

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TERESA PENIX	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellant	:	William B. Hoffman, J.
	:	Julie A. Edwards, J.
-vs-	:	Case No. 09-CA-14
	:	
OHIO REAL ESTATE APPRAISER	:	<u>OPINION</u>
BOARD, et al.	:	
	:	
Defendants-Appellees	:	

CHARACTER OF PROCEEDING: Civil Appeal from Fairfield County Court of Common Pleas Case No. 08-CV-984

JUDGMENT: Affirmed In Part and Reversed and Remanded In Part

DATE OF JUDGMENT ENTRY: December 2, 2009

APPEARANCES:

For Plaintiff-Appellant

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For Defendants-Appellees

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Edwards, J.

{¶1} Plaintiff-appellant, Teresa Penix, appeals from the February 26, 2009, Judgment Entry of the Fairfield County Court of Common Pleas affirming the decision of defendant-appellee, Ohio Real Estate Appraiser Board, to suspend appellant's real estate appraiser's license for 30 days and to fine appellant \$500.00.

STATEMENT OF THE FACTS AND CASE

{¶2} In April of 2005, appellant Teresa Penix was a registered real estate appraisal assistant working under Richard Chapman, an Ohio licensed real estate appraiser. Appellant obtained her license as an Ohio residential real estate appraiser in 2006.

{¶3} In April of 2005, appellant appraised a property located at 748 Blaine Street in Greenfield, Ohio. As part of her appraisal, appellant generated a workfile¹ that included the auditor's report, zoning information, Multiple Listing Service information, information that appellant pulled from RealQuest, which is a real estate database, and appellant's notes as to how she arrived at the appraised value. Appellant did not keep a copy of her work file. According to appellant,

{¶4} "A. Well, the procedure was Mr. Chapman requested that those work files, the originals were physically taken to his office on a monthly basis. They were - - I would file the report there, and the understanding was, if I needed the report, I could obtain the report, and vice versa. He'd have the report there if he needed it." Transcript² at 30.

¹ The terms work file and workfile are used interchangeably.

² References to the Transcript are to the Transcript of the May 8, 2008, hearing before a Hearing Officer for the Department of Commerce, Division of Real Estate and Professional Licensing.

{¶5} After the Ohio Division of Real Estate and Professional Licensing received a complaint regarding appellant's appraisal, an investigation was initiated. In July of 2007, the Division sent appellant a copy of the complaint against her. However, the wrong cover letter was sent with the complaint. Shannon Drawns, an investigator with the Division, contacted appellant twice in November of 2007 about appellant's appraisal report and asking for appellant's workfile.

{¶6} On December 3, 2007, Danitra Kourkounakis, an Investigation Supervisor with the Division of Real Estate and Professional Licensing, contacted appellant by phone. During their conversation, the two discussed the fact that appellant allegedly had received a cover letter pertaining to a different case than appellant's case. When Kourkounakis asked appellant about her workfile, appellant indicated that Richard Chapman had the file. After appellant told Kourkounakis that she had not spoken with Chapman about obtaining the workfile, Kourkounakis advised appellant that she needed to do so and to submit the file to the Division. Kourkounakis faxed appellant the correct cover letter on December 3, 2007. In response, appellant sent the Division a copy of her appraisal and also a letter in response to the complaint.

{¶7} On December 11, 2007, Shannon Drawns contacted appellant again. Drawns asked appellant if she had contacted Richard Chapman about obtaining a copy of her workfile and appellant indicated that she had not. When contacted by Drawns, Richard Chapman also indicated that appellant had never contacted him. The Division received a copy of the workfile directly from Chapman in January of 2008.

{¶8} A hearing before a Hearing Officer for the Ohio Division of Real Estate and Professional Licensing was held on May 8, 2008. The Hearing Officer, in her May

30, 2008, Report and Recommendation, recommended that appellant be found in violation of R.C. 4763.11(G)(5) and R.C. 4763.11(G)(14) based on her failure to provide the Ohio Division of Real Estate and Professional Licensing, pursuant to its investigation, with a complete copy of her workfile for the appraisal report of the subject property.

{¶9} The Real Estate Appraiser Board, in an Adjudication Order filed on July 24, 2008, adopted the Findings of Fact and Conclusions of Law and Recommendation of the Hearing Officer and ordered that appellant's Ohio residential real estate appraiser license be suspended for thirty (30) days and that appellant pay a fine in the amount of \$500.00.

{¶10} Appellant then filed an appeal with the Fairfield County Court of Common Pleas pursuant to R.C. 119.12. After the parties filed briefs, the trial court, pursuant to a Judgment Entry filed on February 26, 2009, affirmed the July 24, 2008 Adjudication Order.

{¶11} Appellant now raises the following assignments of error on appeal:

{¶12} "I. THE TRIAL COURT'S INTERPRETATION OF ORC 4763.11(G)(5) AND ORC 4763.11(G)(14) TO THE EFFECT THAT THEY REQUIRE AN ASSISTANT APPRAISER TO PERSONALLY DELIVER A WORK FILE TO THE DIVISION IS ERRONEOUS AS A MATTER OF LAW AND ITS ENFORCEMENT WOULD CONSTITUTE AN ABUSE OF DISCRETION.

{¶13} "II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE OHIO REAL ESTATE APPRAISER BOARD HAS NO LAWFUL AUTHORITY TO LEVY A MONETARY CIVIL PENALTY."

STANDARD OF REVIEW

{¶14} In an administrative appeal pursuant to R.C. §119.12, the trial court reviews an order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. Reliable, probative and substantial evidence has been defined as: (1) “Reliable” evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) “Probative” evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) “Substantial” evidence is evidence with some weight; it must have importance and value.” *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303.

{¶15} In determining evidentiary conflicts, the Ohio Supreme Court in *University of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 407 N.E.2d 1265, directed courts of common pleas to give deference to the administrative resolution of such conflicts. The Supreme Court noted when the evidence before the court consists of conflicting testimony of approximately equal weight, the common pleas court should defer to the determination of the administrative body, which, acting as the finder of fact, had the opportunity to determine the credibility and weight of the evidence. *Conrad* at 111, 407 N.E.2d 1265.

{¶16} On appeal to this Court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707, 590 N.E.2d 1240. In reviewing the trial court's determination that appellee's order was supported by reliable, probative and substantial

evidence, this Court's role is limited to determining whether the trial court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680, 610 N.E.2d 562. The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶17} It is applying this standard that we shall review appellant’s assignments of error.

I

{¶18} Appellant, in her first assignment of error, argues that the trial court’s interpretation of R.C. 4763.11(G)(5) and R.C. 4763.11(G)(14) as requiring an assistant appraiser to personally deliver a workfile to the Division “is erroneous as a matter of law and its enforcement would constitute an abuse of discretion.” These sections incorporate provisions of the Uniform Standards of Professional Appraisal Practice Rules (“USPAP”) by operation of R.C. 4763.13(A).

{¶19} R.C. 4763.11³ states, in relevant part, as follows: (G) The board shall take any disciplinary action authorized by this section against a certificate holder, registrant, or licensee who is found to have committed any of the following acts, omissions, or violations during the appraiser's certification, registration, or licensure:...(5) Violation of any of the standards for the development or communication of real estate appraisals set forth in this chapter and rules of the board;...(14) Failing to maintain records for five years as required by section 4763.14 of the Revised Code....”

³ R.C. 4763.11 has since been amended, effective October 16, 2009.

{¶20} In turn, R.C. 4763.14⁴ states as follows: “A person licensed, registered, or certified under this chapter shall retain for a period of five years the original or a true copy of each written contract for the person's services relating to real estate appraisal work and all appraisal reports and supporting data assembled and formulated by the person in preparing those reports. The retention period begins on the date the appraisal is submitted to the client unless, prior to expiration of the retention period, the certificate holder, registrant, or licensee is notified that the appraisal or report is the subject of or is otherwise involved in pending litigation, in which case the retention period begins on the date of final disposition of the litigation.

{¶21} “A certificate holder, registrant, and a licensee shall make available all records required to be maintained under this section for inspection and copying by the superintendent of real estate or the real estate appraiser board, or both, upon reasonable notice to the certificate holder, registrant, or licensee.” (Emphasis added)

{¶22} The Record Keeping Section of the Ethics Rule for 2005 USPAP provides, in relevant part, as follows:

{¶23} “An appraiser must retain the workfile for a period of at least five (5) years after preparation or at least two (2) years after final disposition of any judicial proceeding in which the appraiser provided testimony related to the assignment, whichever period expires last.

{¶24} “An appraiser must have custody of his or her workfile, or make appropriate workfile retention access, and retrieval arrangements with the party having custody of the workfile.”

⁴ R.C. 4763.14 has since been amended, effective October 16, 2009.

{¶25} Comments to the Record Keeping Section indicate that a workfile must be made available “by the appraiser” when required by state enforcement agencies.

{¶26} As is stated above, the trial court affirmed the Adjudication Order, finding that appellant had violated R.C. 4763.11(G)(5) and (G)(14) by failing to provide the Ohio Division of Real Estate and Professional Licensing with a complete copy of her workfile. Appellant now argues that the trial court erred in interpreting such sections “to the effect that they require an assistant appraiser to personally deliver a work file to the Division.” Appellant notes that the Hearing Officer, in her Report and Recommendation, found, in relevant part, as follows:

{¶27} “32. It was Respondent’s [appellant’s] understanding that she had access to and could obtain the workfiles from the Supervisory Appraiser [Richard Chapman] at any time. Respondent believed that she was in compliance with USPAP because she had a procedure in place to obtain the workfiles. Testimony of Respondent.

{¶28} “33. In 2005, Respondent’s relationship with the Supervisory Appraiser became strained due to divorce proceedings between the Supervisory Appraiser and his wife, who was also involved in the Supervisory Appraiser’s business. Respondent began to accept appraisal work only from the Supervisory Appraiser’s wife instead of the Supervisory Appraiser. Testimony of Respondent....

{¶29} “62. Respondent established that she had an appropriate retrieval arrangement with the party having custody of the work file and the Division ultimately did obtain the work file from the party. There was no evidence to indicate that Respondent *could not* obtain the work file at the Division’s request; rather the evidence

showed that Respondent simply *did not* obtain the work file due to a strained interpersonal relationship.”

{¶30} A reviewing court must give deference to an administrative agency's interpretation of its own rules and regulations where such interpretation is consistent with the statutory law and the plain language of the rules. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.* (1994), 68 Ohio St.3d 377, 382, 627 N.E.2d 538; *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St.2d 173, 181, 281 N.E.2d 1; *Cuyahoga Cty. Bd. of Commrs. v. Ford* (1987), 35 Ohio App.3d 88, 92, 520 N.E.2d 1.

{¶31} We find that the trial court did not err in its interpretation of R.C. 4763.11(G)(5) and R.C. 4763.11(G)(14). Clearly, the intent of the rules is to put the duty of providing a workfile on the appraiser who produced the file. In the case sub judice, there is no dispute that appellant did not have custody of her workfile. As noted by the Hearing Officer, appellant had a work file retrieval system in place with Richard Chapman, who did turn over the workfile to the Division. At the hearing, testimony was adduced that appellant told Danitra Kourkounakis that Richard Chapman had the workfile. However, the record is clear that although the Division contacted appellant a number of times requesting the workfile, appellant herself never contacted Chapman and asked him to turn over the file. The following is an excerpt from her testimony at the hearing:

{¶32} “Q. Now, you stated that you called one time to Mr. Chapman asking for a copy of the work file.

{¶33} “A. Yes. Well, I just called him.

{¶34} “Q. You called him?

{¶35} “A. I don’t recall whether I said I need a work file. I don’t recall what I said. I just called and asked him to call me.

{¶36} “Q. Oh, so you didn’t say I need a work file in your message. You just said call me. This is Teresa - -

{¶37} “A. Yes.

{¶38} “Q. - - Penix, Mr. Chapman, give me a call?

{¶39} “A. Yes.

{¶40} “Q. So there was no really request made - - your testimony is that’s the only time that you called him, that one time and left a message, correct?

{¶41} “A. Yes.

{¶42} “Q. So there was no request from you made to him asking for the work file; is that correct?

{¶43} “A. That’s correct.” Transcript at 205-206. (Emphasis added).

{¶44} As noted by appellee, “[a]fter the Division requested [appellant] provide her work file, she did absolutely nothing to assist the Division in obtaining the work file.” By failing to do so, appellant, in essence, thwarted the investigation against her.

{¶45} For the foregoing reasons, appellant’s first assignment of error is overruled.

II

{¶46} Appellant, in her second assignment of error, argues that the trial court erred in failing to find that the Ohio Real Estate Appraiser Board had no lawful authority to levy a monetary civil penalty on appellant. As is stated above, the Board in this matter ordered appellant to pay a fine in the amount of \$500.00.

{¶47} R.C. 4763.11 (F) states as follows: “(F) If the board determines that a licensee, registrant, or certificate holder has violated this chapter for which disciplinary action may be taken under division (G) of this section, after review of the referee's or examiner's report and the evidence as provided in division (E) of this section, the board shall order the disciplinary action the board considers appropriate, which may include, but is not limited to, any of the following:

{¶48} “(1) Reprimand of the certificate holder, registrant, or licensee;

{¶49} “(2) Suspension of the certificate, registration, or license for a specific period of time;

{¶50} “(3) Suspension of the certificate, registration, or license until the certificate holder, registrant, or licensee complies with conditions the board sets, including but not limited to, successful completion of the real estate appraiser examination described in division (D) of section 4763.05 of the Revised Code or completion of a specific number of hours of continuing education instruction in courses or seminars approved by the board;

{¶51} “(4) Revocation of the certificate, registration, or license.

{¶52} “The decision and order of the board is final, subject to review in the manner provided for in Chapter 119. of the Revised Code and appeal to any court of common pleas.”

{¶53} The Ohio Real Estate Appraiser Board is part of the Ohio Department of Commerce, Division of Real Estate and Professional Licensing, an administrative agency. As noted by the Ohio Supreme Court in *DABE, Inc. v. Toledo-Lucas Co. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536; “It is well settled that an

administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency. *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 379, 71 O.O.2d 366, 329 N.E.2d 693.

{¶54} ‘Such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant.

{¶55} ‘In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it.’ *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, 117 N.E. 6.” Id at paragraphs 38-40.

{¶56} There is no express power in R.C. 4763.11 (F) authorizing the Ohio Real Estate Appraiser Board to impose a monetary fine. While such section authorizes the Board to issue appropriate disciplinary action, which includes, but is not limited to, reprimands, suspensions or revocations, we concur with appellant that “[t]he power to impose a monetary fine is not incidental or ancillary to these actions.”

{¶57} Furthermore, the rule of ejusdem generis provides that where a statute includes both a specific enumeration of things to be included, as well as a more general classification, the general classification is not to be construed broadly, but rather is restricted in scope to include only things similar in kind to these specifically named.

State v. Barker (1983), 8 Ohio St.3d 39, 41, 457 N.E.2d 312. Applying such rule, we must interpret the phrase “not limited to” as used in R.C. 4763.11(F) as limited to actions similar to those listed in the statute. Imposing a monetary fine is not similar to a reprimand, suspension, or revocation.

{¶58} Appellant’s second assignment of error is, therefore, sustained.

{¶59} Accordingly, the judgment of the Fairfield County Court of Common Pleas is affirmed in part and reversed in part. This matter is remanded to the trial court for further proceedings.

By: Edwards, J.

Gwin, P.J. and

Hoffman, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES

JAE/d0813

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
	:	
OHIO REAL ESTATE APPRAISER	:	
BOARD, et al.	:	
	:	
Defendants-Appellees	:	CASE NO. 09-CA-14

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed in part, and reversed and remanded in part. Costs assessed 50% to appellant and 50% to appellee.

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES