

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE REAL ESTATE COMMISSION**

In the Matter of)	
)	
JOSELEYDE BEVINGTON)	OAH No. 10-0110-REC
)	Agency Case No. 3004-10-014
_____)	

DECISION

I. Introduction

On February 11, 2010, the Division of Corporations, Business and Professional Licensing (Division) suspended Joseleyde Bevington’s real estate license for an alleged violation. Ms. Bevington appealed, receiving a hearing on April 14, 2010.¹

Because the Division has exceeded its authority in imposing the suspension, and because there was no violation in the first place, the suspension should be vacated immediately.

II. Facts

Joseleyde “Josy” Bevington was first licensed as a real estate professional in Colorado, holding an associate broker license there from 2003 to 2006.² She obtained an Alaska salesperson license on December 16, 2005,³ a license that she has renewed biennially ever since.

In her 2008 online renewal application, Ms. Bevington indicated that she had completed the continuing education (CE) hours required for renewal.⁴ A random audit revealed that she had not.⁵ Ms. Bevington explained that she had been uncertain if her past education, completed just prior to the CE reporting period, placed her in compliance, and that she contacted Jennifer Shine of the Board of Realtors for advice, receiving incorrect advice that the prior education would count.⁶

In late 2008, Ms. Bevington and the Real Estate Commission entered into a Consent Agreement. The Consent Agreement made a factual finding that “When Bevington completed

¹ Each side presented two witnesses. In addition, the Division presented eleven numbered exhibits, all of them admitted without objection. A twelfth exhibit (a public record of a Real Estate Commission meeting) was accepted after the hearing closed in order to correct an inadvertent misstatement by one of the witnesses at the hearing.

² Ex. 11 at REC 161.

³ *Id.* at REC 152.

⁴ Ex. 3 at REC 42, ¶¶ 3a, 3b.

⁵ *Id.* at REC 43, ¶¶ 3f, 3g.

⁶ *Id.* at REC 43, ¶ 3h; Ex. 11 at REC 128; direct testimony of Bevington.

her renewal application she believed she was in compliance.”⁷ The Consent Agreement found two violations nonetheless: “failure to meet the continuing education requirements” and “failure to verify completion of the required hours.”⁸ It assessed a total civil fine of \$3,500 with all but \$1500 suspended, recorded a reprimand, and required completion of the education requirements with mandatory audit for the next two renewal periods.⁹

The Consent Agreement also contained the following terms:

Bevington will not violate the laws and regulations of the United States and the State of Alaska pertaining to her real estate salesperson license or in acting as a real estate salesperson in this state. Any such violation that occurs during the period that this agreement is in effect will constitute a violation of this agreement.¹⁰

and

The violation of this agreement will result in the suspension of Bevington’s real estate license. If this license is suspended under this paragraph, Bevington shall be entitled to an administrative hearing regarding the issue of the suspension in accordance with AS 44.62.¹¹

The Consent Agreement did not have an express term defining the “period that this agreement is in effect,” but the context of the agreement suggested that it would be in effect through the next two renewal cycles. The word “probation” was not used in the agreement.

After the Consent Agreement had gone before the Commission and received approval, the Division mailed a final “fully signed copy” to Ms. Bevington.¹² The fifth paragraph of the cover letter said, “Please be aware that on future renewal applications, you’ll need to answer ‘yes’ to any questions relating to a disciplinary proceeding or reprimand”¹³

A year later, on January 27, 2010, Ms. Bevington applied for renewal. She did so by coming to the Division’s office, bringing with her continuing education certificates, and obtaining and filling out a paper application on the spot.¹⁴ Question 2 on the application read exactly as follows:

Since the date of your last application, have you had a real estate license revoked, denied, suspended, or other license action? YES NO

⁷ Ex. 3 at REC 43, ¶ 3h. This factual finding is echoed in the fact that Ms. Bevington was reprimanded only for failing to complete the required education, not for dishonesty. See REC 47. The factual finding is binding on both parties to the present case.

⁸ Ex. 3 at REC 45.

⁹ *Id.*

¹⁰ *Id.* at REC 47-48.

¹¹ *Id.* at REC 48.

¹² Ex. 2 at REC 40.

¹³ *Id.*

¹⁴ Direct testimony and cross-exam of Bevington.

Ms. Bevington checked the “NO” box.¹⁵

Ms. Bevington did not understand her 2008 Consent Agreement to be a license action, and it did not occur to her to check the “YES” box.¹⁶ Since she brought in her continuing education certificates and submitted them with her application—an obvious indication that she was subject to an auditing agreement—her overall conduct is inconsistent with an attempt to hide the existence of her Consent Agreement. The Division has not contended in this case that there was intent to deceive.¹⁷

Ms. Bevington was not the only person to understand the application question as she did. There had been eight licensees who entered into consent agreements in 2008 fining them for continuing education noncompliance.¹⁸ Three of the eight, or 37.5 percent, checked the “NO” box for Question 2 in the 2010 licensing cycle.¹⁹

After Ms. Bevington’s renewal was approved, Division investigator Michele Wall-Rood checked Ms. Bevington’s application with the specific purpose of finding out if she had checked “YES” or “NO” for Question 2.²⁰ When she saw a “NO” answer, she consulted with the Real Estate Commission in a teleconference on February 3, 2010. She informed the Commission that “there’s three licensees who have submitted to us a second falsified application.”²¹ She told them that “The Consent Agreement requires that when the licensee renewed again they check ‘yes’ to the professional fitness question #2.”²² Based on these representations, the commission “recommended” that Ms. Wall-Rood proceed with a suspension.²³

On February 11, 2010, the Division contacted Ms. Bevington for the first time about the alleged misstatement on her application. The contact was made by means of a letter from Chief Investigator Brian Howes.²⁴ Mr. Howes informed Ms. Bevington that her answer to Question 2

¹⁵ Ex. 11 at REC 97.

¹⁶ Direct and cross-exam of Bevington.

¹⁷ The Division believes the statutes and regulations prohibiting false statements on applications, such as 12 AAC 64.160, authorize discipline even for misstatements that are shown to be wholly innocent or inadvertent. Direct testimony of Wall-Rood (“Unfortunately there’s no intent in our statute and regulations. I mean if you violate a law, you have violated a law”).

¹⁸ Ex. 1, p. 3.

¹⁹ Direct testimony of Wall-Rood.

²⁰ *Id.* This seems to have been done as a kind of test.

²¹ Direct testimony of Wall-Rood.

²² Ex. 12.

²³ *Id.*

²⁴ Ex. 6.

“constitutes a violation” of the Consent Agreement and stated that “upon receipt of this letter, your real estate salesperson license #16755 is hereby automatically suspended.”²⁵

Although the Department of Commerce, Community and Economic Development has statutory authority to issue temporary orders to real estate licensees with approval of the commission,²⁶ the February 11 notice of suspension did not follow, and was not intended to follow, the statutory procedure.²⁷ Instead, the Division believed it was acting under authority that was conferred in some way by the 2008 Consent Agreement. The Division regards the finding of a violation and the imposition of a suspension to have been acts of the Division in its capacity as the enforcement arm of the Commission.²⁸

III. Discussion

Procedurally, this case is an after-the-fact hearing on the Division’s finding of a violation and imposition of a suspension. The agency action under review is the Division’s letter of February 11, 2010. The letter is an imposition of discipline. The Division has the burden to show that the discipline is justified.

A. The Division Did Not Have Authority to Impose a Suspension

The Division conceded at the hearing that its suspension letter was not an exercise of the Department’s limited statutory power to issue temporary or permanent orders under AS 08.88.037.²⁹ The Division’s presenting witness was initially at a loss to explain the authority for issuing the letter, but the Division eventually clarified that it believes the 2008 Consent Agreement granted it the power to take this action.

The 2008 Consent Agreement was an agreement of two parties to permit the Real Estate Commission to enter an order. When the Commission adopted it, it became an order of the Commission. The section the Division relies on for authority is a section entitled “Decision and Order.” The Division relies on the following particular language from that section:

²⁵

Id.

²⁶ AS 08.88.037. The statute contains safeguards to protect the due process rights of the affected person.

²⁷ ALJ exam of Wall-Rood.

²⁸ Division’s closing argument. The Division treated other applicants in Ms. Bevington’s position the same way; it did not single her out for this procedure. Applicants who acquiesced in the Division’s finding and did not request a hearing had their suspensions lifted promptly and received a \$2000 fine with \$1000 suspended. *See* Ex. 7, 8.

²⁹ AS 08.88.037 orders are orders “to stop [an] act or practice,” not ordinarily used for, and perhaps not appropriate for, suspension of a license. They may be issued to someone who has engaged in or is about to engage in illegal conduct. Permanent orders are to be issued only “after reasonable notice and an opportunity for a hearing.” Temporary orders may be issued before a hearing, but the recipient has a right to a highly expedited hearing (not a hearing under AS 44.62).

The violation of this agreement will result in the suspension of Bevington's real estate license. If this license is suspended under this paragraph, Bevington shall be entitled to an administrative hearing regarding the issue of the suspension in accordance with AS 44.62.

There are two problems with the Division's reliance on this language as authority for *the Division*, with no advance notice to Ms. Bevington, to suspend Ms. Bevington's license and put her out of business for an indefinite period.

The first problem is that there is no language in the document whereby Ms. Bevington agreed, or the Commission ordered, that this power would be wielded by anyone other than the Commission itself. The document is an order of the Commission, and a natural reading, in the absence of an express provision to the contrary, would be that that enforcement action is to be exercised by the Commission. Indeed, the reference to AS 44.62 in the quoted language confirms this. It is the Real Estate Commission, not the Department of Commerce, Community and Economic Development, whose actions on real estate matters are subject to AS 44.62.³⁰ There is no statutory provision bringing actions of the Department with respect to real estate licensees under that chapter.

In light of these circumstances, the best reading of the Consent Agreement is that the suspension could not occur without a Commission vote to find a violation and suspend the license. In this case, of course, the Commission did take up the question of suspension on February 3, 2010. However, the Commission had no specific facts before it and was in no position to make a finding of a violation by a particular person (instead, it was simply assured that violations by unspecified people had occurred). Moreover, the Commission's minutes record that it made only a "recommendation," and the Division acknowledges that the Commission did not itself impose the suspension.³¹

The second problem is that the language does not unequivocally provide for suspension in advance of a hearing. The second sentence of the applicable paragraph can be read to set up an after-the-fact hearing, but it is also consistent with a hearing before the suspension takes effect. The notion of taking away someone's right to earn a living first, and asking questions later, is an unusual one in Alaska law. When the legislature has authorized it, it has done so only

³⁰ See AS 44.62.330(11).

³¹ This discussion is not intended to imply that parties and the Commission could not agree to a consent order that would confer summary enforcement power on the Division. It may well be legally permissible for them to do so. The point is that in order for such power to be conferred and become part of the agreed resolution of a case, the document needs to say so.

with tight safeguards.³² Moreover, in a case such as this one there is no emergency to justify precipitous action; any suspension deserved could easily be imposed after a hearing, with equal punitive effect. Under these circumstances, the most plausible reading of the Consent Agreement is that it envisioned suspension after, not before, a hearing.

B. There Was No Violation on Which to Base a Suspension

The only legal provision the Division relied upon at the hearing was 12 AAC 64.160. That regulation authorizes a suspension for “any false or fraudulent representation or material misstatement on an application for a license [or] renewal.” The key prerequisite to any discipline under 12 AAC 64.160 is an untrue statement by the applicant.³³ The Division must prove that such a statement was made.

The statement at issue in this case is the checking of the box for “NO” to the question “Since the date of your last application, have you had a real estate license revoked, denied, suspended, or other license action?” In order for there to be a violation, this question must be sufficiently clear that one can determine that the only true answer Ms. Bevington could have given was “YES.” This is not the case with Question 2.

First, the question is ungrammatical and garbled. Perhaps the Division meant to ask, “Since the date of your last application, have you had a real estate license revoked, denied, suspended, or has other action been taken against your license?” That is not the question printed on the form, however. As written, the question breaks down into the following four elements:

“Since the date of your last application, have you had a real estate license revoked?”

“Since the date of your last application, have you had a real estate license denied?”

“Since the date of your last application, have you had a real estate license suspended?”

“Since the date of your last application, have you had a real estate license other license action?”

The correct answer to the first three elements, for Ms. Bevington, is clearly “NO.” The syntax of the fourth element is unintelligible.

³² The most relevant example is AS 08.88.037.

³³ If an agency seeks to impose discipline for misrepresentation but cannot prove the representation is false, the discipline cannot be imposed. *See, e.g., In re Grubich*, OAH No. 06-0144-PTP (Alaska Professional Teaching Practices Commission, 2006).

Second, the phrase “license action” is vague. At one extreme, as one broker pointed out at the hearing, approval of a prior application or renewal is a “license action.” By that interpretation, every renewal applicant should answer “YES,” and all who do not have committed falsification. On the other hand, an applicant could reasonably interpret “license action” to mean something like the three examples given—revocation, denial, or suspension—that is, actions that limit a license. A license restriction or license surrender, and perhaps license probation, would fall in this category. It is not clear that Ms. Bevington’s Consent Agreement, which did not limit her ability to practice nor state that it was placing her on probation, would fall in this category.

Third, it is telling that 37.5 percent of the respondents read the question as Ms. Bevington did, and not as the Division now interprets it. This indicates that the question was ambiguous. There is no evidence that any of the 37.5 percent acted with intent to deceive; in Ms. Bevington’s case, it is clear that she did not. So far as one can tell, the “NO” answers stemmed only from a different reading of the question.

It does not change the outcome that, in a cover letter sent more than two years earlier, the Division had said, “on future renewal applications, you’ll need to answer ‘yes’ to any questions relating to a disciplinary proceeding or reprimand.” Question 2 does not ask if the applicant has been subject to a disciplinary proceeding or reprimand. It asks if she has had “license action.”

It should be noted that the Division is entirely capable of writing clearer questions. On its application to change license status, for example, it asks, “Have you ever had a real estate license revoked, denied, suspended, surrendered, placed on probation, or been subject of any restriction, censure, reprimand, or other disciplinary action in any jurisdiction?”³⁴ Although it contains minor grammatical errors, this question is far less ambiguous than the one used on the renewal application.

Because the question was ambiguous and someone in Ms. Bevington’s situation could truthfully answer either “YES” or “NO,” the Division cannot prove that her “NO” answer was a misstatement.

IV. Conclusion and Order

Pursuant to the Commission’s supervisory authority, the license suspension imposed on February 11, 2010 is vacated retroactive to its imposition. This order is effective only upon adoption of this decision by the Commission.

³⁴ Ex. 11 at REC 139.

Because the suspension was imposed without proper authority and without a proper factual basis, the Division shall take care to avoid harm to Ms. Bevington's professional reputation that might otherwise be caused by having a suspension on her public licensure record. Specifically, the Division shall ensure that its websites and public databases do not indicate to the public that Ms. Bevington has had a license suspension.

Dated this 11th day of May, 2010.

By: *Signed* _____
Christopher Kennedy
Administrative Law Judge

Adoption

The Real Estate Commission adopts this decision as final under the authority of AS 44.64.060(e)(1). 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 distribution of this decision.

DATED this 27th day of May, 2010.

By: *Signed* _____
Signature
Bradford Cole
Name
Chairman – AREC
Title

[This document has been modified to conform to technical standards for publication.]