpose of the appraisal was to appraise the fee simple market value of the house, land and improvements.

15. [Petitioner] used Cost and Sales

Comparison Approaches to value the subject property.

16. [Petitioner] used three comparable sales in his appraisal report.

17. These sales were located two to three miles north of the subject and in an area that was superior to the subject, yet [Petitioner] made no adjustments for the difference in location.

18. The subject property was partially located in a flood zone. None of the comparable sales were located in a flood zone, yet [Petitioner] made no adjustments to his comparable sales for this difference.

19. There were other sales located in the subject area that were much more comparable to the subject property and that would have indicated a value for the subject property of around \$81,000[.00].

The notice of hearing further stated that "[a]n evidentiary hearing before the . . . Board on the foregoing allegations has been scheduled for Tuesday, December 14, 2004 at 9:00 am, or as soon thereafter as the matter may be heard, at the Board's offices, 3900 Barrett Drive, Raleigh, North Carolina."

Following the hearing, the Board entered an order dated 23 February 2005. The Board made findings of fact and conclusions of law and revoked Petitioner's real estate appraiser certification. Petitioner does not challenge the findings of fact on appeal.

The Board concluded that Petitioner was guilty of violating the following rules of the Uniform Standards of Professional Appraisal Practice (USPAP): (1) the Competency Rule, (2) Standard Rule 1, (3) Standard Rule 1-1(a), (4) Standard Rule 1-4(g), (5) Standard Rule 2, and (6) Standard Rule 2-2. The Board further concluded that by

violating the various provisions of USPAP, Petitioner violated Section 57A.0501 of the North Carolina Appraisal Board Rules and N.C. Gen. Stat. § 93E-1-12(a) (9).

Petitioner filed a petition for judicial review of the Board's order. The trial court entered an order and decision on judicial review on 3 April 2006, upholding the Board's order. The trial court ruled, *inter alia*, that (1) Petitioner received adequate notice of the allegations against him, (2) the Board did not abuse its discretion when it found that Petitioner violated the Appraiser's Act and revoked Petitioner's certification, and (3) the Board did not act arbitrarily or capriciously in revoking Petitioner's certification. Petitioner appeals.

I.

Petitioner argues the trial court erred by affirming the Board's order because the order was based upon findings of violations of which Petitioner had no prior notice. Specifically, Petitioner argues "the Board violated both [Petitioner's] basic due process rights and the [applicable] statutory provisions . . . by making findings and imposing sanction based on matters beyond it[s] notice of proposed action." Petitioner argues he did not receive adequate notice of the following findings of fact:

19. [Petitioner] was not experienced in the subject market, nor did he understand the nuances of the subject market.

. . .

27. [Petitioner] did not correctly complete the research and analysis necessary to produce a credible appraisal.

28. [Petitioner] did not correctly employ

recognized methods and techniques necessary to produce a credible appraisal. In addition, he failed to demonstrate effective use of the sales comparison approach to value.

29. [Petitioner's] appraisal in this case is not credible.

. . .

33. There was no mention in the appraisal report of the appraisal procedures followed or of the reasoning that supported . . . [Petitioner's] analysis, opinions or conclusions.

. . .

47. [Petitioner] was not experienced in the subject market, nor did he understand the nuances of the subject market.

48. [Petitioner] did not correctly employ recognized methods and techniques necessary to produce a credible appraisal in this case. In addition, he failed to demonstrate effective use of the sales comparison approach to value.

49. [Petitioner's] appraisal in this case is not credible.

"Judicial review of the final decision of an administrative agency in a contested case is governed by section 150B-51(b) of the APA." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). "Appellate review of a judgment of the superior court entered upon review of an administrative agency decision requires that the appellate court determine whether the trial court utilized the appropriate scope of review and, if so, whether the trial court did so correctly." *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999).

The nature of the error asserted by the party seeking review dictates the appropriate manner of review: if the appellant contends the agency's decision was affected by a legal error, G.S. § 150B-51(b)(1)(2)(3) & (4), de

novo review is required; if the appellant contends the agency decision was not supported by the evidence, G.S. § 150B-51(b)(5), or was arbitrary or capricious, G.S. § 150B-51(b)(6), the whole record test is utilized.

Id. In the present case, Petitioner asserts the Board and the trial court committed legal error, and we therefore apply *de novo* review. *See id.*

Due process of law requires notice and an opportunity to be heard. *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). N.C. Gen. Stat. § 150B-38(b) (2005) provides:

Prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing. Notice to the parties shall include:

- (1) A statement of the date, hour, place, and nature of the hearing;
- (2) A reference to the particular sections of the statutes and rules involved; and
- (3) A short and plain statement of the facts alleged.

In the present case, Petitioner received a notice of hearing, which stated:

In accordance with G.S. Chapter 150B, the Administrative Procedures Act, you are hereby notified that the . . . Board has received information which, if true, may warrant disciplinary action against you including the revocation or suspension of your certification as a residential real estate appraiser pursuant to G.S. 93E-1-12(a)(8), (9) and (11); NCAC 57A.0501(a); and the following Rules and Standards of the Uniform Standards of Professional Appraisal Practice: The Ethics Rule, Competency Rule, and Standard 1 and Standard 2.

The notice of hearing also included a statement of the factual allegations against Petitioner. The notice of hearing further stated that "[a]n evidentiary hearing before the . . . Board on the foregoing allegations has been scheduled for Tuesday, December 14, 2004 at 9:00 am, or as soon thereafter as the matter may be heard, at the Board's offices, 3900 Barrett Drive, Raleigh, North Carolina."

Petitioner argues that several of the Board's findings of fact in its order revoking his certification were not included in the notice of hearing. However, the Board was not required to give Petitioner notice of every fact it would ultimately prove. The statute only requires a "short and plain statement of the facts alleged." N.C.G.S. § 150B-38(b)(3). The Board clearly complied with this requirement. Moreover, the Board gave Petitioner notice of every statute or rule under which Petitioner was ultimately disciplined.

Petitioner also argues that pursuant to N.C. Gen. Stat. § 150B-42(a), the Board erred by basing its findings of fact on matters that were not "officially noticed." N.C. Gen. Stat. § 150B-42(a) (2005) provides:

After compliance with the provisions of G.S. 150B-40(e), if applicable, and review of the official record, as defined in subsection (b) of this section, an agency shall make a written final decision or order in a contested case. The decision or order shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

However, despite Petitioner's argument to the contrary, the term

"officially noticed" does not refer to those facts that are alleged in a notice of hearing. Rather, N.C. Gen. Stat. § 150B-41(d) (2005) provides: "Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency." N.C.G.S. § 150B-41(d) makes clear that official notice is similar to judicial notice and does not require an agency to limit its findings of fact to facts that were alleged in a notice of hearing. We conclude the Board adequately complied with N.C.G.S. § 150B-38(b) and provided notice sufficient to satisfy due process of law. Therefore, the trial court did not err by holding that Petitioner received adequate notice of the allegations against him. We overrule these assignments of error.

II.

Petitioner argues the trial court erred by upholding the Board's order because the revocation of Petitioner's certification was arbitrary, capricious, an abuse of discretion, and was not supported by substantial evidence. We first note that Petitioner did not challenge any of the Board's findings of fact. Therefore, the Board's findings of fact are conclusive on appeal. See *Cox v. Real Estate Licensing Board*, 47 N.C. App. 135, 139, 266 S.E.2d 851, 853, *disc. review denied*, 301 N.C. 87, 273 S.E.2d 296 (1980). Moreover, Petitioner did not appeal the trial court's determination that the Board's findings of fact were sufficient to support the Board's decision to revoke petitioner's certification. Accordingly, we only determine whether the Board's order was arbitrary,

capricious, or an abuse of discretion, and we apply the whole record test. See *Dillingham*, 132 N.C. App. at 708, 513 S.E.2d at 826.

"A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Watkins*, 358 N.C. at 199, 593 S.E.2d at 769. "Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Id.*

Petitioner argues the Board's action was grossly disproportionate to the violations charged. Petitioner argues that "[w]hile the [t]rial [c]ourt correctly note[d] that nothing in Chapter 93E expressly states that the Board will employ a system of progressive discipline, both basic common sense and the Board's public pronouncements require such a conclusion." Petitioner relies on the comments of the Board's counsel at the hearing before the Board. The Board's counsel argued that she should be able to ask whether there had been other complaints against Petitioner, and stated: "The only reason for bringing this to your attention is that it is a matter of when you are considering any sanction against [Petitioner], it is something that you've taken into account in the past, your progressive discipline system, whether or not there has been prior discipline." The comments of the Board's counsel were not evidence and are not the law.

Pursuant to N.C. Gen. Stat. § 93E-1-12(a), the Board is

authorized to suspend or revoke a certification if it finds the certificate holder guilty of one of the eleven enumerated offenses. N.C. Gen. Stat. § 93E-1-12(a) (2005). Under *Edwards v. Latham*, 60 N.C. App. 759, 763, 299 S.E.2d 819, 822 (1983), one violation of a licensing statute is sufficient to support the revocation of the license. In the present case, the Board determined that Petitioner violated N.C.G.S. § 93E-1-12(a)(9). Pursuant to the statute, and in accordance with *Edwards*, this one violation was sufficient to support the revocation of Petitioner's certification.

Petitioner also argues the Board's decision to revoke his certification was arbitrary and capricious because it amounted to retaliation for Petitioner's refusal to settle the case through a consent order. In a letter dated 2 February 2004, the Board's counsel offered to settle the case. However, the letter also stated: "If we are unable to resolve this matter through settlement, [the Board's counsel] will return the case to a prosecution footing." As was made clear in the notice of hearing, Petitioner was subject to the revocation of his certification by virtue of the allegations made against him. When Petitioner chose not to accept the settlement, Petitioner chose to have a hearing before the Board, which he knew could result in the revocation of his certification. For the reasons stated above, the Board's revocation of Petitioner's certification was not arbitrary, capricious, or an abuse of discretion. We overrule the assignments of error grouped under this argument.

Affirmed.

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Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).