

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-10-0358-REA REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 2016-2010
TREATMENT OF THE LICENSE OF)	
JOE SEIPEL, CERTIFIED GENERAL)	
APPRAISER, License No. 362.)	
)	

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

I. INTRODUCTION

The Business Standards Division (BSD) filed a complaint against the certified general appraiser’s license of Joe Seipel. The complaint alleges that Seipel committed unprofessional conduct in violation of Mont. Code Ann. § 37-1-316(18) by violating the Uniform Standards of Professional Appraisal Practice in failing to comport with Standard 3 while testifying as an expert witness in an administrative hearing. Prior to the hearing, the parties filed cross-motions for summary judgment which were denied.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on February 15, 2011. Michael Fanning, agency legal counsel, appeared on behalf of BSD. Patrick Flaherty, attorney at law, appeared on behalf of Seipel. Seipel, Billie Veerkamp, and Terri Smith all testified under oath. BSD’s Exhibits 1 and 2 and Seipel’s Exhibits A, C, and G were admitted for purposes of the hearing. Seipel’s Exhibit H was admitted for purposes of the licensee’s motion for summary judgment only. Based on the evidence and argument adduced at hearing, the following findings of fact, conclusions of law, and recommended decision are made.

II. FINDINGS OF FACT

1. At all times pertinent to this matter, Seipel has been a licensed certified general appraiser in the state of Montana.

2. On February 4, 2008, a hearing regarding the proposed disciplinary treatment of the license of Montana real estate appraiser Donald Heppner was held

before the Hearings Bureau. The allegations of that complaint related to Heppner's preparation of an appraisal of real property located in Columbia Falls, Montana.

3. As part of the investigation into Heppner's conduct, Billie Veerkamp, a Montana Board of Real Estate Appraisers investigator who is also a licensed general appraiser in the state of Montana, prepared an appraisal review of Heppner's appraisal of the Columbia Falls property. That appraisal review was completed in conformity with Standard 3 of the Uniform Standards of Professional Appraisal Practice (USPAP).¹

4. Seipel testified on behalf of Heppner at the hearing. During that hearing, the parties stipulated that Seipel was properly qualified to provide expert testimony regarding the standards for professional appraisal practice prescribed by the USPAP.

5. When Seipel testified, he was asked about various facets of Heppner's appraisal and Veerkamp's Standard 3 review. With respect to Heppner's report, Seipel engaged in the following colloquy with counsel:

Question (Q). You have been asked to render an opinion here on the report that Mr. Heppner's prepared. Have you reviewed the appraisal report?

Answer (A). I reviewed the document. I wouldn't characterize it as an appraisal report.

Q. What would you characterize it as?

A. My understanding is it's a consulting assignment that he used with some canned forms on it.

Q. And, as such, have you noticed any USPAP violation in preparing a consulting report on what you call the "canned form"?

A. I did not do a review on it or look at it in terms of the standards. I do know that if it's a consulting assignment, it should be looked at per Standards 4 and 5.

Q. Do you have an opinion on whether or not that is a consulting 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.

A. There is no lender, and my understanding was he was simply providing value on this occasion for listing purposes, which is not a typical appraisal assignment, that would be understandable.

* * *

Q. Is it a consulting report?

A. Based on what I've seen, that's what I would consider it. And if you look at the 2004 USPAP definitions and read under "consulting assignments" or "Appraisal Consulting" or "Scope Work," you would probably see it more apt to be placed there than as an appraiser report.

Exhibit 2, Transcript of Heppner hearing, page 67, lines 5 through 25, page 68, lines 1 through 10.

6. Seipel next discussed Standard 3 reviews during his testimony. That colloquy went as follows:

Q. All right. Standard 3 reviews, are you familiar with what those are?

A. Yes, I do reviews.

Q. Okay. What are the requirements for you to be able to do a Standard 3 review? And I'm asking you to tie that in, you did not do a Standard 3 review of his report, right?

A. I did not.

Q. Can a person such as Billie Veerkamp do a Standard 3 review?

A. My opinion is, if you read Standard 3, there is tie [sic] into competency in the ethics requirement, and an appraisal and/or review a person needs to disclose, if they're not competent, what they did to get competent. And my understanding with Billie is she hasn't appraised and is not familiar with that market in over five years, so to do a review, you're looking at economics, you're looking at property characteristics, you would want to be understanding of the market to be able to do a review or to do a report in that market.

Q. So what is your opinion as to whether or not Mrs. Veerkamp can give a Standard 3 review within the meaning of USPAP?

A. I believe she can. She would just have to disclose that she has not appraised in that market and she is not aware of the economics and not competent and what she did to get competent.

Q. Did she do that in this case?

A. Not what I saw. There wasn't any disclosure there.

Exhibit 2, page 68, lines 11 through 25, page 69, lines 1 through 15.

7. Later in his testimony, Seipel was asked on cross-examination if he did a review of Veerkamp's Standard 3. He responded "No, I did not do a review in terms of appraisal review. I looked at her material." Exhibit 2, page 72, lines 5 through 8.

8. Later, a colloquy between the hearing examiner and Seipel ensued. That colloquy was as follows:

Q. You heard Mr. Heppner testify?

A. Yes.

Q. And you heard that he gave himself a "C-" for his appraisal; is that correct?

A. Yes.

Q. As an expert, is it your opinion that someone that does a "C-" appraisal has done work that might not meet USPAP standards?

A. I agree with his assessment if it were an appraisal report assignment in the typical sense, as Standard 1 and Standard 2 apply in the typical sense. But because it was a consulting agreement, my opinion, as Billy Wilke [sic, should probably be Billy Veerkamp] stated, the standard differences are in 4 and 5 and it's a totally different application.

Q. Did you review his appraisal under the standards that are in 4 and 5?

A.. I did not.

Q. So you don't know how good a job he did under those?

A. I do not know, no.

9. It is not disputed that Seipel did not complete any work file or undertake a Standard 3 review of either Heppner's appraisal or Veerkamp's Standard 3 review of Heppner's appraisal.

III. CONCLUSIONS OF LAW²

A. The Tribunal Has No Authority To Decide Licensee's Motion For Summary Judgment Based On Alleged Irregularities In The Screening Panel Process.

This tribunal has no power to rectify any perceived shortcoming in the screening panel process. It is well settled in Montana that an administrative tribunal has only those powers specifically granted by statute or rule. *Auto Parts of Bozeman v. Uninsured Employers' Fund*, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193. In that case, the court held that the validity of a contract, not being pertinent to any fact issue within the scope of an administrative tribunal's subject matter jurisdiction, could not be adjudicated by the administrative tribunal. In reaching its determination, the court reasoned:

While an administrative body acting as a tribunal has quasi-judicial power, it does not follow that its power is equal to the power of a district court to hear all facets of a case. Jurisdiction in an administrative hearing . . . is strictly limited by statute. * * * An administrative agency may not assume jurisdiction without express delegation by the legislature.

Id.

The court then went on to hold that since there was no statutory delegation of authority to the administrative agency (the Department of Labor and Industry in the context of an uninsured employer's fund case) to adjudicate the merits of contract dispute between the parties to the litigation, the agency properly determined that it could not adjudicate the issue. *Auto Parts*, ¶ 39.

Licensee's counsel fails to cite any authority, statutory or otherwise, that would permit this tribunal to review the process that brought about the complaint in this matter. All this tribunal can do is determine whether the allegations of the complaint have been proved by the Business Standards Division. Accordingly, his motion for summary judgment on that issue had to be denied.

² 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.

B. *The Licensee Has Not Violated Professional Standards.*

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. § 39-54-403 requires licensed appraisers to “comply with generally accepted standards of professional appraisal practice” as evidenced by USPAP. Admin. R. Mont. 24.207.402 provides that the Board adopts by reference USPAP standards.

3. As Seipel’s testimony occurred in 2008, the USPAP standards for that year (USPAP 2008-2009 Edition effective January 1, 2008 through December 31, 2009) apply to his conduct. All references to USPAP in this recommended decision are references to the 2008-2009 USPAP standards.

4. Under USPAP, the noun “appraisal” is defined as “the act or process of developing an opinion of value.” An “appraisal review” is defined as “the act or process of developing and communicating an opinion about *the quality* of another appraiser’s work that was performed as part of an appraisal, appraisal review or appraisal consulting assignment.” Emphasis added.

5. USPAP Standard 3 requires that “in performing an appraisal review assignment, an appraiser acting as a reviewer must develop and report a credible opinion as to *the quality* of another appraiser’s work and must clearly disclose the scope of the work performed.” Emphasis added. The comment to that standard notes that appraisal review is “the act or process of developing and communicating an opinion about the quality of all or part of the work of another appraiser that was performed as part of an appraisal, appraisal review, or appraisal consulting assignment.” Thus, if Seipel was developing and communicating an opinion about the quality of Heppner’s appraisal or Veerkamp’s Standard 3 review, he was required to follow the dictates of Standard 3.

6. FAQ Number 276 from the Appraisal Foundation also provides guidance on the issues related to the instant case. That response notes that in reviewing another appraiser’s appraisal review report, an appraiser must comply with Standard 3. The answer further expounds that “Simply stated, appraisal review encompasses more than just the review of another appraiser’s appraisal. *It is the act or process of developing and communicating an opinion about the quality of another appraiser’s work.*” (Emphasis added).

7. Neither party has suggested that the term “quality” is defined in USPAP. The term’s dictionary definition includes both an understanding to mean an essential feature of a thing (i.e., a characteristic) and an understanding pertaining to the degree of excellence (i.e., a grading) of a thing. *Webster’s Ninth New Collegiate Dictionary* (1988).

8. Construing the USPAP requirements in conjunction with the dictionary definition of “quality,” it is obvious that the term “quality” as used in the USPAP standards applicable to this case does not simply mean any discussion which merely touches on the characteristics of an appraisal. Rather, since applicable USPAP standards refer to *the* quality of an appraisal, an opinion that would trigger the need to observe Standard 3 requirements must be an opinion which grades an appraisal in terms of the Standards 1 and 2.

9. The complaint in this matter alleges three bases for misconduct. The first basis, contained in Paragraph 3 of the complaint, was not asserted at the hearing in this matter as a basis for finding misconduct. The hearing examiner would have in any event not found this to be a valid basis for sanctions as the BSD counsel in the Heppner hearing stipulated that Seipel was an expert in appraisal practice. Record transcript, page 67, lines 1 through 3. As both parties stipulated to his expertise in appraisal practice, he was clearly qualified to testify and appropriately testified as an expert in appraisal.

10. The second and third bases relate to Seipel’s testimony regarding Heppner’s appraisal and Veerkamp’s Standard 3 review. Seipel’s testimony responding to counsel’s questions and the hearing examiner’s questions about Heppner’s appraisal was not a comment specifically directed to the quality of Heppner’s work. In response to counsel’s questions, Seipel specifically stated “I did not do a review on it or look at it in terms of the standards.” When the hearing examiner asked Seipel whether generally “someone that does a “C-” appraisal” could be considered to have violated USPAP standards, Seipel responded that he might agree with Heppner’s assessment if Standards 1 and 2 applied to Heppner’s work, but that he did not agree that Standards 1 and 2 applied to Heppner’s work. He never opined as to how good or bad Heppner’s work was under Standards 1, 2, 4, or 5. Indeed, even though Heppner’s counsel asked Seipel two times about his opinion (Exhibit 2, pages 67 and 68), Seipel never answered the questions with an opinion regarding Heppner’s quality of work. Seipel’s testimony about Heppner’s work was not directed at its quality and the Standard 3 requirements were not violated.

11. The testimony regarding Veerkamp’s Standard 3 review walked a little closer to the threshold of impermissible conduct. Overall, however, that testimony does not preponderantly demonstrate a violation of the Standard 3 strictures. Again,

looking for guidance to the USPAP definitions, USPAP Standards, and the insight provided by FAQ 276, it is only where an appraiser provides an opinion about the quality of another appraiser's Standard 3 review that the appraiser must comport with Standard 3 requirements. Here, Seipel stated no more than (1) Veerkamp could do a Standard 3 review if she disclosed in her Standard 3 review that she had familiarized herself with local economic factors and (2) that as a matter of fact, she did not disclose that in her Standard 3 review. He did not specifically opine as to the quality of her work, for example, by stating that the quality of her work was poor or substandard in light of any of the Standards. As BSD carries the burden of proof in this matter to show by a preponderance of the evidence that Seipel violated professional obligations, the answers that he gave here, while perhaps close to going over the line, do not meet the quantum of proof necessary to demonstrate an opinion that would require Seipel to comport with Standard 3 requirements.

12. 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 31st day of March, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

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