

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kevin Randolph,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-909
Ohio Division of Real Estate,	:	(C.P.C. No. 09CVF-01-1292)
Appellee-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 8, 2010

Teresa Villarreal, for appellant.

Richard Cordray, Attorney General, and *Theodore L. Klecker*,
for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Appellant, Kevin Randolph ("appellant"), appeals from the Franklin County Court of Common Pleas' decision affirming the Ohio Division of Real Estate's order revoking his real estate broker's license. The agency issued formal charges to appellant in September 2008 based on a complaint filed by Sherri Myrick, one of appellant's former clients. Among other things, the agency revoked appellant's license because it found that he breached his fiduciary duties to Myrick in connection with the purchase of a \$64,000 piece of real property in which appellant himself retained \$20,400 in bonuses and commission. Because the record contains reliable, probative, and substantial evidence

supporting the agency's order, and the order is in accordance with law, we affirm the decision of the trial court.

{¶2} Appellant represented Myrick in connection with the purchase of three parcels of real property on Columbus' near east side: a four-unit apartment building at 1045–51 East 20th Avenue, a duplex at 1106 East Whittier Street, and a single-family home at 1396 East 22nd Avenue. (Decision & Entry Affirming the Order of the Ohio Div. of Real Estate, Aug. 31, 2009, at 1.) At that time, Myrick had been recently widowed and she was purchasing the properties as rentals/investments to supplement her upcoming retirement. (Administrative Hearing Officer's Report and Recommendation, Dec. 1, 2008, at 3.) In addition to purchasing the properties using appellant as her broker, Myrick also made an agreement with appellant for him to manage the East Whittier Street and East 20th Avenue properties.

{¶3} Myrick purchased the first of the properties on East 20th Avenue around December 2004. At the time of purchase, three of the four units were occupied by tenants; the unit at 1051 was vacant, and required new flooring before it could be rented. Id. at 3. Contemporaneously with the purchase of the East 20th property, appellant and Myrick entered into a property management agreement, which was purported to be for the 2005 calendar year. Pursuant to the management agreement, appellant was responsible for collecting rents, performing or ordering maintenance/repairs, and making reasonable efforts to keep all of the units rented. In exchange for these services, appellant was to earn seven percent of the rent he collected.

{¶4} Myrick and appellant mutually agreed to terminate the management agreement around October 2005 after Myrick became upset that appellant had failed to

re-rent units that had become vacant, and had not repaired the flooring in the 1051 unit. There was also a question as to the reliability of appellant's accounting of the proceeds and expenses.

{¶5} Myrick purchased the East Whittier property around May 2005, and entered into a similar management agreement with appellant for the remainder of the calendar year. The parties also terminated this agreement in October 2005, prior to its completion.

{¶6} Myrick purchased the East 22nd property in June 2005 from Bobby Ellis. Appellant claims that Ellis approached him in March or April 2005, and offered him an "investor fee" if he were able to find a buyer. In a sworn affidavit, Ellis refuted appellant's account of the story, and specifically stated that the investor fee was solely appellant's idea. Appellant showed the property to Myrick and, on April 14, 2005, she made an offer to purchase the East 22nd property for \$64,000. Myrick signed a Disclosure of Investor Fee/Real Estate Bonus ("Disclosure"), which included the following language:

Seller hereby agrees to pay an investor fee of \$18,400 to Randolph & Associates Real Estate, Inc. at closing on subject property. * * *

(Exhibit Q.)

{¶7} Myrick apparently signed the Disclosure, but she has no recollection of doing so, and she testified before the agency that, had she known about the bonus, she would have offered less based on the fact that the seller was obviously willing to take less for the property. Indeed, Ellis stated in his affidavit that he would have sold the property for \$35,000 to \$45,000.

{¶8} On February 17, 2006, Myrick filed a complaint with the Division of Real Estate. The agency conducted an investigation, and later, issued 12 formal charges to

appellant, alleging violations of R.C. 4735.18 and 4735.62. The agency held a hearing on October 28, 2008, in which appellant appeared pro se, and gave testimony on his own behalf. Appellant's wife also testified on his behalf, and appellant introduced five exhibits, which were all admitted into the record. The State introduced 18 exhibits, to which appellant stipulated. Testifying on behalf of the State were Myrick, and two Division of Real Estate investigators.

{¶9} The hearing officer issued her findings of fact and conclusions of law in a 12-page report, ultimately concluding that appellant violated R.C. 4735.18(A)(24), which requires real estate brokers to keep complete and accurate records of all transactions for three years. Despite the evidence concerning the circumstances of the \$18,400 bonus that appellant received in connection with the sale of the East 22nd property, the hearing officer found that the agency failed to prove that appellant knew or should have known that the seller would have accepted less than what Myrick paid. The hearing officer, thus, recommended that charges 6 through 11 be dismissed.

{¶10} On January 7, 2009, the Ohio Real Estate Commission ("Commission"), convened a review hearing at which they heard additional testimony from appellant and Myrick. (Trial court, at 6.) The Commission accepted the hearing officer's conclusions with regard to Counts 2 and 3, and also made additional findings of fact and conclusions of law, including that appellant failed to disclose a material fact to his client regarding the asking price for the East 22nd property, and violated the Canons of Ethics for the Real Estate Industry. (Division of Real Estate Adjudication Order, Jan. 15, 2009.) Pursuant to these findings, the Commission imposed the following penalties on appellant:

Count 2	\$300.00 civil penalty and 3 hours of education in core law
Count 3	\$300.00 civil penalty and 3 hours of education in ethics
Counts 6, 7 and 8	Revocation
Count 9	\$1,000 civil penalty
Counts 10 and 11	Revocation

(Adjudication Order, at 2.)

{¶11} Appellant appealed the agency's order to the Franklin County Court of Common Pleas. After considering all the evidence in the record, the trial court affirmed the agency's order, finding that the order was supported by reliable, probative, and substantial evidence, in accordance with *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. See *Ford v. Ohio Dept. of Natural Resources* (1990), 67 Ohio App.3d 755, 757 (holding that the common pleas court must affirm an agency's order if it is supported by reliable, probative and substantial evidence).

{¶12} Appellant now appeals the trial court's decision to this court, as a matter of right, presenting six assignments of error for our review:

ASSIGNMENT OF ERROR NUMBER 1: The trial court erred when it determined the Commission's decision that Appellant failed to disclose material facts to his client concerning the purchase price of 1396 E. 22nd Ave Columbus, Ohio was supported by reliable, probative, and substantial evidence.

ASSIGNMENT OF ERROR NUMBER 2: The trial court erred when it determined that the Commission's decision that Appellant failed to exercise reasonable skill and care when representing his client in the purchase of 1396 E. 22nd Ave Columbus, Ohio was supported by reliable, probative, and substantial evidence.

ASSIGNMENT OF ERROR NUMBER 3: The trial court erred when it determined that the Commission did not err when it relied on the affidavit testimony of Bobby Ellis.

ASSIGNMENT OF ERROR NUMBER 4: The decision of the Commission was unduly harsh.

ASSIGNMENT OF ERROR NUMBER 5: The trial court erred when it determined that the Commission's decision that Appellant failed to exercise reasonable skill and care in managing 1045-1051 E. 20th Ave Columbus, Ohio was supported by reliable, probative, and substantial evidence.

ASSIGNMENT OF ERROR NUMBER 6: The trial court erred when it determined the revocation of Appellant's Real Estate Broker's License was supported by reliable, probative, and substantial evidence.

{¶13} The common pleas court is the reviewing tribunal for appeals from administrative agencies such as the Ohio Division of Real Estate, and the standard of review is provided by R.C. 119.12. This statute provides that the trial court may affirm the agency's order complained of in the appeal if, after considering the entire record, the court finds that the order is supported by reliable, probative, and substantial evidence, and in accordance with law. *Conrad* at 111. Although an agency's findings are not conclusive, when reviewing agency orders, courts must defer to the agency's factual findings and resolution of any evidentiary conflicts. See *Id*; see also *General Motors Corp. v. Joe O'Brien Chevrolet, Inc.* (1997), 118 Ohio App.3d 470, 482 ("[The] common pleas court * * * performs a hybrid function: it makes a determination of the law and considers the evidence revealed at the administrative level.").

{¶14} The trial court's level of review is, thus, limited. Our review, however, is even more limited than that of the trial court. The court of appeals' function is solely to determine whether the trial court abused its discretion—"not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio St. Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122; *Hartzog v. Ohio St. Univ.* (1985),

27 Ohio App.3d 214, 216 ("Abuse of discretion implies a decision that is both without a reasonable basis and clearly wrong."); but see *Gen. Motors Corp.*, at 483 ("On the question of whether the agency's order is in accordance with law, our review is plenary.").

{¶15} Turning to the assignments of error, although they are all interrelated, assignments IV and VI concern only the degree of penalty imposed by the agency. We will therefore address those assigned errors separately, after first considering assignments I through III which concern the purchase of the East 22nd property, and assignment V, which concerns the property management agreement.

{¶16} Ohio law imposes a fiduciary duty upon real estate brokers to use their best efforts to further the interests of their clients. R.C. 4735.62. This includes the duty to disclose to the client "any material facts of the transaction of which the [broker] is aware or should be aware in the exercise of reasonable skill and care[.]" R.C. 4735.62(F). The Commission found that appellant violated his fiduciary duty to his client with regards to the purchase of the East 22nd property because he failed to tell his client that the seller was willing to accept \$40,000, rather than the actual purchase price of \$64,000. The Commission based this finding on the affidavit of the seller, and also on appellant's own testimony before the Commission:

COMMISSIONER FROEHLICH: * * * did you explain to her that [the seller] was willing to take \$18,400 less for the property basically by paying [you] a bonus?

[APPELLANT]: I didn't know he was willing to take \$18,400 less.

COMMISSIONER FROEHLICH. If he's paying a \$18,400 bonus to you, isn't he netting less for that property?

[APPELLANT]: Obviously, he's netting less but I didn't know he was willing to take less. He have [*sic*] never told me that.

COMMISSIONER FROEHLICH: He told you he was going to [pay you a bonus of] \$18,400 on [a] \$64,000 sale.

[APPELLANT]: Yes sir. The only thing --

COMMISSIONER FROEHLICH: Does that mean he would net less?

[APPELLANT]: That means he would net less, yes.

(Commission Hearing, Tr. 22-23.)

{¶17} It is true that appellant provided a disclosure form to his client identifying the bonus, however, Myrick testified that he never told her about the bonus, and that she did not recall signing the disclosure form. Needless to say, appellant did not have a meaningful discussion with his client regarding the fact that he was keeping roughly one-third of the \$64,000 purchase price. On a typical transaction of this nature, the real estate broker would keep six percent or \$3,840. Given the substantial discrepancy between the ordinary broker's commission and the amount appellant received from this transaction, it was incumbent upon him to do more than to simply include the bonus amount on some disclosure form and get his client to sign off on it without fully explaining what it means. What appellant did is akin to a doctor getting a patient to consent to a particularly risky procedure without fully disclosing the risks involved. The fiduciary requirements in R.C. 4735.62 are not inclusive or exhaustive: "[T]he licensee shall be a fiduciary of the client and shall use the licensee's best efforts to further the interest of the client *including, but not limited to, doing all of the following*[" (Emphasis added.) So the fact that there is no provision in R.C. Chapter 4735 that requires brokers to get "informed consent" for certain

types of bonuses, does not excuse conduct that common sense should tell you is unethical at the very least.

{¶18} On these facts, the Commission found that appellant violated R.C. 4735.18(A)(9) as it incorporates R.C. 4735.62(F).

{¶19} With regard to appellant's mismanagement of Myrick's rental properties, the hearing officer found that appellant failed to keep accurate records, which was a direct violation of R.C. 4735.18(A)(24). Myrick also gave testimony that appellant failed to perform his duties under the management agreement, by failing to make reasonable efforts to keep the units occupied, and failing to perform required maintenance.

{¶20} Appellant claims that Myrick failed to provide the requisite funds for him to make the needed repairs. However, appellant has no evidence to support this assertion. Furthermore, Myrick testified that there was a balance of funds from which appellant could have made the repairs, and that despite the availability of funds, the unit at 1051 East 20th Avenue could not be rented for the entire time that appellant managed the property. (Decision and Judgment Entry, at 16.) Furthermore, the ledger sheets introduced as evidence at the agency hearing showed that Myrick made two deposits into the reserve account for \$2,500. (Id. citing exhibit No. 1.)

{¶21} On these facts, the Commission determined that appellant violated R.C. 4735.18(A)(9) as it incorporates R.C. 4735.62(A).

{¶22} The trial court found that there was reliable, probative, and substantial evidence to support the Commission's order. (Decision and Judgment Entry, at 12–13, 16.) Given the facts, we cannot see any abuse of discretion.

{¶23} We, accordingly, overrule the first, second, and fifth assignments of error. We also find no abuse of discretion with regard to the Commission's reliance on the seller's affidavit. As the trial court notes, the Rules of Evidence are not controlling in administrative proceedings. (Decision and Judgment Entry, at 13); see, e.g., *Hayes v. State Med. Bd. of Ohio*, 138 Ohio App.3d 762, 769 ("[T]he Ohio Rules of Evidence may be taken into consideration by the hearing examiner in determining the admissibility of evidence but are not controlling."). Moreover, appellant's own testimony more or less corroborates the evidence gleaned from the affidavit. We therefore overrule the third assignment of error.

{¶24} The remaining assignments of error attack the alleged harshness of the penalty levied against appellant by the Commission. These assignments of error have no basis under Ohio law, which provides that once an administrative agency finds a violation, the penalty is entirely within the province of that agency. See *Henry's Café, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233, paragraph three of the syllabus. So long as the penalty is within the range provided by statute or purview of the agency's authority, the court has no jurisdiction to pass on its harshness. *Id.*; see also *King v. State Med. Bd. of Ohio* (Jan. 28, 1999), 10th Dist. No. 98AP-570, 1999 WL 35500, at *2 (holding that the common pleas court is precluded from interfering with or modifying an administrative penalty if such penalty is authorized by law); *Hale v. Ohio State Veterinary Med. Bd.* (1988), 47 Ohio App.3d 167 (holding that the trial court abused its discretion by changing the Board's suspension of a veterinarian from six months to one month on the basis that it was "unduly harsh").

{¶25} The Revised Code specifically authorizes the Commission to revoke any broker's license for a violation of R.C. 4735.18. See R.C. 4735.051(l)(1). The Commission found that appellant violated R.C. 4735.18, thus, revocation of appellant's broker's license was in accordance with law.

{¶26} We, accordingly, overrule the fourth and sixth assignments of error.

{¶27} Having overruled all six assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
