

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-06-0079-REA REGARDING:

THE LICENSE APPLICATION OF) Case No. 924-2006
TOM KONENCY, Applicant.)
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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED
ORDER**

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I. INTRODUCTION

Tom Konency filed an application with the Board for licensure as a certified general appraiser. On October 3, 2005, the Board gave written notice of its proposed denial of Konency’s application. On October 24, 2005, Konency requested a hearing on the Board’s proposed action. On October 26, 2005, the Department of Labor and Industry transferred the case to the Hearings Bureau for a hearing.

Hearing Examiner Anne L. MacIntyre conducted a hearing in the case on May 31, 2006. Konency was present and represented himself. The Department was represented by agency counsel John P. Atkins. Konency, Candace Durran, Jeanne Holmgren, Keith O’Reilly, and Billie Veerkamp testified. Exhibits A, C, D, 4, and 5 were admitted by stipulation. Exhibits 2, 3, 6, 11, and B were admitted over various objections. Exhibits 1, 9, and 10 were excluded. Exhibit 1 is Konency’s summary of minutes of the Board, and the actual minutes are admitted as Exhibits 2 and 3. Exhibits 9 and 10 were not submitted through witness testimony, and lack authentication.

The parties submitted post-hearing briefs on or about July 26, 2006. Following receipt of the briefs, the case was deemed submitted for decision.

On July 31, 2006, the Department filed a post-hearing reply brief. On August 10, 2006, Konency filed a motion to strike the reply brief, objecting to it

because reply briefs were not contemplated by the agreement of the parties and Hearing Examiner for post-hearing submissions. The Department did not respond to the motion and it is therefore granted. The Department's reply brief is therefore stricken from the record of proceedings and has not been read or considered by the Hearing Examiner in arriving at her decision.

II. ISSUE

The issue in this case is whether the Board of Real Estate Appraisers properly denied Tom Konency's application for licensure as a certified general real estate appraiser.

III. FINDINGS OF FACT

1. In 2005, Tom Konency filed an application with the Board for licensure as a certified general appraiser pursuant to Mont. Code Ann. § 37-54-202. Prior to this application, he had been an appraiser in Wisconsin.

2. In support of his application for licensure, Konency also submitted three appraisal reports containing his work. The appraisal reports Konency submitted were of a resort in Chetek, Wisconsin (Exhibit A), a greenhouse in Rice Lake, Wisconsin (Exhibit C), and a dairy farm in Exeland, Wisconsin (Exhibit D). Konency prepared these as an appraiser in Wisconsin in 2004.

3. Billie Veerkamp is a certified general appraiser in the State of Montana. She is employed as the Board's investigator and, in that capacity, reviews appraisals submitted by applicants to the Board for licensure as appraisers. The purpose of the reviews, generally referred to as "Standard 3" reviews, is to determine whether the appraisals conformed to the Uniform Standards of Professional Appraisal Practice (USPAP).¹ Standard 3 refers to the USPAP requirements placed upon appraisal reviewers and requires the reviewer to develop and report a "credible opinion as to the quality of another appraiser's work." Standard 3, USPAP, p. 33, 1094-96.

4. In most instances, when the Board receives an application for licensure, Veerkamp completes a Standard 3 review of the applicant's work before the Board

¹ The standards contained in USPAP govern development and reporting requirements for appraisers. They are promulgated by the Appraisal Standards Board of the Appraisal Foundation and apply to the work of Montana appraisers. Mont. Code Ann. § 37-54-403.

reviews the application. Her review is then submitted to the Board with the work product of the applicant.

5. Veerkamp was unavailable and therefore did not review the appraisals submitted by Konency prior to the Board's consideration of his application.

6. The members of the Board reviewed Konency's application at a meeting on September 12, 2005. When Konency's application was considered, one member, Kraig Kosena, recused himself. Another member, Keith O'Reilly, moved to deny Konency's application, based on USPAP violations and failure to follow accepted appraisal practice. Another member seconded the motion, which carried.

7. Following the Board's action, Veerkamp completed a Standard 3 review of the resort in Chetek, Wisconsin (Exhibit B), at the request of the Board.

8. USPAP Standard 1 governs the development of appraisals of real property. It requires the appraiser to identify the problem to be solved and the scope of the work necessary to solve the problem, and correctly complete research and analysis necessary to produce a credible appraisal. Standard 1 contains a number of subsidiary Standards Rules (SRs), including rules requiring that the appraiser be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal (SR 1-1(a)), identify any known easements, restrictions, encumbrances, leases, reservations, covenants, contracts, declarations, special assessments, ordinances, or other items of a similar nature (SR 1-2(e)(iv)), identify the scope of work necessary to complete the assignment (SR 1-2(f)), identify and analyze the effect on use and value of existing land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends (SR 1-3(a)), and develop an opinion of the highest and best use of the real estate (SR 1-3(b)).

9. USPAP SR 1-4 establishes requirements for various appraisal approaches, including the sales comparison approach, the cost approach, and the income approach. SR 1-4(a) requires an appraiser using a sales comparison approach to analyze such comparable sales data as are available to indicate a value conclusion. SR 1-4(b) requires that an appraiser using a cost approach develop an opinion of site value, analyze available cost data to estimate the cost of new improvements, and to estimate accrued depreciation. SR 1-4(c) requires an appraiser using an income approach to analyze comparable rental or earnings data, to analyze operating expense data, to analyze rates of capitalization, rates of discount, or both, and to project future income potential and expenses on reasonably clear and appropriate evidence.

10. USPAP SR 1-6 requires an appraiser to reconcile the quality and quantity of data available and analyzed and to reconcile the applicability or suitability of the approaches used to arrive at the value conclusion.

11. USPAP Standard 2 requires that in reporting the results of a real property appraisal, the appraiser must communicate each analysis, opinion, and conclusion in a manner that is not misleading. SR 2-1 of Standard 2 requires the appraiser to clearly and accurately set forth the appraisal in a manner that will not be misleading, to include sufficient information in the appraisal report to enable the intended users of the appraisal to understand the report properly, and to clearly and accurately disclose any extraordinary assumption, hypothetical condition, or limiting condition that directly affects the appraisal and indicate its impact on value. SR 2-2 requires the appraisal report to be developed under one of three options, and to state prominently which option is used.

12. The reporting option pertinent to this case is the summary appraisal report option. SR 2-2(b) contains specific requirements for summary reports, including requirements that the report summarize information sufficient to identify the real estate involved, including the relevant physical and economic property characteristics (SR 2-2(b)(iii)), and to disclose to the client and any intended users of the appraisal the scope of work used to develop the appraisal (SR 2-2(b)(vii)). The report must summarize the information analyzed, the appraisal procedures followed, and the reasoning that supports the analyses, opinions, and conclusions (SR 2-2(b)(ix)). It must state the use of the real estate existing as of the date of the value and the use of the real estate reflected in the appraisal; when the purpose of the assignment is market value, it must summarize the support and rationale for the appraiser's opinion of the highest and best use of the real estate (SR 2-2(b)(xi)). It must also contain a signed certification in accordance with SR 2-3 (SR 2-2(b)(xii)).

13. Konency's appraisal reports submitted in support of his application to the Board contained numerous substantial violations of the USPAP standards set forth above. The reports failed adequately to describe how Konency arrived at his opinions of value. The violations of USPAP included substantial flaws in methodology. The reports did not adequately describe the condition of the property improvements, as required by SR 2-2(b)(iii). Virtually all of the opinions in the reports are conclusory in nature, rather than stating the scope of the work used to develop the appraisal and summarizing the information analyzed, the procedures followed, and the reasoning that supports the analyses, as required by SR 2-2(b)(vii) and (ix).

14. In developing the sales comparison approach for the resort in Chetek, Wisconsin, Konency noted that the comparable sales included business personal property, but failed to explain how he arrived at the value of this property in any way. The analyses of the comparable sales include adjustments that are not explained. The analysis of comparable sale 5 includes an adjustment of \$50,000.00 for a bar with no support or rationale for the amount of the adjustment.

15. In developing the cost approach for the resort in Chetek, Wisconsin, Konency failed to provide any support for his opinion of site value. The report states it is based on “review of sales.” The report states that the cost of the improvements is based on the “Marshall Swift Evaluation Service . . . along with local sources.” Based on this, the report concludes that the cost of the dwelling is \$90.00 per square foot, the cost of the garage/office is \$20.00 per square foot, the cost of the one story cabins is \$45.00 per square foot, the cost of the cabin with porch is \$85.00 per square foot, and the cost of the fish house is \$15.00 per square foot. The report also values the docks at \$6,500.00, the driveway/parking at \$2,500.00, the wells/septics at \$55,000.00, and business personal property at \$20,000.00. The report then lists depreciation for the improvements with no explanation whatever at how the depreciation figures were calculated.²

16. In developing the income approach for the resort in Chetek, Wisconsin, Konency projected income for the property “using area rental rates times the number of resort units times typical occupancy rates times appropriate weeks, and adding a nominal amount for rental of boats, motors, etc. . . .” The report contains no discussion of what any of these factors were, or how they were derived. It contains no analysis of the actual income of the subject property or any comparable property, except to say that the figure of \$100,000.00 was “supported by the subject’s own Schedule C’s.” It fails to address the operating expenses of the subject property or the comparables in any manner. It applies a gross income multiplier to the projected gross income without any support for this multiplier, except to state that it was “developed from the market” and based on the income reported by several of the comparables. The report does not estimate rates of capitalization or discount or use reasonably clear and appropriate evidence to project future rent or income potential, all of which are required by SR 1-4(c).

17. Konency’s appraisal report for the resort in Chetek, Wisconsin, also fails to discuss the effect on use and value of land use regulations, economic supply and demand, the physical adaptability of the real estate, or market area trends. The

²The report for this property fails even to describe the age of the improvements, which might assist in evaluating the depreciation calculation.

stated opinion of the highest and best use of the property is conclusory, with no analysis as required by SR 2-2(b)(xi). The report does not adequately explain how Konency reconciled the various approaches to the final estimate of value.

18. In developing the income approach for the greenhouse property in Rice Lake, Wisconsin, Konency used an improper methodology involving a strict capitalization rate tied to the business. He then took a yield rate and turned it into a capitalization rate. In essence, he mixed business valuation techniques with real estate valuation techniques.

19. In developing the sales comparison approach for the greenhouse property in Rice Lake, Wisconsin, Konency was unable to identify comparable sales of greenhouses in the general market area. Therefore, he compared the property to four sales of commercial properties in the area. He derived a price per square foot for the buildings on the property for each of the comparable sales. However, the subject real estate is more than twice the size of the largest of the comparables, and the report contains no explanation of why the sales prices reflect only the square footage of the improvements. Further, the report concludes a value per square foot for the improvements of \$59.28 with no explanation of how this value was derived.

20. In developing the cost approach for the greenhouse property in Rice Lake, Wisconsin, Konency fails to explain the basis for his conclusion of depreciation, or to explain how he arrived at the site value from the three comparisons discussed.

21. The appraisal report for the greenhouse property in Rice Lake, Wisconsin, includes no analysis to support the opinion of highest and best use, despite the fact that the reconciliation suggests that the current use might no longer represent the highest and best use.

22. The appraisal report for the farm in Exeland, Wisconsin, also contained substantial USPAP violations.

23. The opinions of value expressed in the appraisal reports submitted by Konency in support of his application for licensing as a certified general appraiser are not credible because of the numerous substantial USPAP violations contained in the reports.

24. Based on his failure to demonstrate compliance with the USPAP standards in the work submitted in support of his application, Konency is not qualified for licensure as a certified general real estate appraiser.

IV. DISCUSSION AND ANALYSIS³

Montana law provides for the licensing and regulation of certain occupations and professions. The purpose of these laws is to protect the public by maintaining competence among the regulated occupations and professions. Among the regulated occupations and professions is real estate appraisal. Mont. Code Ann. § 39-54-105(5) authorizes the Board of Real Estate Appraisers to receive and review applications of persons requesting licensure as in this profession. In addition, Mont. Code Ann. § 39-54-303(2) requires the Board to adopt rules for undertaking appraisals that are at least as stringent as those required for compliance with Title XI of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). Those standards are articulated in the USPAP requirements.

When the Board proposes to deny a real estate appraiser license, the applicant may request a hearing on the denial (Mont. Code Ann. § 37-1-131(2)), but has the burden of proving that the agency's denial of the license was improper. *See, e.g., Montana Environmental Information Center and Environmental Defense v. Montana Dept. Of Environmental Quality*, 2005 MT 96, ¶16, 326 Mont. 502, ¶16, 112 P.3d 964, ¶16 (holding that under the Montana Administrative Procedures Act, the party asserting that an agency determination is in error has the burden of going forward with evidence and the burden of persuading the fact finder that the agency's determination was in error).

Konency requested this hearing because the Board proposed to deny his application for licensure as a certified general appraiser. The essence of Konency's case is that the appraisals submitted as examples of his work in support of his application were adequate and in compliance with USPAP because they provided the information needed by the client and intended user of the reports.⁴ Based on this, Konency argues that if the reports were adequate for his clients, they met the standard. He further contends that because the Department and Board failed to contact his clients and because they were not familiar with the local market, their reviews of his appraisals lack validity. He also objected to the testimony and evidence proposed by the Department because it allegedly amounted to *post hoc* justification for the Board's decision.

³Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

⁴A comment to SR 2-2(b)(ix) provides that reports must provide sufficient information for the client and intended users to adequately understand the rationale for the opinions and conclusions.

In addition, at the hearing, Konency objected strenuously to the testimony of Keith O'Reilly and asked that the testimony be stricken, and he renewed his objection in his post-hearing brief. His objection is essentially a request for a discovery sanction. In discovery, Konency requested, and the Hearing Examiner ordered, that the Department produce all notes and materials relating to Konency's application for licensing. During Konency's cross-examination of O'Reilly on the subject of what report or file he had maintained concerning Konency's application, O'Reilly indicated that he had made hand written notations on his copy of the appraisal reports submitted by Konency with his application. However, those copies and notes had been shredded in accordance with the routine practice of the Board following the meeting at which the Board proposed denial of the license. Thus, the Department contends, the documents did not exist in order to produce during discovery. The Department did not, however, advise Konency that certain documents existed that had been shredded. The Hearing Examiner declined to strike the testimony of O'Reilly on this basis, but agreed to consider Konency's objection in determining the weight to be given to O'Reilly's testimony.

Konency's objection mischaracterizes the nature of the document the Department allegedly failed to produce. He refers to it as a "work file," and maintains he repeatedly asked the Department to produce any work file. However, O'Reilly did not create a work file, at least as that term is generally understood. He took notes on a copy of the appraisal reports submitted with Konency's application, used his notes in the Board meeting discussion of the application, and, when the meeting concluded, gave his notes to the Board staff, who shredded them.

Further, Konency has failed to demonstrate that the Department denied the existence of such a document. In response to a motion to compel discovery filed by Konency, the Hearing Examiner granted Konency's motion to compel production of documents with respect to phone conversation notes, electronic mail messages, memos, other notes, minutes, transcriptions or recordings that relate in any way to his application. Discovery Order, March 2, 2006. The Department was ordered to make a diligent search for any such information that had not been provided to Konency in response to his discovery request, and to make that information available to Konency for inspection and copying. However, O'Reilly's notes had been shredded and did not exist after approximately September 13, 2005. Thus, the failure to produce them did not violate the Hearing Examiner's discovery order.

In the same discovery order, the Hearing Examiner denied Konency's motion to compel a response to the following interrogatory:

All department personnel and board member that did any screening, investigating or other processing of the application and/or denial are to provide a complete, thorough, detailed description of their actions including dates of those actions.

Although the Hearing Examiner denied the motion to compel, she extended the discovery period to allow Konency to submit additional written interrogatory requests to the Department. She did so because of Konency's *pro se* status and the fact that he had raised questions in his motion to compel that could form the basis for valid interrogatories, including questions about which Board member reviewed Konency's application, what information existed about his review, and what USPAP violations and departures from accepted appraisal practice were found. Following this order, Konency submitted additional interrogatories addressed to each member of the Board except Kosena. Although he asked each member whether the member created any kind of report or work file, he did not ask any of the other questions raised in his motion to compel. The interrogatory responses of the Department or Board are not in the record of the case. Therefore, the record fails to establish that the Department denied that a report or work file ever existed. Even if the response denied that a report or work file ever existed, such a response would not have been improper because the notes compiled by O'Reilly during his review of Konency's appraisal reports were neither reports or work files.

Finally, Konency's objection to O'Reilly's testimony generally misapprehends the issue for hearing, which is whether he qualifies for licensure as an appraiser based on the work he submitted in support of his application. This is an objective determination for the Hearing Examiner to make based on the evidence presented at hearing. The issue before the Hearing Examiner is whether Konency's appraisals have substantial USPAP violations, or, conversely, whether they comply with USPAP.

Although Konency argued that the failure of the Department to produce O'Reilly's "work file" tainted O'Reilly's testimony, this argument is entirely speculative. It is undisputed that the Board proposed to deny Konency's application "based on USPAP violations and failure to follow accepted appraisal practice." O'Reilly's testimony at hearing was consistent with this Board decision. Whether O'Reilly identified different USPAP violations when the Board considered the application than he did in his testimony is ultimately irrelevant. His testimony is credible, relevant and admissible to assist the trier of fact, i.e. the Hearing Examiner, to determine whether Konency's appraisal reports qualify him for licensure as a certified general appraiser. If the testimony presented at hearing constitutes *post hoc* justification for the denial of Konency's license, Konency's remedy is to present substantive evidence at hearing proving his qualifications.

Further, even if O'Reilly's testimony were disallowed, it does not help Konency to prove his case. In the absence of substantive evidence proving his qualifications, he cannot prevail.

Konency failed to prove that he qualified for licensure or that his appraisal reports complied with USPAP. His only affirmative evidence that his appraisals complied with USPAP was his own testimony and that of Jeanne Holmgren. Konency was not qualified as an expert and his testimony is contradictory to the express requirements of USPAP.

Although Holmgren is a licensed certified general appraiser, her testimony was insufficient to support Konency's qualifications. She reviewed the appraisal report for the resort (Exhibit A), but did not perform a Standard 3 review. She characterized the biggest deficiency of Exhibit A as being not properly titled a "Summary Report." She indicated that this would be a signal to the reviewer that certain data supporting the appraisal would be in the appraiser's work file. She stated that, because of her experience as an appraiser, she assumed that information not included in the appraisal report would be in the work file, and that as long as the supporting information was in the work file, she would consider Exhibit A credible. In response to questions on cross-examination concerning the deficiencies alleged by the Department (identification of highest and best use, cost approach data, the methodology for the market data figure, the income methodology, the evaluation of personal property, exposure time, the roadway, zoning, and the value placed on the bar in one of the comparables), she stated that she took the statements in the report at face value and assumed the supporting information would be in the work file. Holmgren's testimony on the requirements for a credible appraisal contradicted the express requirements of USPAP and did not demonstrate the expertise necessary to give a credible opinion on Konency's qualifications.

Konency's appraisal reports contained numerous and substantial violations of the USPAP standards. Paragraphs 13 through 21 of the findings of fact describe the most significant violations, but not all of them. As to certain requirements, such as those contained in SR 1-4(c) regarding the income approach, Konency's reports contain no analyses of comparable data whatever, even though such analyses are specifically required by the rule. As to a number of other requirements, such as the opinion of highest and best use, site values, capitalization rates, the value of business personal property, and the calculation of depreciation, among others, the opinions and conclusions contained in the appraisal reports are conclusory, with no explanation of the data or analyses supporting the conclusions. Although Holmberg stated that she would assume the supporting data and analyses would be contained in the appraiser's work file if absent from the report, and that she considered this an

acceptable reporting method, USPAP requires that the analyses and data be explained in the summary report.

As a corollary to his contention that it is not necessary to address all data and analyses in the summary report, Konency maintains that USPAP requires only that the report contain sufficient information for the client and intended users to adequately understand the rationale for the opinions and conclusions. This contention is based on a comment to USPAP SR 2-2(b)(ix). He maintains that the reports at issue were adequate for his clients, and the inquiry can go no farther. However, the USPAP standards are intended to establish objective standards for real estate appraisal practice. The issue is not whether they were sufficient for Konency's clients on a subjective basis, but whether they met the USPAP standards on an objective level. Clearly, they did not. To carry Konency's argument to its logical end, his appraisal report could state nothing more than his ultimate opinion of value, as long as his client considered such a report adequate. Obviously, USPAP requires more than a client who is satisfied with the result.

Konency's contention that, to constitute a valid review of his appraisal report, the reviewer must be familiar with the local market addressed in the report is similarly without merit. USPAP unquestionably requires familiarity with the local market to arrive at an opinion of value. The purpose of the reviews conducted by the Board and Department was not to arrive at an opinion of value for the properties, but rather to determine whether the appraisals met the requirements of USPAP for methodology, principles, and procedures in order to arrive at a credible opinion as to the quality of another appraiser's work. Geographic competence is not necessary to evaluate these objective factors.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.
2. Konency had the burden of proof to demonstrate that the Board's proposed denial of his license was erroneous either in fact or law.
3. To qualify for licensure as a certified general appraiser, an applicant must demonstrate competence in complying with the standards set forth in the Uniform Standards of Professional Appraisal Practice. Mont. Code Ann. §§ 39-54-105(3) and 39-54-403.

4. Konency has failed to prove that he is qualified for licensure as a certified general appraiser. The appraisal reports he submitted in support of his application contain numerous, substantial violations of USPAP.

5. In light of the Board's purpose of protecting the public, the statutory requirements of certified general appraisers, and the USPAP deficiencies demonstrated in Konency's appraisal reports, the Board did not err either in fact or law in proposing to deny Konency's application for licensure.

VI. RECOMMENDED ORDER

Based upon the foregoing, the Hearing Examiner recommends that the Board of Real Estate Appraisers affirm the denial of Tom Konency's application for licensure as a certified general appraiser.

DATED this 4th day of October, 2006.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ ANNE L. MACINTYRE
ANNE L. MACINTYRE
Hearing Examiner

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the applicant, 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.