

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-07-0048-REA REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 905-2007
TREATMENT OF THE LICENSE OF)
RICHARD CAERBERT,)
Certified Residential Appraiser No. 421.)

and

IN THE MATTER OF DOCKET NO. CC-08-0017-REA REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 306-2008
TREATMENT OF THE LICENSE OF)
RICK CAERBERT, Certified Residential)
Appraiser No. 421.)

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

I. INTRODUCTION

Hearing Examiner Gregory L. Hanchett convened contested case hearings in each of the above referenced matters. In Case No. 905-2007, the contested case hearing occurred on November 14, 2007. Michael McCabe, agency legal counsel, represented the Business Standards Division (BSD). Patrick Flaherty, attorney at law, represented Caerbert at that hearing. The Licensee, Billie Veerkamp, BSD investigator and a Montana licensed general appraiser, and Joe Seipel, a Montana licensed general appraiser, all testified under oath. The parties stipulated to the admission of BSD's Exhibits 1 through 4 and Licensee's Exhibits 1, 2, and 3.

In Case No. 306-2008, the hearing examiner held a contested case hearing on September 5, 2008. McCabe appeared on behalf of BSD. Flaherty appeared on behalf of Caerbert. BSD's Exhibits 1 and 2 as well as Licensee's Exhibit A were admitted into evidence. Licensee's Exhibit B was not admitted. Billie Veerkamp, BSD investigator and Montana licensed general appraiser, and the Licensee both testified under oath. By prior agreement of the parties, Caerbert appeared and gave testimony by telephone.

The parties were permitted to file post-hearing briefs in these matters, the last of which was filed on January 9, 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

A. Case No. 905-2007: *The Demersville Road Appraisal*

1. At all times material to this case, Caerbert has been a licensed residential appraiser in the state of Montana, holding License No. 421.

2. In November 2005, American Home Mortgage retained Caerbert to complete a residential appraisal on a residence located at 395 Demersville Road in Kalispell, Montana. American Home requested the appraisal in order to determine whether to provide a loan to a purchaser. The appraisal was for a federally related transaction. This appraisal, therefore, was subject to the requirements of the Uniform Standards of Professional Appraisal Practice (USPAP).¹

3. The property on which the residence is located is just over ten acres in size. The ten acres is located on the old town site of Demersville.

4. The county zoning applicable to the property at the time of the appraisal permitted subdivision into ½ acre lots. The ability to subdivide the property affects the valuation of the property.

5. At the time Caerbert was retained to complete the appraisal, the home was only three years old. Caerbert had appraised the property on two earlier occasions in conjunction with different loans for the property. The first of these two appraisals occurred shortly after the home was built and the second occurred sometime later. By the time of the third appraisal, Caerbert was familiar with the characteristics of the property, having previously inspected both the interior and exterior of the property.

6. In completing the inspection for the property for the third appraisal, Caerbert enlisted the services of his office assistant, Paul Hennion. Hennion has not at any time been licensed as an appraiser nor has he been registered as an apprentice. In addition, at no time has Caerbert been an appraiser mentor in Montana. At the time Caerbert utilized Hennion's service, the applicable Montana administrative rules required appraisers to be licensed mentors in order to utilize the services of appraiser apprentices.

7. Caerbert had Hennion go out to the property to complete the interior inspection of the home located on the property. Although Caerbert had completed an interior inspection of the property in the past, he did not do an interior inspection for this appraisal.

8. Caerbert submitted two versions of the appraisal to American Home Mortgage for this property. The first one had an effective date of November 17, 2005 and shows a report

¹ The USPAP rules are promulgated by the Appraisal Standards Board of the Appraisal Foundation and govern the professional conduct of Montana appraisers by virtue of Mont. Code Ann. § 37-54-403. The effective date of the appraisal in Case No. 905-2007 is November 17, 2005. Therefore, the 2005 edition of USPAP is applicable to this case.

completion date of November 21, 2005 (11/21/05 version). The second also shows an effective date of November 17, 2005. This one, however, shows a completed report date of December 1, 2005 (12/01/05 version).

9. In the 11/21/05 version, Caerbert indicated in his appraiser's certification that he undertook a complete visual inspection of the interior and the exterior of the property (Exhibit 2, Page 5 of 6 in the URAR) as part of the appraisal. In fact, Hennion had done the interior inspection and Caerbert did not do the interior inspection. Nowhere in the 11/21/05 version does Caerbert indicate that Hennion did the interior inspection. The report also contains a certification page to the client proving that Caerbert submitted the 11/21/05 report to the client.

10. American Home Mortgage contacted Caerbert about the 11/21/05 version because that version contained an error, indicating that the property improvements were "new construction." Contrary to this assertion, the improvements were already existing and had been built at least three years earlier. Caerbert then provided American Mortgage with the 12/01/05 report. This new report changed the addenda page and the supplemental addenda page. The addenda page showed that Paul Hennion was an "apprentice appraiser" who provided significant professional assistance. The supplemental addenda page indicates that Hennion completed the inspection of the interior and further stated that Caerbert accepted the responsibility for the contributions of his assistant. If American Mortgage had not contacted Caerbert, he would not have provided the supplemental page showing that Hennion had undertaken a significant part of the appraisal.

11. Other than as noted above, both reports were identical. Both reports suffered from several violations of the USPAP.

12. The first deficiency in each report is that each report failed to identify the fact that the underlying zoning permitted subdivision of the lots down to one dwelling unit per ½ acre. Thus, the reports failed to identify pertinent characteristics of the property that would be relevant to the type and definition of value and the intended use of the appraisal.

13. Each report also failed to properly develop an opinion of the highest and best use of the subject property and to summarize the support and rationale for the appraiser's opinion of the highest and best use of the property. The report only indicates that the "present use" is the highest and best use. The report, however, contains no support for that determination. To determine the highest and best use, Caerbert should have looked at four factors: (1) those uses that were physically possible and appropriately supported, (2) what was legally permissible as a use on the property, (3) what is financially feasible on the property, and (4) what is the maximally productive use of the property. The report contains no discussion of these four criteria but simply asserts that the present use is the "highest and best use."

14. A third problem with each of the reports is that they failed to develop an opinion of site value by an appropriate appraisal method. Specifically, in determining the cost approach method of valuing of the property, Caerbert utilized a list of seven site values that were merely averaged together to arrive at his conclusion about the value of the land as though vacant.

Simply averaging values is not acceptable under the USPAP standards. Instead, in order to conform with the minimum USPAP requirements, Caerbert should have summarized the information analyzed, the appraisal procedures he followed, and the reasoning that supported his analysis that these other sites provided appropriate comparable sites such that they could be utilized in determining the value of the subject land.

B. Case No. 306-2008: *The 1335 2nd Avenue East Appraisal*

15. At all times material to this matter, Caerbert held Montana certified residential appraiser License No. 421. The appraisal in this case had an effective date of February 15, 2006.² Accordingly, the 2005 USPAP standards are applicable to this appraisal.

16. At all times material to this case, Hennion continued to work for Caerbert as an office assistant. At no time during this time period was Hennion either a licensed appraiser or an appraiser trainee. Neither was Caerbert a Montana appraiser mentor.

17. On February 22, 2006, Hennion and Caerbert prepared a written appraisal report of a single family residence located at 1335 2nd Avenue East in Kalispell, Montana. The intended use of the appraisal was for mortgage financing through Heritage Bank, a Federal Deposit Insurance Corporation (FDIC) insured bank. The transaction for which the report was prepared was a federally related transaction, mandating that Caerbert comply with USPAP standards in completing the appraisal. The appraisal describes itself as a summary appraisal. URAR, page 1 of 6.

18. The signature page of the Uniform Residential Appraisal Report (URAR) indicates that Paul Hennion was the appraiser. Exhibit 1, URAR, page 6 of 6. Hennion signed the appraisal as the “appraiser.” Caerbert signed the appraisal as the “supervisory appraiser.” In signing the document, Caerbert certified that the appraiser identified in the appraisal report (Hennion) was “qualified to perform this appraisal and is acceptable to perform this appraisal under the applicable state law.” Exhibit 1, URAR, page 6 of 6.

19. The supplemental addendum to the URAR indicates that Hennion “has displayed proficiency for the principal appraiser to place reliance on his work. He has met all of the required experience hours, completed appraisal education and is competent to inspect the real estate and participate in the preparation of the appraisal report.” The URAR also contains 20 different appraiser’s certification which, within the “four corners” of the report, are to be attributed to Hennion’s qualifications. In fact, he had none of the qualifications as asserted in the URAR.

20. The appraisal work itself contains several problems. First, the appraisal fails to give adequate information to understand the quality of the construction of the improvements on the property. This affected the credibility of the cost replacement method of valuing the property

² As the effective date of the appraisal is February 22, 2006, the 2005 USPAP rules, which remained in effect until July 1, 2006, apply to this appraisal.

since there is no stated basis of how the depreciation of the improvements impacts the value placed on the improvements.

21. At the time of the appraisal, the real estate market in the Kalispell area was experiencing an increase in value. The presence of the increasing property values was noted in the report. The increasing values were also evident in the fact that the subject property itself, which had sold just seven months prior to the effective date of the appraisal for \$128,000.00, had appreciated 18.75% according to Caerbert's appraisal to \$152,000.00. Despite the increasing value of the property, the report used comparable sales which were upwards of six months old without adjusting those comparable sales or at least explaining how those comparables were considered to account for the increasing market conditions.

22. While the report did mention the fact that the subject property had sold just seven months earlier, the report failed to do any analysis of that sale.

23. The report also failed to do any analysis for the value assigned to the site. There is no discussion of how that value was arrived at. The preparer simply filled in the value and asserted "Site value determined by extraction and known land costs." Exhibit 1, URAR, page 3 of 6.

C. Mitigating Factors

24. Other than these two incidents, Caerbert has had no complaints against his license in 18 years of practicing as a Montana appraiser.

25. Caerbert has not actively practiced appraisal in Montana since 2007. Caerbert presently lives in Texas and is engaged in farming.

26. There is insufficient evidence to show that Caerbert's failure to note Hennion's assistance in his 11/21/05 appraisal of the Demersville property was undertaken with an intent to defraud or mislead the client.

27. The USPAP violations in both reports are serious, affect the credibility of the appraisals, and demonstrate conduct that falls below the standards required by Mont. Code Ann. § 37-1-316(18). The fact that they have been repeated in two separate appraisals militates in favor of a sanction that includes both a term of probation and remedial education in order to ensure that the deficiencies do not happen again. The totality of the evidence, however, does not convince the hearing examiner that the errors are so egregious that they demonstrate an incurable lack of professional competence that cannot be rectified short of suspension or revocation. Rather, the evidence presented suggests that the Licensee's shortcomings in these appraisals can be remedied and the public can be adequately protected by remedial education and a term of probation for his license.

III. CONCLUSIONS OF LAW³

A. *Caerbert Violated Professional Standards.*

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

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. Montana licensed appraisers must “comply with generally accepted standards of professional appraisal practice” as evidenced by USPAP. Mont. Code Ann. § 39-54-403(1). In addition, Admin. R. Mont. 24.207.402 provides that the Board adopts by reference USPAP standards.

4. Montana licensed appraisers, like all Montana licensed professionals, must not engage in conduct that fails to meet generally accepted standards of practice. Mont. Code Ann. § 37-1-316(18).

5. The USPAP Ethics Rule, Conduct section, requires an appraiser to perform assignments ethically and competently, in accordance with USPAP. The rule specifically forbids an appraiser from communicating assignment results in a misleading manner.

6. The USPAP Competency Rule provides that an appraiser must properly identify the problem to be addressed and have the knowledge and experience to complete the assignment competently or must disclose the appraiser’s lack of knowledge to the client and then take all steps necessary to complete the assignment competently.

7. USPAP Standard Rule 1 requires an appraiser in developing an appraisal to “correctly complete research and analysis necessary to produce a credible appraisal.”

8. USPAP Standard Rule 1-2(e)(i) and (iv) requires an appraiser to identify the characteristics of the property to be appraised that are relevant to the type and definition of value and intended use of the appraisal which includes its location and physical, legal and economic attributes and any known zoning, easements or other similar restrictions that might affect the value of the property.

9. USPAP Standard Rule 1-4 requires that an appraiser, in developing a real property appraisal, collect, verify, and analyze all information applicable to the appraisal problem, given

³ 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.

the scope of work identified. USPAP Standard Rule 1-4(b)(i) notes that when a cost approach is developed (as it was in these cases), an appraiser must develop an opinion of site value by an appropriate appraisal method or technique. USPAP Standard Rule 1-4(b)(ii) also requires an appraiser in developing a cost method of valuation to analyze such comparable cost data as are available to estimate the cost new of the improvements. USPAP Standard Rule 1-4(b)(iii) also requires an appraiser when developing the cost approach method of valuation to analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (i.e., the accrued depreciation of the improvements).

10. USPAP Standards Rule 1-5(b) requires an appraiser who is developing a market value opinion to analyze all sales of the subject property during the three years preceding the effective date of the appraisal if such information is available to the appraiser in the normal course of business.

11. USPAP Standard Rule 2-1 requires that a written real property appraisal must contain sufficient information to enable the intended users of the appraisal report to understand the report properly.

12. USPAP Standard Rule 2-2(b)(iii) requires that the content of a summary appraisal summarize information sufficient to identify the real estate involved in the appraisal, including the physical and economic property characteristics relevant to the assignment. USPAP Standard rule 2-2(b)(viii) requires that when reporting an opinion of market value, a summary of the results analyzing prior sales of the subject property is required or if such information is not relevant, a statement as to why it is not relevant.

13. USPAP 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 opinions and conclusions contained in the reports. USPAP Standard Rule 2-2(b)(x) and the comment to that rule require that the content of a summary report, when reporting an opinion of market value, summarize the support and rationale for the appraiser's highest and best use of the real estate.

14. Both of Caerbert's Demersville Road appraisals violated USPAP requirements in several significant aspects that affected their credibility. Of great concern to the hearing examiner is Caerbert's failure to mention at all in the appraisal the existence of the zoning on the site which permits building homes on lots down to ½ acre in size. The failure to mention in any way this existing land use regulation violates Standard Rule 1-2(e)(i) and (iv) and Standard Rule 2-2(b)(iii). In light of the plain language of the requirements under these three standards, it is unreasonable to conclude that proper analysis of the subject property's value could fail to include at least an acknowledgment of the underlying zoning and why it was not a consideration in arriving at the value conclusions reached in the appraisal.

15. Each of the Demersville Road appraisals also violated USPAP Standard Rule 2-2(b)(x) in failing to appropriately consider and report the highest and best use analysis of the property. In developing the highest and best use analysis, the reports should have analyzed the impact of the underlying zoning that permitted subdivision down to ½ acre lots and at least explained why such permitted use did not affect the valuation. In addition, the reports contain

no discussion at all, much less the summary required by 2-2(b)(x), as to why the “present use” is the highest and best use of the property. The reports merely check off “present use” as the highest and best use. It is clear that under the applicable standards there should have been some discussion of why the present use was the highest and best use.

16. The 1335 2nd Avenue East appraisal also violated USPAP standards in several respects which affected the credibility of the appraisal. The appraisal’s plain import that Hennion was properly qualified to undertake appraisal functions is misleading in violation of the USPAP standards, violating the Ethics Rule of the USPAP. Hennion signed off on the URAR in effect certifying that he had undertaken all of the processes that should only have been undertaken by a certified appraiser or a properly permitted appraiser trainee. The report then attempts to contradict this by indicating that Hennion “has not determined market value or prepared valuation conclusions.” Overall, the report gives a misleading impression that Hennion was competent to carry out the appraisal functions described in the report when in fact he was not.

17. The 1335 2nd Avenue East appraisal failed to provide adequate information in the development of the cost approach method of valuation to enable the intended user to understand the quality of the construction of the subject property improvements or understand the verifiable data sources that were used to establish the cost new of the subject property. In doing so, the appraisal failed to meet the requirements for developing appraisals contained in Standard Rule 1-4(b)(ii), Standard Rule 2-1, and Standard Rule 2-2(b)(ix).

18. The report also failed to identify the methodology that was employed to determine the accrued depreciation. Standard Rule 1-4(b)(iii) requires an appraiser to analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements. In reviewing the cost approach summary, there is no explanation at all as to how depreciation was determined.

19. The report also utilized comparable sales but provided no adjustment for the obvious increasing values that the market was experiencing. The first comparable had sold one month earlier. In doing this, the report violated Standard Rule 1-4(a), Standard Rule 2-1, and Standard Rule 2-2(b)(ix).

20. The appraisal, while acknowledging the existence of the subject property’s sale just one year earlier, fails to complete any analysis of the prior sale. This violated Standard Rule 1-5(b) which requires such an analysis when the value opinion to be developed is market value (as in this case). The failure to analyze the subject property’s sale also violates Standard Rule 2-2(b)(ix) which requires a summary of the results of analyzing the subject’s prior sales one year earlier.

21. Finally, the report violated Standard Rule 1-4(b)(i) and Standard Rule 2-2(b)(ix) relating to the valuation of the subject property site. There is no discussion of how that value was determined. The preparer simply filled in the value and asserted “Site value determined by extraction and known land costs.”

22. Without engaging in a Standard 3 appraisal review of Veerkamp's appraisal review, Appraiser Joe Seipel offered what he deemed to be several problems with Veerkamp's review. The hearing examiner does not find Joe Seipel's testimony to be credible.⁴ The hearing examiner reaches this conclusion for three reasons.

First, Seipel's criticism of Veerkamp's analysis regarding the failure of either of Caerbert's Demersville Road appraisals to mention the underlying zoning is wholly inconsistent with the plain language of Standard Rule 1-2(e)(i) and (iv) and Standard Rule 2-2(b)(iii). In essence, Seipel suggested that the appraisal practice in the area did not require Caerbert to mention the existence of the underlying zoning in determining the value of the subject property. It is not the local practice, but the USPAP standards that set the bar for the appraiser's conduct. In light of the plain language of the USPAP standards, it is not reasonable to conclude that the appraisal could fail to at least mention the fact that the underlying zoning that permitted subdividing lots down to a parcel size of ½ acre and still meet USPAP standards. Furthermore, it is not reasonable to conclude that the failure to mention the underlying zoning did not seriously impact the credibility of the appraisal.

Second, Seipel in his testimony did not hide the fact that he has an axe to grind with the Montana Board of Real Estate Appraisals. This bias has obviously colored whatever expert opinion he could offer on the issue of the USPAP standards, making his testimony less credible.

Finally, as BSD's counsel points out in his closing response brief, Seipel's criticisms of VeerKamp's Standard 3 appraisal reviews did not comport with standards of professional appraisal practice with respect to a review of another appraiser's work. *See generally*, Standard Rule 3, USPAP. Therefore, Seipel's testimony is rejected.

23. In contrast to Seipel's testimony, the testimony of Veerkamp is found to be highly credible both as to her testimony on the Demersville Road appraisals and the 1335 2nd Avenue East appraisal. Her Standard 3 review of the Demersville Road appraisals and her Standard 3 review of the 1335 2nd Avenue East Appraisal were completed in conformity with the Standard 3 requirements. Her testimony convinces the fact finder that she is highly qualified to engage in the Standard 3 reviews that she carried out in investigating these appraisals. In addition, her standard 3 reviews accurately reflect the problems associated with all of Caerbert's appraisals in this case.

B. The Appropriate Sanction In This Matter Is To Place Caerbert's License On Probation With Terms That He Complete Remedial Education.

24. A regulatory board may impose any sanction provided for by Montana Code Annotated Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, a regulatory board may revoke or restrict a license, may

⁴Seipel testified in the Demersville Road Appraisals case only. He did not testify in the 1335 2nd Avenue East case.

impose probation, may require remedial education, and may require monitoring of the practice by a supervisor approved by the regulating authority. Mont. Code Ann. § 37-1-312.

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

26. BSD has argued strenuously for the revocation of Caerbert's license. The primary basis for this argument is BSD's perception that Caerbert's use of Hennion's services was fraudulent. BSD further argues that Caerbert's appraisals are so off base that they demonstrate an irreversible incompetence in Caerbert's practice. While the hearing examiner finds that Caerbert's reports were misleading, the evidence does not convince that Caerbert's acts were fraudulent. With respect to the Demersville Road appraisal, if there had been substantial evidence to show that Caerbert, for example, did not actually file a second appraisal with the lender as he claimed, then the argument for revocation would be stronger as the inference of fraud would be stronger. Such evidence might have come from testimony of someone connected to the lender. No such evidence was brought forth.

Rather, it appears that Caerbert, relying on his misguided interpretations of USPAP advisory comments, believed he could use an office assistant to the extent he did. He was wrong, but the evidence does not preponderantly convince the hearing examiner that Caerbert was trying to fraudulently disguise Hennion's qualifications. Moreover, while it is true that Caerbert's appraisals demonstrated serious violations of USPAP standards, these are the only two violations that have come forth to date. In an otherwise unblemished 18 year career, revocation does not seem necessary to protect the public. Rather, a period of probation with terms that include successful completion of remedial education is adequate to protect the public.

IV. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board of Real Estate Appraisers enter its order placing Caerbert's license on probation for a period of two years with the terms that:

(1) Caerbert shall at his own expense attend and successfully complete remedial education as directed by the Board and shall provide, within 180 days of the entry of the Board's final order in this matter, documentary evidence to the Board that demonstrates to the satisfaction of the Board that he has successfully completed any such remedial education.

(2) Caerbert shall at all times comport with the requirements of Mont. Code Ann. Title 31, Chapters 1 and 54 and Admin. R. Mont. Title 24, Chapter 207.

(3) In the event Caerbert fails to comport with any of the terms of the Board's final order in this matter, his license shall be suspended until such time as he complies with said terms.

DATED this 8th day of April, 2009.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

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

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.