

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE BOARD OF CERTIFIED REAL ESTATE APPRAISERS**

IN THE MATTER OF)
)
STEPHEN DEMARS) Case No. OAH-06-0678-REA
_____)

DECISION FOLLOWING REMAND

I. Introduction

Stephen DeMars appeals from a three-count accusation filed by the Division of Corporations, Business and Professional Licensing ("the division") asserting that he did not submit documentation that he completed required continuing education, or "CE" credits; that he has violated 08.87.120(a); and that he has knowingly made a false statement, submitted false information, or failed to provide complete information in response to an application for renewal of a certificate. Administrative Law Judge Dale Whitney conducted a hearing on the appeal on December 11, 2006. Steven Winker represented the division. Mr. DeMars did not appear at the hearing or present any evidence. The administrative law judge issued a proposed decision finding that Mr. DeMars is subject to disciplinary action for count I, but not counts II and III.

At its regular meeting on October 5, 2007, the board indicated approval of the proposed decision as to count I, but the case was returned to the ALJ for taking of additional evidence and further findings of fact regarding count III. The ALJ held a supplemental hearing on December 18, 2007. Mr. DeMars and Mr. Winker both appeared by telephone.

The evidence shows it is more likely than not that Mr. DeMars failed to provide documentation of completing required CE credits upon request, as found at the first hearing; disciplinary action under count I is therefore appropriate. Count II does not allege activity for which disciplinary action may be taken against a licensee, and no action should be taken under that count. Because a preponderance of the evidence does not show that Mr. DeMars knowingly submitted false information in an application to renew his real estate appraiser's license, no action should be taken on count III.

II. Facts

Mr. DeMars submitted an application for a biennial certified real estate appraiser license renewal that was signed on June 2, 2005. On this application, Mr. DeMars checked a box to certify the following:

I certify that in accordance with Article 2 of the 12 A A C 70, I have obtained 28 hours of continuing education as well as satisfactorily completed of a *[sic]* 7-hour National

USPAP Update Course (the 7-hour course may be a part of the 28 hours) during the concluding licensing period of July 1, 2003 - June 30, 2005.¹

The form advised applicants that

the board will audit a percentage of the license renewals. If your license is randomly selected for audit, you will be required to submit copies of certificates as proof that you satisfied the continuing education requirements as you stated on this renewal form. Save your documents for at least four years so you can respond to audits.

On December 14, 2005, the division notified Mr. DeMars that his license renewal application had been selected for a random audit, and it requested that he provide documentation of the hours he had completed.² When Mr. DeMars did not respond, the division sent another letter.³ Mr. DeMars eventually did contact the division by telephone and email. He stated that he had completed the requisite number of credits, but the documentation may have been lost when his furnace failed in the winter while he was out of town, causing extensive water damage. On July 21, 2007, Mr. DeMars stated that he had contacted the education provider, William King of William King & Associates and asked that documentation of his attendance be forwarded to the division. The division never received any such documentation, and it filed the accusation that commenced this case.

In response to the accusation, Mr. DeMars requested a hearing and provided some documentation. These documents included certificates of completion showing that Mr. DeMars had completed 20 hours of approved continuing education from April 3 through 5, 2003; 7 hours of approved education on February 26, 2005; and 7 hours of approved education on August 8, 2005. The February 26, 2005, class was a Uniform Standards of Professional Appraisal (USPAP) update class. Of these classes, only the seven hours of credit from February 26, 2005, fall within the two year licensing period that ranges from July 1, 2003, through June 30, 2005.

The outstanding issue regarding count III concerns credit that Mr. DeMars claims he has obtained, but has not documented. Based on the record at the conclusion of the initial hearing, it appeared that Mr. DeMars had claimed to have obtained all of the required credit from William King, and the supplemental hearing would be limited to determining whether or not records maintained by William King would confirm Mr. DeMars' attendance of the additional classes.

At the supplemental hearing, Mr. DeMars and the division stipulated that the records of William King & Associates would reflect that Mr. DeMars obtained only fourteen credits

¹ Exhibit A, page 2.

² Exhibit C.

between the period from July 1, 2003, to June 30, 2005. Mr. DeMars agreed that William King's records would not reflect attendance at any other classes, confirming the information that the division had obtained for the supplemental hearing. Mr. DeMars asserted that he had consistently claimed to have taken two other classes from continuing education providers whose names Mr. DeMars cannot now recall. Mr. DeMars asserted that he had been asking Mr. King, whom he counts as a personal friend, to help him identify and locate the other two providers, as Mr. King knows most of the education providers. Review of the recorded prehearing conference of October 31, 2006, confirms that Mr. DeMars has been consistent in this position, and never did claim to have taken all of the required credit from William King & Associates.

III. Discussion

The division has styled the accusation against Mr. DeMars in three counts. They are addressed here in order. According the Administrative Procedure Act, in a disciplinary proceeding the petitioner has the burden of proof by a preponderance of the evidence.⁴ Thus, for each count, the division must prove it is more likely than not that the alleged violation has occurred.

Count I

Count I asserts that "[Mr.] DeMars fails to submit to the department, documentation to verify completion of the CE hours indicated by his response on his 2005-2007 license renewal application within 30 days of modification as required by 12 A A C 02.960(e)." The regulation cited, 12 A A C 02.960(e), requires any licensee selected for audit to present documentation to verify compliance with CE requirements. The division presented testimony from division staff members that showed that although the division had sent Mr. DeMars several letters requesting documentation, and had spoken with him on the phone several times about the matter, the division has not received from Mr. DeMars documentation that he has met more than fourteen of the twenty-eight required number of CE credits.⁵ Seven of the fourteen credits were received after the two-year licensing period during which the credits were to be obtained. The division has proved that Mr. DeMars violated 12 A A C 02.960(e); he did not provide proof of attendance at the required number of CE classes upon request in a random audit.⁶

³ Exhibit D.

⁴ AS 44.62.460(e).

⁵ Testimony of Cori Hondolero; Jan Mays; Steven Winker.

⁶ AS 08.87.210 provides for disciplinary sanctions if the licensee has violated a provision AS 08.87 or a regulation adopted by the board under this chapter, been convicted of a crime that involves moral turpitude, or committed, while acting as a real estate appraiser, an act or omission involving dishonesty, fraud, or misrepresentation with the

Count II

Count II asserts that

[Mr.] DeMars' presumed failure to meet the CE requirements of 12 A A C 70 to renew his residential real estate appraiser license for the 2005-2007 licensing period is a violation of AS 08.87.120(a) and constitutes grounds for imposition of disciplinary sanctions against his residential real estate appraiser license under AS 08.68.210(1) and AS 08.87.200(2).

The statute that Mr. DeMars is alleged to have violated, AS 08.87.120(a), reads:

The board may not renew a certificate issued under this chapter unless the person applying for renewal presents evidence satisfactory to the board that the person has, within the two years preceding the application for renewal, attended classroom instruction, as required by the board in regulation, in courses or seminars that have received the approval of the board.

There are two errors in the state's argument regarding count II. The first is in the division's assertion that there is a "presumed failure" that Mr. DeMars did not meet the CE requirement. There is no such presumption in law. Mr. DeMars did not provide documentation of his CE attendance upon request. By failing or refusing to provide documentation in an audit, Mr. DeMars has violated 12 A A C 02.960(e). Failure to provide documentation of attendance at a class does not mean that a person has not taken the class. While it is possible that Mr. DeMars did not take the classes he has been unable to document, there is no law that creates a "presumed failure to meet the CE requirements." Mr. DeMars asserted that he did take all required classes, and the division has the burden of proving otherwise.

The second error in count II is that the statute that Mr. DeMars has allegedly violated, AS 08.87.120(a), does not impose any duty on Mr. DeMars. It prohibits the board from renewing a license unless the applicant has presented "evidence satisfactory to the board" that the person has obtained proper CE credit. The board apparently found Mr. DeMars' certification on his application that he had received the credit to be satisfactory evidence, and therefore the board did not violate the law.

Although this statute makes it impossible for an applicant to have a license renewed if the applicant's evidence does not satisfy the board, the statute does not impose any duty or obligation on the applicant. The applicant might or might not receive a license from the board,

intent to benefit the appraiser or another person or to injure another person. 12 A A C 02.960 is a regulation that has been adopted by the department, not the board under AS 08.87. Whether the regulation even applies to a board case when the board has not adopted a similar regulation is an issue that has not been raised or argued in this case.

but there is no way the applicant can violate the statute. Thus, regardless of the facts in this case, it cannot be shown that Mr. DeMars has violated AS 08.87.120(a).

Count III

Count III of the accusation states that

[Mr.] DeMars' statement on his 2005 - 2007 Biennial Certified Real Estate Appraiser License Renewal application to certify compliance with the CE requirements is presumed false and constitutes grounds for imposition of disciplinary sanctions against his residential real estate appraiser license under AS 08.87.200(5).

The cited statute, AS 08.87.200(5), reads as follows:

A certified real estate appraiser may not...knowingly make a false statement, submit false information, or fail to provide complete information in response to a question in an application for certification or for renewal of a certificate....

The division is correct that, if it had been proved that Mr. DeMars never actually took the classes he claims to have taken, it would be clear that the information that Mr. DeMars submitted on his application would be false. In addition to proving that the applicant has submitted false information, the statute requires proof that the false information was submitted "knowingly."

Mr. DeMars did not falsely claim to have taken all of the required credit from William King & Associates. He never claimed to have taken from William King more than the two classes that he has documented. The remaining issue is whether Mr. DeMars was knowingly providing false information when he certified that he attended two other classes somewhere else, classes he has not documented.

Mr. DeMars testified that he cannot remember the names of the education providers he took the two classes from, and that he cannot find completion certificates, canceled checks, or any other evidence that would support his attendance or even identify the providers, in part because of documents being destroyed when his basement flooded. Mr. DeMars testified, however, that he was certain at the time he completed his renewal application that he had completed the required number of credits.

It may be odd that someone could not identify where he took a class, even if more than a year had passed, but it is not inconceivable. This case comes down largely to the credibility of Mr. DeMars' testimony. Repeated reviews of Mr. DeMars's testimony and careful consideration supports the conclusion that it is more likely than not that Mr. DeMars at least believed he had completed all continuing education requirements when he submitted his license renewal and through the audit and appeal process. To the extent Mr. DeMars may have provided false

information about whether he took the required number of classes, he did not do so knowingly. No sanctions should be imposed under count III.

Disciplinary Sanctions

The division has proved that Mr. DeMars violated 12 A A C 02.960(e) by not providing proof of attendance at the required number of CE classes upon request in a random audit. Determining the appropriate sanction in this case is a more difficult task. The board may impose, singly or in combination, any of the following disciplinary actions:

- (1) permanently revoke a license;
- (2) suspend a license for a specified period;
- (3) censure or reprimand a licensee;
- (4) impose limitations or conditions on the professional practice of a licensee;
- (5) require a licensee to submit to peer review;
- (6) impose requirements for remedial professional education to correct deficiencies in the education, training, and skill of the licensee;
- (7) impose probation requiring a licensee to report regularly to the board on matters related to the grounds for probation;
- (8) impose a civil fine not to exceed \$5,000.⁷

In exercising its authority to implement the above sanctions, the board is required to seek consistency in the application of disciplinary sanctions. The board must explain a significant departure from prior decisions involving similar facts in the order imposing the sanction.⁸

The degree of sanctions that are appropriate in a given case is a matter that depends largely on the board's particular expertise and discretion. It does not appear that the board has ever adopted regulations that would provide guidance in disciplinary proceedings. The division has declined to recommend any specific penalties for the board's consideration.

Some policy concerns the board may wish to address include the need to protect the public from unqualified individuals, the need to effectively deter this and other licensees from future violations, and any desire of the board to publicly repudiate failure of licensees to comply with professional standards.

In order to protect the public from unqualified appraisers, the board should order the suspension of Mr. DeMars' license until such time as he has demonstrated full compliance with all licensing requirements, including acquiring sufficient CE credits to make up the deficit from the previous licensing period. These credits should not be counted toward the number of credits that Mr. Demars would need to meet the requirements of the next licensing period. A mandatory

⁷ AS 08.87.210(a); AS 08.01.075(a).

⁸ AS 08.01.075(f).

audit of Mr. DeMars applications should be performed for the next two licensing periods to ensure that Mr. DeMars remains current in his continuing education obligation.

A civil penalty will deter Mr. DeMars and other licensees from disregarding the requirement to document completion of CE requirements. Suspending a portion of the penalty contingent on Mr. DeMars meeting future CE requirements will deter Mr. DeMars from further violations, while sending a message to other licensees. Imposing the maximum amount of the penalty without suspending some portion would not be appropriate. While there are few mitigating factors in this case, it is easy to imagine a more egregious case. Mr. DeMars, for example, does not appear to have previously violated any professional requirements. He did at least obtain fourteen of the required 28 credits, including the required USPAP component, and there are no allegations of any specific actions demonstrating lack of competence. As noted in the discussion sections for counts II and III, it has not been proved that Mr. DeMars provided false information, only that he failed to provide required information. The maximum penalty should be reserved for the most egregious cases, including cases where intentional deceit has been proved. In this case, imposing a penalty of \$1,500 but suspending all but \$500 contingent on compliance with the board's decision will serve the goals of deterrence.

A written reprimand expresses the board's insistence on compliance with professional standards and creates a permanent record of the board's findings regarding a particular licensee. Attached as Exhibit A to this decision is a reprimand expressing findings that Mr. DeMars did not meet his obligation to document completion of the required number of CE credits.

IV. Conclusion

It is more likely than not that in a random audit Mr. DeMars failed to document completion of continuing education requirements, thereby violating 12 A A C 02.960(e). The division has not proved the allegations in counts II and III of the accusation. The following disciplinary sanctions shall be imposed:

1. Mr. DeMars' license as a certified residential real estate appraiser will be suspended until he provides proof of completing all continuing education requirements for the 2003 - 2005 licensing period. These credits may be obtained at the present time, but may not be applied toward credit required for subsequent licensing periods.

2. The division shall perform a mandatory audit of Mr. DeMars' applications for renewal of his license, if he submits one, for the next two licensing periods.

3. A civil penalty of \$1,500 shall be imposed. \$500 of this amount shall be paid before the suspension of Mr. DeMars' license will be lifted. The remaining \$1000 shall be suspended so long as Mr. DeMars complies with all licensing requirements for the next two licensing periods.

4. The board issues the written reprimand attached as Exhibit A.

DATED this 19th day of March, 2008.

By: Dale Whitney
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 08.87.210. The undersigned, on behalf of the Board of Certified Real Estate Appraisers and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 6th day of June, 2008.

By: Dale Whitney
Administrative Law Judge

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

Case Parties
6/10/08