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STATE OF WISCONSIN
BEFORE THE REAL ESTATE APPRAISERS BOARD

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	ORDER RESTORING
	:	SUSPENDED LICENSE
RAY K. MILLER, JR.,	:	
RESPONDENT	:	LS 0703081 APP

DOE case file numbers 05 APP 044, 06 APP 062, 06 APP 084, 06 APP 102, 06 APP 119

PARTIES

The parties to this action for the purposes of Wis. Stat. § 227.53, are:

Ray K. Miller
W3410 Dore Road, Suite A
Lyndon Station, WI 53944

Ray K. Miller by:
George B. Strother, IV
Krekeler Strother S.C.
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Wisconsin Real Estate Appraisers Board
Wisconsin Department of Regulation and Licensing
P.O. Box 8935
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Findings of Fact

1. The respondent, Ray K. Miller, Jr., is licensed by the Department of Regulation and Licensing of the State of Wisconsin as a Real Estate Appraiser, license number 4-1520, first issued on February 6, 2003.
2. The Findings of Fact contained in paragraphs 2 through 5 of the Order of Summary Suspension, relating to the respondent’s appraisal of property at 712 Cornelia Street in Janesville, Wisconsin, do not constitute a severe emergency or conduct which is or likely to be engaged in such that the public health, safety or welfare imperatively requires emergency suspension of the respondent’s license.
3. The Findings of Fact contained in paragraphs 6 and 7 of the Order of Summary Suspension, relating to the respondent’s appraisal of property at 223 West Limit Road in Lyndon Station, Wisconsin, do not constitute a severe emergency or conduct

which is or likely to be engaged in such that the public health, safety or welfare imperatively requires emergency suspension of the respondent's license.

4. The Findings of Fact contained in paragraphs 8 and 9 of the Order of Summary Suspension, relating to the respondent's appraisal of property at 900 Whispering Way, Unit A, Cottage Grove, Wisconsin, do not constitute a severe emergency or conduct which is or likely to be engaged in such that the public health, safety or welfare imperatively requires emergency suspension of the respondent's license.

5. The Findings of Fact contained in paragraphs 10 and 11 of the Order of Summary Suspension, relating to the respondent's appraisal of property at 14876 County Hwy A, Viola, Wisconsin, do not constitute a severe emergency or conduct which is or likely to be engaged in such that the public health, safety or welfare imperatively requires emergency suspension of the respondent's license.

Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the Hearing to Show Cause in this matter pursuant to Wis. Admn. Code § RL 6.11 (1) (a).

2. The Petitioner has failed to meet the burden to show by a preponderance of the evidence why the summary suspension order should be continued. Wis. Admn. Code § RL 6.09 (4).

Order

1. IT IS HEREBY ORDERED: that the suspension of real estate appraiser license number 4-1520 is lifted and that license is immediately restored to the respondent Ray K. Miller, Jr., effective March 23, 2007.

Applicable Law

Wis. Stat. § 227.51 (3)

227.51 Licenses.

...

(3) Except as otherwise specifically provided by law, no revocation, suspension, annulment or withdrawal of any license is lawful unless the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If an agency finds that public health, safety or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings shall be promptly instituted and determined.

Wis. Admn. Code §RL 6.06

RL 6.06 Issuance of summary suspension order.

(1) If the licensing authority finds that notice has been given under s. RL 6.05 and finds probable cause to believe that the respondent has engaged in or is likely to engage in conduct such that the public health, safety or welfare imperatively requires

emergency suspension of the respondent's license, the licensing authority may issue an order for summary suspension. The order may be issued at any time prior to or subsequent to the commencement of a disciplinary proceeding under s RL 2.04.

Wis. Admn. Code §RL 6.09

RL 6.09 Hearing to show cause.

- (1) The respondent shall have the right to request a hearing to show cause why the summary suspension order should not be continued until the effective date of the final decision and order in the disciplinary action against the respondent.
- (2) The request for hearing to show cause shall be filed with the licensing authority which issued the summary suspension order. The hearing shall be scheduled and heard promptly by the licensing authority but no later than 20 days after the filing of the request for hearing with the licensing authority, unless a later time is requested by or agreed to by the licensee.
- (3) At the hearing to show cause the petitioner and the respondent may testify, call, examine and cross-examine witnesses, and offer other evidence.
- (4) At the hearing to show cause the petitioner has the burden to show by a preponderance of the evidence why the summary suspension order should be continued.
- (5) At the conclusion of the hearing to show cause the licensing authority shall make findings and an order. If it is determined that the summary suspension order should not be continued, the suspended license shall be immediately restored.

Opinion

On February 28, 2007, the Wisconsin Real Estate Appraisers Board, after notice to the respondent, ordered the summary suspension of respondent's real estate appraiser's license pursuant to Wis. Stat. § 227.51(3). The respondent timely requested a Hearing to Show Cause, pursuant to Wis. Admin. Code § RL 6.09. On March 23, 2007, the Hearing to Show Cause was held at which time the respondent's license was restored.

Wisconsin statutory law provides for summary suspension as follows, "...If an agency finds that public health, safety or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings shall be promptly instituted and determined." Wis. Stat. § 227.51(3). When a board is presented with a petition for the issuance of a summary suspension order it is required to find probable cause to believe emergency action is imperatively required. The summary suspension order may then issue. Wis. Admin. Code § RL 6.06 (1).

The Hearing to Show Cause may be requested at the option of the respondent, and requires the petitioner to show by a preponderance of the evidence why the summary suspension order should be continued. Wis. Admin. Code § RL 6.09(4). In this matter the petitioner failed to meet its burden of proof to support the factual finding needed to continue a summary suspension order in effect. "...the validity of any action taken under the statute and proposed rules will be measured against whether the facts support a finding that there was a severe emergency." 76 Op. Att'y Gen. 110, 113 (1987) The requirement of a severe emergency is therefore recognized by the Attorney General as being implicit in Section 227.51(3), Stats.

Requisite findings underlying an order for summary suspension must always demonstrate the need to take emergency action. A mere showing of probable unprofessional conduct alone is not enough.

The respondent is not alleged to have committed fraud in this case. Rather, the Order of Summary Suspension and Complaint filed thereafter focus on five appraisals performed between June, 2005 and July, 2006. For each appraisal a list of errors is alleged. No explicit citations to USPAP Standards Rules violations are pled in the Complaint, nor referenced in the Order of Summary Suspension.

A large portion of the Hearing to Show Cause dealt with wrangling over the existence of and the effects of the errors alleged in the Complaint. However, the Wis. Admn. Code § RL 6.09, Hearing to Show Cause procedure is not a full blown evidentiary hearing on the merits. Rather the focus is on the existence or potential existence of conduct requiring emergency action.

The factors necessary to support the need for imperative emergency action are not set forth in Section 227.51(3), Stats. Likewise, the concept of a “severe emergency”, as used by the Attorney General is not further defined. The general rule is that, “in the absence of an applicable statutory definition, it is the common usage of nontechnical words and phrases which is presumed meant by the legislature.” *Department of Revenue v. Trudell Trailer Sales*, 104 Wis.2d 39, 42, (1981) citing *State v. Ehlenfeldt*, 94 Wis.2d 347, 356, (1980). Absent a statutory definition, words are construed according to their common and approved usage, which may be established by resort to recognized dictionaries. *Northwest Properties v. Outagamie County*, 223 Wis.2d 483, 490 (Ct.App. 1998).

Webster defines ‘emergency’ as, “a sudden, generally unexpected occurrence or set of circumstances demanding immediate action...” Webster's New World Dictionary, *Second College Edition*. (1974).

Given that the Attorney General interprets Section 227.51(3) to require a factual finding of a severe emergency, in combination with the use of the words, “imperatively requires emergency action” in the text of Section 227.51(3), it is apparent that the summary suspension process requires an additional showing of a nexus between the complained of conduct and an articulable imminent serious threat to the public constituting an emergency.

Karen Scott, a Wisconsin Certified General Appraiser and member of the Department’s Real Estate Appraisers Board, reviewed the respondent’s appraisal reports at issue in the Complaint.^[1]

Without belaboring the specifics of the appraisal reports at issue addressed by Ms. Scott, one conclusion is clear. At best, Ms. Scott has only provided evidence of violations which may be addressed more fully in an evidentiary hearing.^[2] No substantial evidence was presented to support a finding of conduct or threat of conduct that, “imperatively requires emergency suspension.”

The petitioner, bearing the burden of proof asked the following of Ms. Scott:

BY MR. SCHWEITZER:

Q Based on all of the information that you have reviewed, the questions that we've asked, the testimony you've been told about or perhaps heard, do you have an opinion as to whether Mr. Miller has demonstrated that he has engaged in or is likely to engage in conduct such that the public health, safety, or welfare imperatively requires emergency suspension of his license?

A Yes.

Q What is that?

A My opinion is that his license should be suspended until resolution of the complaints against him.

MR. SCHWEITZER: Thank you. Nothing else. (R.T. p. 103)

Such testimony is wholly unresponsive of maintaining the summary suspension in this case.

On cross examination Ms. Scott supplied little additional analysis of value. Her further testimony could at best be said to potentially support a USPAP Standards Rule violation, but does not credibly support a finding for the need for summary suspension of the respondent’s license.

Q How has the public health been endangered or likely to be endangered by Mr. Miller?

A Health, I would interpret that word to mean physical health, and that's not an issue.

Q How about the public safety?

A I think that his appraisals are at best careless. As an example, if you look at pages 74 and 75, we have properties which sold for \$60,000, and the seller gave the buyer \$8,925 and change, so the property sold for \$51,075; yet, Mr. Miller appraised it for 21 percent more than that sales price without providing any support for that value opinion. If we look at the question -- I don't --page 146, Mr. Miller clearly does not understand departure nor limited appraisal,

and that's a very basic USPAP term. He doesn't understand it. He says that he departed, and then he says that the reason for departure is that an approach is not applicable. That isn't subject for departure.

Q How is the public safety endangered by that?

A Because he doesn't understand -- if you have a person that doesn't understand their profession, how can they be completing their work in a competent, professional manner?

Q Is there any one of Mr. Miller's appraisals that you reviewed where you felt his opinion on value was incorrect?

A Yeah. I just told you the A-frame, page 75; his value opinion is completely unsupported.

Q Do you think it's wrong?

A Yes.

Q What should be the value then?

A I didn't appraise the property. My professional opinion as of here, as defined by USPAP, is that value opinion is totally unsupported.

Q Is it wrong?

A I think that it's wrong, yes.

Q Then what is the right opinion? What should it have been?

A A review appraisal does not require me to give my own opinion of value. If I give you an opinion of value, I have made an appraisal; and I have not appraised this property.

Q But you're telling us that Mr. Miller's number is wrong?

A Yes.

Q Okay. Then isn't it fair for me to ask you what the right number is?

A It's fair for you to ask, but I can't answer the question because I have not appraised the property. As an appraiser, if I give you a dollar number, it means that I have appraised the property and I have to adhere to --

(Reporter interruption)

A My answer is that: Yes, I think it's fair for you to ask me the question if I have an opinion of the value of the Lyndon Station property. However, as an appraiser, if I give a dollar number, it means that I have made an appraisal. And I have to go through all of the steps pertained in Standards Rules 1 and 2 to give that dollar opinion of value, so I cannot answer that question. And I refer you to the definition of appraisal in USPAP on page 1. "It is the act or process of developing an opinion of value." Within a review appraisal, I am obligated to formulate an opinion as to whether or not the -- I'm looking at page 35, line 1193. "Develop an opinion as to whether or not the analyses, opinions, and conclusions are appropriate and reasonable given the scope of work applicable to the assignment and develop the reasons for disagreement." And I think I've given you my reasons for disagreeing with his value opinion. It's completely unsupportive.

Q So would you agree that even an unsupported opinion of value may nevertheless be an accurate opinion of value?

A No. I wouldn't agree with that because an unsupported opinion of value violates USPAP. So it's irrelevant whether the dollar number matches or not.

Q So you're saying, if I understand it then, the public safety is endangered by Mr. Miller because he hasn't properly supported his opinions on value?

A He demonstrated -- yes. And he's also demonstrated that he does not understand basic USPAP terminology and procedures by describing his reports as a -- his other report as a limited appraisal, and he doesn't know what departure is. He doesn't understand what a limited appraisal is. And I'm referring to page 146.

Q And how is the public welfare imperatively -- I'm sorry. How is the public welfare endangered by Mr. Miller or likely to be endangered?

A His work cannot be relied upon. His value opinion cannot be relied upon based on the information that's been presented today. (R.T. pp. 104-109)

While generally addressing incompetence, at one point Ms. Scott sparred over one of the respondent's valuation opinions, claiming it to be 'wrong' but refusing to supply her opinion of a correct value. In summary, Ms. Scott's testimony may present interesting questions regarding how to parse the, at times, arcane provisions of USPAP, but hardly amounts to the stuff upon which emergencies are built.

Date: May 29, 2007

William Anderson Black
Administrative Law Judge

[1] The Real Estate Appraisers Board is the disciplinary authority in this case, and Ms. Scott is a current board member, while also serving as the prosecution's expert witness against the respondent.

[2] At this stage of the proceedings, I do not make any specific findings regarding the existence of violations. The parsing of the alleged violations will require a full evidentiary review of the facts and law at issue, including a dissection of the applicable USPAP standards rules, comments and advisory opinions.