

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000933-MR

KENTUCKY REAL ESTATE COMMISSION

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 01-CI-003537

GREGORY MOYER

APPELLEE

OPINION
REVERSING

** ** * * *

BEFORE: COMBS, KNOPF, and TACKETT, Judges.

COMBS, JUDGE. The Kentucky Real Estate Commission ("the Commission") appeals from an order of the Jefferson Circuit Court that had reversed a Commission action denying Gregory Moyer's application for a Kentucky real estate broker's license. We reverse the order of the circuit court.

Pursuant to a reciprocal memorandum of understanding between the Commission and the State of Illinois Office of Banks and Real Estate ("the Illinois OBRE"), Gregory Moyer applied for

a Kentucky real estate broker's license on December 18, 2000. On January 26, 2001, the Commission notified Moyer that his application had not been approved. However, it offered him an opportunity to be heard -- specifically with respect to a disciplinary action that had been brought against him by the Illinois OBRE.

Before moving to Illinois, Moyer held real estate licenses in Arizona and in California. Originally performing "ministerial duties" for an Illinois real estate agency, Moyer argues that he was falsely accused by a disgruntled former colleague of practicing real estate without a license in Illinois. The disciplinary inquiry with OBRE initially resulted in an offer of a thirty-day suspension and one year on probation. Moyer contends that he elected instead a five-year probationary period in order to avoid any hiatus in his work at the Illinois agency. Upon leaving Illinois during the probationary period, Moyer subsequently obtained real estate licenses in Minnesota (1999) and in Indiana (2000).

Moyer directs our attention to the Indiana licensure proceeding due to its similarities to his Kentucky experience. As was the case in Kentucky, the Indiana Real Estate Commission also refused to license him pending completion of his five-year probation in Illinois. He appealed the denial, and an administrative hearing resulted in a reversal of the decision of

the Indiana Commission. Thus, Moyer received his Indiana license.

Careful recitals by the Indiana administrative law judge (the ALJ) noted that the conduct at issue presented no threat of harm to the public. The ALJ additionally relied on the fact that Moyer had been in the process of applying for a real estate license in Illinois when the disciplinary action occurred. Moyer based his application for a Kentucky license on reciprocity with his Indiana license. These findings of the Indiana ALJ were presented as arguments when Moyer and his counsel appeared before the Kentucky Commission on March 29, 2001, for an administrative hearing held pursuant to KRS 324.170.¹

Following the hearing, the Commission deferred its decision and sought additional information from Moyer. By its final order dated April 23, 2001, the Commission denied Moyer's application for licensure. The Commission's order provided, in part, as follows:

KRS 324.045(1) states licenses shall be granted only to persons who are trustworthy and competent to transact the business of a broker or sales associate in a manner to safeguard the interest of the public and only after satisfactory proof of qualifications has been presented to the Commission.

¹ Kentucky Revised Statutes.

The reciprocal licensing agreement between Kentucky and Illinois indicates (at paragraph 5): "the Kentucky Real Estate Commission and Illinois Office of Banks in (sic) Real Estate reserve the right to deny any applicant for a reciprocal license in the respective jurisdiction for any reason."

Mr. Moyer was disciplined by the Illinois Real Estate Division in 1998 pursuant to a consent decree between Mr. Moyer and the Division. Pursuant to this agreement, Mr. Moyer was placed on a 5-year probation. This probation is set to expire in 2003.

* * * * *

After considering all the evidence in this matter, the Kentucky Real Estate Commission finds that Mr. Moyer's application is denied until the end of his probationary period with the Illinois Division of Real Estate. Upon successful completion of the probationary period with the Illinois Division, Mr. Moyer may reapply with the Kentucky Commission. At that point, the Real Estate Commission will reconsider his application.

The Kentucky Real Estate Commission notes the actions by Mr. Moyer in Illinois were sufficiently serious to produce a five-year probationary period and a significant fine. Before this Commission will consider Mr. Moyer's application, he should successfully complete the probation in order to prove he merits a Kentucky real estate license.

In May 2001, Moyer filed a complaint against the Commission in Jefferson Circuit Court pursuant to KRS 13B.140.² He argued that the Commission erred in denying his application

²KRS 13B.140 captions such a complaint as a "petition for review".

since there was no evidence that he lacked the character necessary to be granted a Kentucky real estate license through reciprocity. Moyer emphasized that the evidence failed to show any Amisbehavior@on his part. In support of his contention, Moyer argued that the State of Indiana had seen fit to grant him a license under circumstances identical to those reviewed by the Kentucky Commission.

In an opinion and order dated April 19, 2002, the circuit court reversed the Commission's findings and denial of the application. The court found that the denial was not supported by substantial evidence. This appeal followed.

The Commission argues that the circuit court erred in reversing its determination. It contends that the Commission decision was based upon substantial evidence in the record: specifically, that the Illinois OBRE had launched an investigation of Moyer, resulting in a consent order in which Moyer, several colleagues, and his employer generally admitted wrongdoing. The final decree imposed a stiff penalty against Moyer's license and a hefty fine against both Moyer and his employer. We agree that the Commission's decision was supported by substantial evidence.

Judicial review of an administrative agency's action centers on the question of arbitrariness. Commonwealth Transportation Cabinet, Dep't. of Vehicle Regulation v. Carnell,

Ky. App., 796 S.W.2d 591, 594 (1990). An administrative decision may be considered arbitrary if: (1) it was not within the scope of the agency's granted powers; (2) the agency failed to provide procedural due process; or (3) the agency's decision was not supported by substantial evidence. Commonwealth Revenue Cabinet v. Liberty National Bank of Lexington, Ky. App., 858 S.W.2d 199, 201 (1993). In finding that substantial evidence did not exist to support the Commission's denial, the circuit court stated as follows:

The fact that Mr. Moyer's Illinois real estate license was on probation does not in itself constitute substantial evidence. The mitigating circumstances . . . must also be considered. The Court is also concerned with paragraph (5) of the Kentucky/Illinois provision that permits either state to deny an application for licensure for "any reason other than provided. . ." Such a standard appears to be arbitrary. The Court agrees with the Commission's assertion that receiving a real estate license is not a "right." However, as [an Indiana administrative law judge determined] the circumstances presented here do not warrant denial of his application for a licensure as a real estate broker in Kentucky.

The trial court focused on paragraph (5) of the Kentucky/Illinois reciprocity agreement, emphasizing that it provided an arbitrary standard *per se* that would entitle either state to deny an application for "any reason other than provided..." While it is true that such language appears to be arbitrary on its face, it is not relevant to the case before us.

The Commission did not base its denial upon that ambiguous sentence. Instead, it relied upon the evidence presented at the administrative hearing - specifically citing the Illinois suspension and circumstances surrounding that disciplinary action as the basis of its inquiry, the source of its concern, and the ultimate reason for its denial of a license to Moyer.

The circuit court also cited the Indiana proceedings in which a similar administrative hearing resulted in a decision overruling the Indiana Real Estate Commission and awarding a license to Moyer. We believe that the court placed undue and inappropriate emphasis on that parallel administrative hearing. Kentucky courts are not bound by administrative rulings from sister states. We have found no rule or principle of comity that would so dictate. Additionally, a circuit court or court of appeals is not at liberty to substitute its judgment as to matters of fact determined by an administrative hearing officer. We as a reviewing court are limited to questions of law and to an inquiry into whether substantial evidence existed for the decision - even if we would have found differently had we stood in the stead of the trier of fact. Our review must analyze whether the Commission acted arbitrarily. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964).

We cannot conclude that the final ruling of the Commission lacked substantial evidence. After the original denial of Moyer's license in January 2001, the Commission granted him a full hearing. There is no evidence to support Moyer's claim (at p. 3 of appellee's brief) that the Commission acted in bad faith and only "went through the motions of a hearing" - having prejudged the outcome based on the initial letter of denial. The Commission fully complied with KRS 324.170 and with all procedural due process requirements. It undertook a hearing in which it heard and evaluated the evidence and circumstances surrounding the probationary status of Moyer's Illinois real estate license. The fact that the Kentucky Commission reached a conclusion opposite from that of its Indiana counterpart does not negate the existence of substantial evidence in support of the outcome. We hold that the Commission acted properly and that it relied upon substantial evidence as an adequate basis for its final order.

We reverse the decision of the Jefferson Circuit Court in this matter and remand it for entry of an appropriate order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Geraldine Lee B. Harris
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jan M. West
Louisville, Kentucky

Paul Croce
Louisville, Kentucky

Stephen C. Sadin
Chicago, Illinois