

BEFORE THE BOARD OF REALTY REGULATION
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2011-RRE-LIC-186 REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 1105-2013
TREATMENT OF THE LICENSE OF)	
CRYSTAL L. COX, Licensed Real Estate)	
Broker, License No. 11581.)	
)	

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

The Business Standards Division (BSD) filed a complaint against licensee Crystal Cox alleging violations of Mont. Code Ann. § 37-1-316(9) (which provides that a real estate salesperson commits unprofessional conduct in revealing confidential client information obtained as a result of a professional relationship), Mont. Code Ann. § 37-1-316(18) (engaging in conduct that does not meet generally accepted standards of practice), Mont. Code Ann. § 37-51-313(4)(a) (failing to act solely in the best interests of the buyer when acting as a buyer’s agent), Mont. Code Ann. § 37-51-313(4)(d) (failing to safeguard a buyer’s confidences when acting as a buyer’s agent), and Admin. R. Mont. 24.210.641(am) (acting as a buyer agent without a written buyer broker agreement). In conformity with the Montana Administrative Procedure Act, Hearing Officer Gregory L. Hanchett issued a scheduling order on February 12, 2013, setting pre-hearing deadlines and dates for the final pre-hearing conference and contested case hearing in this matter. The scheduling order was provided to both parties and the licensee received the order.

On February 19, 2013, the licensee sent an e-mail to the Hearings Bureau inquiring as to whether her “Response/Objection to Notice of Proposed Board Action had been received.” In response, legal assistant Sandy Duncan advised Cox that the Hearings Bureau had received that document (as it had been provided with the file sent from the Board of Realty Regulation to the Hearings Bureau). In addition, in response to the licensee’s February 19 e-mail regarding whether the hearing had already been held, the hearing officer apprised the licensee via e-mail of the specific time and date of the hearing.

In a communication to BSD counsel, the licensee indicated that she would not be attending the hearing in person and that she did not have a cell phone. She provided no other phone number at which she could be reached to either the Hearings Bureau or the BSD.

The hearing officer, in conformity with the scheduling order, convened a final pre-hearing conference in this matter that Cox failed to appear at despite proper notice of the date, time, and place of the conference. Don Harris, agency legal counsel, represented the BSD. At the time of the conference, BSD moved to admit BSD's Exhibits 1 through 9. Those documents were admitted.

On May 29, 2013, once again in conformity with the scheduling order, the hearing officer convened a contested case proceeding in this matter. The licensee failed to appear and the hearing proceeded in her absence. Mr. Harris represented the BSD. Jeannie Worsach testified under oath and BSD's Exhibits 1 through 9 were considered. Based on the evidence adduced at hearing, the following findings of fact, conclusions of law and recommended decision are made.

II. FINDINGS OF FACT

1. At all times material to this case, Cox has held Montana Real Estate Broker License No. 11581.

2. In the fall of 2010, Martin Cain contacted several real estate agents in Kalispell and Eureka, Montana, seeking information on and looking to view real estate. Cain was interested in purchasing or possibly leasing real estate in Montana for his business. One of the real estate agents he contacted was the licensee.

3. At Cain's request, the licensee lined up various properties for him to see when he visited Montana. One of these properties was the property formerly known as "Gwynn Lumber and Reload" which was located on a railroad track spur in Eureka, Montana. Acting as an agent on behalf of Cain, the licensee contacted the owner of the property and scheduled with the owner a time for Cain and the licensee to see the property and to meet with the owner. Exhibits 4 and 5. In addition, the licensee suggested options for how Cain might take possession of the property (e.g., lease/option to purchase). Exhibit 5, page 1, e-mail from Cox to Cain dated October 29, 2010. The licensee also obtained quotations for Cain on purchasing building materials (such as cement) for making improvements to the property.

4. Cain made a phone call to the licensee just prior to traveling to Montana to view properties. The phone call did not go well and as a result, Cain decided not to speak with the licensee anymore and not to engage her as a real estate agent.

5. At no time did Cain enter into any type of agreement with the licensee for her representation as a buyer's agent.

6. The licensee describes herself as an investigative blogger and apparently maintains various website blogs regarding entities that she believes engage in wrongdoing.

7. The licensee became enraged that Cain had decided not to work with her. As a result of her anger, soon after Cain severed their business relationship, the licensee began blogging about Cain and contacting Cain through both e-mail and telephone. The licensee's blogs exposed many of Cain's real estate purchase plans for his company, information which the licensee had obtained through her discussions with Cain when Cain was having her line up properties in Montana. By way of example, the licensee's December 9, 2010 blog (Exhibit 1, December 9, 2010 blog, pages 4 of 10 through 10 of 10) lays out how the licensee perceived that Cain cut her out of potential commission on the sale of real property in Montana. In doing so, the licensee made public through her website information related to Cain's efforts to procure real estate in Montana. She also exposed conversations that Cain had with her regarding how, for example, the owner of the Gwynn Lumber and Reload property would not work with Cain if the licensee was involved in the transaction. December 9, 2010 blog, page 5 of 10.

8. The licensee's blogging tirades continued on for months and included things such as Cain had previously been convicted of some type of theft and that Cain had hired someone to kill the licensee. The licensee's comments were defamatory toward Cain. See generally, Exhibits 1 and 4 through 8.

9. The licensee's blogs were frequently written on a website domain name that she purchased - www.martincain.com. The licensee wrote and/or published all of the content that appeared on that website. On this website, she would reprint various comments that Cain had made between himself and his vendors as well as confidential information about Cain, some of which Cox obtained through her contacts with Cain. She would also post letters that Cain's attorneys had sent to her in an effort to get her to stop making defamatory comments about Cain on her blogs. The licensee would also add her own editorialized comments regarding Cain and her perception of his trustworthiness. While Cain was attempting to negotiate to purchase real estate in Montana, Cox was blogging about his untrustworthiness.

10. On her February 17, 2011 blog on the www.martincain.com website, the licensee posited "Montana Man Admits to Working With Martin Cain to Set Me Up, Harm me, Kill me." Exhibit 1, February 17, 2011 blog. Afterwards, the licensee deleted the February 17, 2011 blog and then sent an e-mail to Cain telling him that

he could purchase the www.martincain.com website and domain name for \$550,000.00.

11. The licensee's real estate broker license should be suspended for six months following the date of entry of a final order in this matter with all but 30 days of the suspension stayed on the condition that the licensee satisfies additional terms and conditions during the first 120 days after entry of the final order in this matter. The additional terms and conditions will include additional education and payment of a fine. The licensee should be also required to take an additional eight hours of continuing education in the area of ethics within 120 days of the date of entry of the final order. The licensee's license should be placed on probation for a period of two years beginning of the date of entry of the final order. These proposed sanctions are necessary to protect the public, will serve to rehabilitate the licensee, and help assure the public that the licensee is able to practice in a manner consistent with Montana law and with the promotion of the health, safety, and welfare of the public.

III. CONCLUSIONS OF LAW¹

A. *The Licensee Has Violated Both Statute and Rule.*

1. The Department bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126. The Department must also show that any sanction which it seeks is appropriate under the circumstances of the case.

2. Mont. Code Ann. § 37-1-316 provides in pertinent part that the following is unprofessional conduct:

* * *

(9) revealing confidential information obtained as a result of a professional relationship without the prior consent of the recipient of services, except as authorized or required by law;

* * *

(18) conduct that does not meet the generally accepted standards of practice.

¹ Statements of fact in contained in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

3. Mont. Code Ann. § 37-51-313(4)(a) provides that a buyer agent is obligated to the buyer “to act solely in the best interests of the buyer, except that a buyer agent, after written disclosure to the buyer and with the buyer’s written consent, may represent multiple buyers interested in buying the same property . . . or show properties to which the buyer is interested to prospective buyers without breaching the obligation to the buyer.”

4. Mont. Code Ann. § 37-51-313(4)(d) provides that a buyer agent is obligated to safeguard the buyer’s confidences.

5. Mont. Code Ann. § 37-51-102(6) defines a buyer’s agent as “a broker or salesperson who, pursuant to a written buyer broker agreement, is acting as the agent of the buyer in a real estate transaction and includes a buyer subagent and an in-house buyer agent designate.” Mont. Code Ann. § 37-51-102(7) defines a “buyer broker agreement” as “a written agreement in which a prospective buyer employs a broker to locate real estate of the type and with terms and conditions as designated in the written agreement.” The duties prescribed for real estate salespersons and brokers in Title 37, Chapter 51 “are intended to replace the duties of agents provided elsewhere in state law and replace the common law as applied to these relationships.” Mont. Code Ann. § 37-51-313(1).

6. Admin. R. Mont. 24.210.641(am) provides that it is unprofessional conduct to act as a buyer agent without a written buyer broker agreement.²

7. The preponderant evidence in this matter demonstrates that the licensee acted as a buyer agent without a written buyer broker agreement in lining up properties for Cain to view, such as Gwynn Lumber property, and thereby violated Admin. R. Mont. 24.210.641(am). By failing to obtain a written buyer broker agreement with Cain in violation of Admin. R. Mont. 24.210.641(am), the licensee also violated Mont. Code Ann. § 37-1-316(18).

8. The preponderant evidence also shows that the licensee violated Mont. Code Ann. § 37-1-316(9) by revealing confidential information about Cain which she had received in the course of a professional relationship with Cain. Specifically, she revealed in her blogs some of Cain’s real estate acquisition interests, such as the

² The complaint properly cites the language of the regulation which the licensee was charged with violating, but erroneously cites to Admin. R. Mont. 24.210.641(al), instead of Admin. R. Mont. 24.210.641(am). The clerical error of citing (al) instead of (am) is of no consequence to the prosecution of this matter since the citation to the correct language is adequate to put the licensee on notice of the alleged violation. That the licensee was in fact on notice of the alleged violation of subsection (am) is manifest in her responses to the Board regarding the charges.

Gwynn Lumber property, information which she had received when she was working with Cain to set up visits for properties.

9. BSD has failed to prove the alleged violations of Mont. Code Ann. § 37-51-313. The standards of conduct imposed upon a buyer's agent under Mont. Code Ann. § 37-51-313 apply to those situations where a buyer's agent is representing a buyer. A buyer's agent is a broker or salesperson who represents a buyer "pursuant to a *written* agreement." (Emphasis added). A written agreement is one that is an agreement where "a prospective buyer employs a broker to locate real estate of the type and with terms and conditions as designated in the written agreement." There is no dispute here that there was never a written agreement between Cain and the licensee. By definition, therefore, the licensee cannot have violated the two provisions of Mont. Code Ann. § 37-51-313 which BSD alleges she violated.

B. The Appropriate Sanction Is Probation of the License with Terms which Include a Suspension, Remedial Education, and a Fine.

10. A regulatory board may impose any sanction provided for by Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Mont. Code Ann. § 37-1-312 provides that a regulatory board may impose probation, remedial education requirements, a suspension, and a fine.

11. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

12. BSD has requested that the licensee receive a four month suspension, remedial education, and a fine. BSD's suggestions are well taken in light of the facts surrounding this case. The licensee publically revealed confidential information that she gained through a professional relationship with Cain. In addition, she acted as a buyer's agent without obtaining a written buyer's agent agreement with Cain. This conduct demonstrates that in order to first protect the public and then to ensure the rehabilitation of the licensee, she should have her license placed on probation for a period of two years with the terms that her license be suspended for six months, with all but 30 days of the suspension stayed if she successfully completes her license probation, that she attend and successfully complete eight hours of ethics training in addition to the rule-prescribed annual continuing education obligation and that she do so within 120 days of the Board's final order of this matter, and that she pay a fine of \$1,000.00 within 120 days of the Board's final order in this matter. Only by

undergoing the suspension, undertaking additional ethical training, and paying a fine can the public be protected in this matter. In addition, only by undergoing the above terms as a condition of probation can the licensee be successfully rehabilitated.

13. Finally, in various responses to the Board, the licensee has ardently maintained that imposing any discipline upon her in this discipline proceeding violates her First Amendment rights to speak out about what she perceives as inappropriate conduct on Cain's part. The finding of violations in this case and the recommended sanction are not at all intended to and do not stem from any desire to punish the licensee for engaging in First Amendment protected speech. The culpable acts here, acting as a buyer's agent without a written buyer's agent agreement and revealing confidences obtained in a professional relationship, do not raise the specter of First Amendment protections and, therefore, sanctioning the licensee for her conduct does not violate her right to free speech. *Cf., Appeal of Trotzer*, 143 N.H. 64, 71-72, 719 A.2d 584, 589 (1998) (noting that sanctioning psychologist who incorporated Christian concepts into his therapies for patients did not infringe on first amendment freedom of religion where the sanctions were imposed because the acts constituted unprofessional conduct regardless of their religious character). Furthermore, it is well settled in Montana that there is no constitutional right to engage in a profession free from reasonable police regulation. *Wiser v. State (Wiser I)*, 2006 MT 20, ¶24, 331 Mont. 28, 129 P.3d 133 ("while one does have the fundamental right to pursue employment, one does not have the fundamental right to practice his or her profession free of state regulation promulgated to protect the public's welfare"). *See also, Montana Cannabis Industry Assoc. v. State*, 2012 MT 201, ¶20, 366 Mont. 224, 286 P.3d 1161 (persons do not have a fundamental right to pursue a particular employment or employment free of state regulation).

IV. RECOMMENDED ORDER

Based on the foregoing, it is recommended that the Board of Realty Regulation enter its final order finding that the licensee violated Mont. Code Ann. § 37-1-316(9) and (18) and Admin. R. Mont. 24.210.641(am). It is further recommended that the Board sanction the licensee's license by placing her license on probation for a period of two years with the terms that:

- (1) the licensee's license be suspended for a period of six months with all but 30 days of the suspension suspended upon successful completion of probation;
- (2) that within 120 days of the Board's entry of the final order in this matter that the licensee undertake and successfully complete eight (8) hours of additional education in ethics which education shall be in addition to and not a part of the licensee's required annual continuing education;

(3) that the licensee shall pay a fine of \$1,000.00 within 120 days of the Board's final order in this matter;

(4) that at all times during her probation that the licensee shall comply with all requirements applicable to brokers under Title 37, Chapters 1 and 51 of the Montana Codes Annotated as well as all requirements applicable to brokers under Title 24, Chapter 210 of the Administrative Rules of Montana.

DATED this 5th day of July, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.