BEFORE THE BOARD OF REAL ESTATE APPRAISERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-07-0113-REA REGARDING:

THE PROPOSED DISCIPLINARY TREATMENT OF THE LICENSE OF JOE SEIPEL, License No. 362 RAG.	) Case No. 1010-2007)))))

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

I. INTRODUCTION

The Montana Department of Labor and Industry Business Standards Division (BSD) filed a complaint against the appraiser's license of Joe Seipel alleging violations of Mont. Code Ann. § 37-54-403(1) (which requires a licensee to comply with generally accepted standards of professional appraisal practice promulgated by the Professional Appraisal Standards Board of the Appraisal Foundation). Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on September 23, 2008. Michael McCabe, agency legal counsel, represented the Business Standards Division (BSD). Patrick Flaherty, attorney at law, represented Seipel. Seipel and Thomas Stevens, a Montana certified general appraiser, testified under oath. The parties stipulated to the admission of Seipel's Exhibits 1 through 12 and BSD's Exhibit B.

The parties were permitted to file post-hearing briefs in this matter, the last of which was filed on February 2, 2009. Based on the testimony, exhibits, and parties' post-hearing briefs, the following findings of fact, conclusions of law, and recommended order are made.

II. FINDINGS OF FACT

1. At all times material to this case, Seipel has been licensed by the State of Montana as a certified general appraiser, holding License No. 362. Seipel is the proprietor of Market Research Group located in Great Falls, Montana.

2. In December 2005, CFIC home mortgage in Missoula, Montana, contacted Seipel to complete a residential appraisal on a property located at 3815 South 7th Street West in Missoula, Montana (hereinafter the property). The lender requested the property be appraised as a residential unit.

3. At the time of the appraisal, the historical use of the property had been as an assisted living facility which was utilized to generate income. The property lies within an area zoned for residential use. Its use as an assisted living facility is conditionally permitted within the zoning. The property is comprised of a 2½ acre lot with a large house with many bedrooms and bathrooms.

4. Seipel's son, Jake Seipel (hereinafter Jake), worked with Seipel at Market Research Group. Seipel enlisted Jake to complete the appraisal at issue in this case. Jake is a licensed Washington appraiser, but is not licensed to complete appraisals in Montana.

5. Jake completed the appraisal and signed off on it as a certified Washington appraiser. Seipel also signed the appraisal as a supervising appraiser. In signing as a supervising appraiser, Seipel certified that, as the supervising appraiser, "I directly supervised the appraiser for this appraisal assignment, have read the appraisal report, and agree with the appraiser's analysis, opinions, statements, conclusions, and the appraiser's certification." Exhibit B, URAR, page 6.

6. Even though the property being appraised was an income producing property, Seipel utilized a Form 1004 Uniform Residential Appraisal Report (URAR) upon which to complete the report. The appraisal was prepared in a summary appraisal format. Because the effective date of the appraisal was December 8, 2005, the 2005 version of the Uniform Standards of Professional Appraisal Practice (USPAP) applied to the appraisal that Seipel and his son completed.

7. At hearing, two versions of the appraisal were introduced into evidence. Both versions are completed on Form 1004. The first, received from a secondary lender and made by an individual named Carole Douglas as part of the complaint against Seipel's license, contains no information whatsoever to indicate the property's present use as a commercial income producing property. See BSD's Exhibit B. Reviewing that appraisal, one can glean no more than that the property being appraised is a non-income producing residential property. All the comparables are single family residences.

8. The second version is several pages longer than the one filed with the complaint. Seipel's Exhibit 2. The second one was introduced by Seipel at hearing. Conspicuously present in this version is an indication on the supplemental addendum page of the URAR that:

> The subject is currently operated as a rental property (assisted living or group home). It was originally constructed as a single family home per zoning permit information. The subject could be used as a single family home within the zoning at the subject site. Per the client/lender's request to appraise the subject as a single family home and the fact the subject could be easily converted to a single family home (see comments above regarding highest and best use), this [sic] is in a 1004 format based on these assumptions and/or hypothetical situation.

9. Neither version attempts to develop a value of opinion by the income method of appraisal, whereby the value of the property is determined through its income producing potential and its comparison to similar income producing properties. Instead, both appraisals specifically note that "[t]he Income Approach is not typically considered since the subject residential property is not rented out as income producing property."

10. Neither appraisal attempts to utilize income producing comparables. Instead, both versions use non-income producing single family residential comparables as a basis for establishing the market value of the subject property.

11. On Page 2 of 6 of the URAR in each appraisal, the reconciliation section indicates that the appraisal is made "as is." This indication was made by checking the "as is" box. Each of the appraisals could have been marked with other options such as the fact that the appraisal was made with a hypothetical condition or an extraordinary assumption.

12. At hearing, the licensee introduced into evidence a comparator appraisal, completed by Philip Rowan, a Montana certified general appraiser, of a commercial property in Great Falls (Mr. Flaherty's law office) that was appraised using an extraordinary assumption that the property was a single family residence. Exhibit 5. The purpose of the offer was to demonstrate the propriety of completing such an appraisal under the hypothetical assumption that the property was in fact marketable and being used as a residential property. That appraisal notes on the FIRREA/USPAP Addendum that the residence was being used by the owner "as a location for his law practice." The report, however, is not completed on a Form 1004 URAR. Instead, it was completed on a qualitative analysis report that is an appropriate report form to use for a commercial property that is being appraised under the auspices of an extraordinary assumption that the property is a residential property.

13. After receiving Douglas's complaint, the Board of Real Estate Appraisers requested that Thomas Stevens, a Montana certified general appraiser, conduct a Standard 3 review of the appraisal report submitted by Douglas with her complaint. Stevens did so and provided a report to the Board. Exhibit B, denominated as "An Appraisal review of 3815 South Seventh Street West, Missoula, Montana." Stevens conducted the review adhering to the USPAP Standard 3 requirements.

14. Stevens's review is necessarily limited by the fact that it only considered the appraisal contained in Douglas's complaint. Stevens was not aware of the other appraisal which Seipel maintains was the appraisal submitted to CFIC. Most importantly, Stevens was not aware (he could not have been expected to be aware since he had not been presented with Seipel's version of the report) of the extraordinary assumption which indicates that the property was being used as an assisted living facility

contained in the supplemental addendum in the version submitted by Seipel at hearing.

15. Stevens concluded that the version of Seipel's appraisal submitted with the report violated the USPAP in several respects. Specifically, Stevens's review found that the version of the appraisal that he reviewed violated the conduct section of the Ethics Rule of USPAP as well as USPAP Standard Rules 1-1(a), 1-1(b), 1-1(c) 1-2(f), 1-4(a), 1-4(b)(i), 1-4(b)(ii), 1-4 (c)(i), 1-4(c)(ii), 2-1(a), 2-1(b), and 2-1(c). Almost all of these violations were tied to Stevens's perception that the appraisal submitted with the complaint was the appraisal completed by Seipel.

16. Stevens did note in his testimony, however, if Seipel had articulated in the URAR that he had utilized the extraordinary assumption that the property was residential and not commercial, "[t]hat would be a start" toward creating an appraisal that was not misleading. Record transcript, page 49, lines 13-25, page 50, lines 1-3. In addition, Stevens testified that if he put in a limiting condition (such as the extraordinary assumption regarding the property's use) into an appraisal, he would put it in the supplemental addendum. Record Transcript, page 52, lines 7 through 24.

17. Seipel testified that the appraisal he submitted at hearing was the one that he supplied to CFIC. He further maintained, as he has throughout these proceedings, that the version which Stevens reviewed was an incomplete version of the appraisal. Based on the fact that Stevens reviewed an incomplete appraisal, Seipel maintained that Stevens's Standard 3 review was faulty.

18. Since his initial response to the Board of Real Estate Appraiser's correspondence regarding Douglas's complaint, Seipel has consistently maintained that the version submitted with Douglas's complaint was not the complete report. Seipel did not produce the version of the appraisal which he maintains he filed until after this matter had been set for contested case hearing.

19. Neither Douglas nor any employee of CFIC was called as a witness at the hearing in this matter.

III. CONCLUSIONS OF LAW[1]

1. The Board of Real Estate Appraisers has jurisdiction over this matter. Mont. Code Ann. § 37-54-105.

[1]Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

2. 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.

3. Mont. Code Ann. § 39-54-403 requires licensed appraisers to "comply with generally accepted standards of professional appraisal practice" as evidenced by USPAP. In addition, Admin. R. Mont. 24.207.402 provides that the Board adopts by reference USPAP standards.

4. The focus of BSD's case centers on its contention that Seipel presented a patently false appraisal which made no mention of the fact that the subject property was being used as an income producing property. From this foundational premise in the complaint flows almost all of the alleged problems with the appraisal, including its failure to state an extraordinary assumption that the property could be used as a single family, the failure to utilize appropriate income producing comparables, and the failure to develop the income method of valuation.

BSD relied on the testimony of Stevens who candidly stated that the appraisal which he reviewed was the only appraisal which he considered. If the evidence satisfied the fact finder that the report which Stevens reviewed was in fact the report that had been promulgated and/or provided to the secondary lender in this case, there would be no question that Seipel had at least signed off as a supervising appraiser on an appraisal which was prepared to deceive a lender. In that case, all of Stevens's concerns would be well founded and this tribunal would have no hesitation in finding the violations alleged in the complaint had occurred and merited a very harsh sanction.[2]

The problem in this case, however, is that the evidence does not convince the fact finder that Seipel submitted an appraisal that was intended to deceive the lender into believing that the property was not an income producing property. Seipel presented evidence at hearing that the only report which he submitted or prepared for CFIC was the version which plainly states on the URAR that the property is an income producing property and that the appraisal is based on the extraordinary assumption that the property is a single family residence. With this countervailing evidence in the record which is unrebutted by any direct evidence, the BSD cannot be said to have met its burden of proof in this case with respect to the alleged violations of the Ethics Rule, the

[2] Such evidence could, for example, have come by presenting the testimony of an employee of CFIC or perhaps the testimony of the complainant, Carole Douglas, to explain how Stevens ended up with the appraisal that he reviewed. No such testimony was presented and the fact finder cannot, therefore, find that the preponderant evidence shows that the appraisal Stevens reviewed was in fact the appraisal that Seipel submitted for purposes of the loan process which resulted in the generation of the appraisal.

failure to state an extraordinary hypothetical, the failure to use appropriate comparables, and the failure to undertake the income method of valuation.

In an effort to overcome this problem, BSD relies heavily on the circumstantial evidence that Seipel, despite many opportunities to do so, failed to produce the second version of the appraisal at any time prior to the contested case proceeding in this matter. Seipel, however, has no burden to prove anything in this case. It is BSD's responsibility, as the proponent of imposition of sanctions, to prove preponderantly that Seipel engaged in the alleged fraudulent conduct. Seipel consistently maintained throughout all of his responses to the Board and throughout this contested case proceeding that Douglas's complaint did not contain a complete version of the appraisal. The appraisal which Seipel presented at hearing contains the requisite extraordinary assumption that the house, while used as an income producing property, was being appraised as a single family residence. Moreover, at hearing Seipel at least demonstrated a correct understanding of the importance and the need to include in the appraisal this extraordinary assumption. The evidence, when taken as a whole and measured against BSD's statutorily imposed burden of proof in this matter, fails to demonstrate that Seipel engaged or assisted in preparing a fraudulent appraisal as asserted in the complaint.

5. BSD's failure to demonstrate preponderantly that Seipel engaged or assisted in preparing a fraudulent appraisal as asserted in the complaint precludes a finding that fact contentions 1 through 7, 9, and 11 can serve as a basis for finding a violation. What remains, then, are the contentions contained in asserted findings 8 and 10. Assertion 8 avers that Seipel failed to properly develop the opinion of site value by failing to indicate how the site value was developed. Assertion 10 suggests that Seipel failed to utilize the appropriate form for completing the type of appraisal at issue in this case wherein an income producing property is being appraised as a single family residence.

With respect to fact contention 8, the complaint contends that Seipel violated both Standard Rules 1-4(b)(i) and 2-2(b)(ix). Standard Rule 1-4(b)(i) requires an appraiser, when developing a cost approach to valuation, to develop an opinion of site value by an appropriate appraisal method or technique. Standard Rule 2-2(b)(ix) requires that a summary appraisal "summarize the information analyzed, the appraisal procedures followed, and the reasoning that supports the analysis." Thus, with respect to the report's development of the cost approach to valuation, Seipel was required to summarize the information that was analyzed to arrive at his conclusion regarding the site value for purposes of determining the cost approach to valuation.

Both reports develop the cost approach to the property identically. Within the six pages of the URAR, each report states that the Marshall and Swift Cost handbook was used to determine the reproduction cost of the property improvements and each report indicates that the site value is determined "from sales of comparable vacant lots in the area and personal knowledge." Stevens's review condemns Seipel's cost approach

valuation for two reasons. First, the appraisal uses Marshall and Swift to determine the cost replacement values of the property improvements which, in Stevens's opinion, "indicates further deception in that the appraisal is based on residential costs, not commercial." Stevens further criticizes Seipel's cost valuation, noting that "the appraisal fails to indicate from where the site value was estimated." Exhibit B, Stevens's Appraisal Review.

There is no evidence in the record that using Marshall and Swift in a circumstance where the extraordinary assumption that a property is a residence has been disclosed, as in the appraisal presented by Seipel, would be inappropriate. Because the evidence is insufficient to support a finding that Seipel failed to disclose in the appraisal the extraordinary assumption that the property was being appraised as a residential property, Stevens's criticism regarding the use of Marshall and Swift cannot support finding a violation in this case in the absence of other evidence to support such a conclusion.

This leaves the issue of the method of the site valuation for purposes of the cost approach. No testimony was solicited from Stevens on this point at hearing. Seipel contended that he properly valued the site for purposes of completing the cost approach to valuation. Under these circumstances, the hearing examiner does not find that BSD has carried its burden of proof with respect to this violation.

6. With respect to contention of fact 10 in the complaint, Stevens testified that using a Form 1004 URAR to appraise the property was in itself inappropriate. The basis for Stevens's testimony appears to be that most intended users would skip over the detailed explanation of the supplemental addendum of the URAR and go straight to the value conclusion once they recognized they were reading a URAR. Record Transcript, page 52, lines 10 through 25, page 54, lines 1 through 9. Stevens contended that the appropriate form to be used is the quantitative analysis form such as the one used in the Rowen appraisal of Flaherty's law office. Seipel, on the other hand, vigorously contended that utilization of the 1004 URAR was appropriate in this circumstance because the extraordinary assumption that the property was being considered as a residential property was prominently stated in the URAR.

While Rowen's use of the quantitative analysis appraisal report provides some support for Stevens's position, the hearing examiner is not persuaded. No party pointed to any requirement in the USPAP or provided other evidence that a specific form be used in circumstances such as exist in this case where the appraisal's credibility is contingent on utilization of an extraordinary assumption. Disclosure of the extraordinary assumption within the six pages of the URAR as occurred in the version of the appraisal championed by Seipel seems on its face to comport with the underlying policy of the USPAP standards. In the absence of additional evidence or additional expert testimony which would have shed further light on the propriety of the use of one

form over the other, the most that can be said on this issue is that the evidence is evenly split between the parties' respective positions. This is insufficient to carry BSD's burden of proof. Thus, BSD has failed to persuade the hearing examiner by a preponderance of the evidence that Seipel has violated any of the USPAP standards as alleged in the complaint.

7. Almost as an afterthought, Seipel's counsel has thrown in an assertion that the complaint, which erroneously contained a summary suspension (which suspension, per the stipulation of the parties, was enjoined in a district court action and not enforced at all during the proceeding before this tribunal) is somehow defective. Seipel has not rationally articulated why he believes the complaint is defective, has provided no authority for such a proposition, and the hearing examiner is not aware of any such authority. Indeed, nowhere does he state what he expects the hearing examiner to do about this alleged defective complaint.

The applicable statutes provide only that the notice of proposed board action must be ***prepared*** by department legal staff. *See, e.g.*, Mont. Code Ann. § 37-1-309(1). The statutes do not dictate who must ***sign*** the notice. There is no indication in this case that the notice was not prepared by Department legal staff. In the absence of some indication either in the language of the statute or in the policies behind the statute that only a Department lawyer may sign the notice, there is no basis for finding that a Board member's signature on the notice vitiates the Board's jurisdiction.

Neither has Seipel articulated why the inclusion of an erroneous summary suspension affects the complaint. During the hearing process, Seipel filed a motion seeking to dismiss the complaint under the auspices of Rule 11 of the Rules of Civil Procedure, arguing that the erroneous suspension somehow demonstrated a frivolous complaint. MRP Rule 11 provides a court with the power to impose an appropriate sanction on a party for frivolous pleadings. Montana courts apply an objective reasonableness standard to test whether complaints meet the test for frivolousness such that sanctions are warranted under Rule 11. *Jacildo v. McFadden*, (1992), 253 Mont. 114, 831 P.2d 597. Under this standard, the pleader must at a minimum have a good faith argument for his view of what the law should be. *Id.*

As was true of his earlier motion, Seipel did not in his post-hearing brief suggest that the complaint in this matter did not comport with the objective reasonableness standard mandated by Rule 11. Indeed, reviewing the complaint, he could not do so as it is evident that the complaint complied with that standard. Here, the hearing examiner cannot find that imposition of any Rule 11 sanction is appropriate since there is no basis in law for finding that the complaint violates Rule 11. Accordingly, this argument provides no basis for dismissing the complaint in this case.

8. Finally, Seipel's counsel also asserts that he has been denied due process. He premises this argument upon his theory that, because this hearing examiner in another case imposed a discovery sanction against a different licensee (also represented by Seipel's counsel) by preluding counsel from propounding interrogatories months after the close of discovery, this hearing examiner should also have precluded BSD from soliciting testimony from Stevens because BSD did not disclose him as a witness by the discovery deadline date. The problem with this argument, however, is that BSD in fact disclosed Stevens as a witness well before the discovery deadline in this date. This is clear from the fact that licensee's counsel deposed Stevens on June 28, 2007, one month before the discovery deadline in this case and over one ***year*** before the hearing in this case. Seipel's counsel has been aware at least since June 2007 that Stevens would be called as a witness and Seipel's counsel was permitted to depose Stevens. There is no legally cognizable prejudice to Seipel's case that would permit the hearing examiner to impose a sanction against the BSD in this case. Accordingly, Seipel has not been deprived of any process that he is due in this proceeding.

9. If a licensee is found not to have violated a provision of Mont. Code Ann. Title 37, Chapter 1, Part 3, then the Department shall prepare and serve the Board's findings of fact and an order of dismissal of the charges. Mont. Code Ann. § 37-1-311. Because the Department has failed to demonstrate that Seipel engaged in conduct that violated Title 37, Chapter 1, Part 3, MCA, dismissal of the charges is appropriate.

IV. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board enter its order dismissing the allegations contained in the complaint filed against Seipel as BSD has failed to prove by a preponderance of the evidence any violation contained in the complaint.

DATED this 1st day of May, 2009.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

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