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STATE OF WISCONSIN
BEFORE THE REAL ESTATE APPRAISERS BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
BRIAN A. PATTERSON,	:	LS0808282APP
RESPONDENT.	:	

Division of Enforcement Case No. 07APP066

The State of Wisconsin, Real Estate Appraisers Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Appraisers Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 25th day of February, 2009.

Sharon Fiedler
Member
Real Estate Appraisers Board

IN THE MATTER OF THE DISCIPLINARY :
PROCEEDINGS AGAINST :

BRIAN A. PATTERSON,
RESPONDENT.

:
:
:
:
:

PROPOSED DECISION
AND ORDER
Case No. LS0808282APP

[DOE Case No. 07APP066]

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

Mr. Brian A. Patterson
7809 N. 60th Street, Apt. C
Milwaukee, WI 53224

Department of Regulation and Licensing
Bureau of Business Licensure
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation & Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

A hearing in the above-captioned matter was held on December 10, 2008, before Administrative Law Judge Jacquelynn B. Rothstein. The Division of Enforcement appeared by attorney John N. Schweitzer. Mr. Patterson did not appear.

Based on the entire record in this case, the undersigned administrative law judge recommends that the Real Estate Appraiser's Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Brian A. Patterson is licensed in the State of Wisconsin as a Real Estate Appraiser (License #4-2019). His license was first granted on February 20, 2007.
2. Mr. Patterson's current address on file with the Department of Regulation and Licensing is 7809 N. 60th Street, Apartment C in Milwaukee, Wisconsin.
3. On May 20, 2007, Mr. Patterson allegedly appraised property located at 5355 N. 57th Street in Milwaukee, Wisconsin, with an estimated value of \$126,300.
4. Mr. Patterson allegedly utilized information from the Multiple Listing Service (MLS) in preparing his appraisal and he identified MLS as the source of his information for reporting that "The subject property has had no change of ownership in the past three years." The MLS sheet for the subject property showed that the subject had been listed for sale from July 18, 2006, to November 1, 2006, for \$116,600; however, in his appraisal report, Mr. Patterson allegedly checked "no" in response to whether or not the subject property had been listed for sale in the previous twelve months.

CONCLUSIONS OF LAW

1. The Real Estate Appraisers Board has jurisdiction in this matter pursuant to § 458.26, Wis. Stats.
2. The evidence does not establish that Brian A. Patterson created a misleading report in violation of Uniform Standards of Professional Appraisal Practice, Standards Rule (SR) 1-5.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that this matter be **DISMISSED**.

OPINION

The Complaint in this matter alleges that Brian A. Patterson violated the Uniform Standards of Professional Appraisal Practice, Standards Rule (SR) 1-5 by creating a misleading appraisal report, namely because he checked “no” in his report in response to whether the subject property had been listed for sale in the previous twelve months. Testifying as an expert witness in this matter was Gary Gruenisen, a Wisconsin Certified General Appraiser. When asked on direct examination whether he believed that the conduct in which Mr. Patterson engaged violated Standards Rule (SR) 1-5, Mr. Gruenisen replied, “It does not.” Tr. at 25.

Nevertheless, the Division of Enforcement is seeking a default judgment against Mr. Patterson. Section RL 2.14 of the Wisconsin Administrative Code provides, in relevant part, that if a respondent fails to file an Answer or fails to appear at the hearing, he or she is in default and the disciplinary authority *may* make findings and enter an order on the basis of the complaint and other evidence. (emphasis added)

During the hearing in this matter, the Division of Enforcement failed to present any evidence that Mr. Patterson was, in fact, the person who actually conducted the appraisal in question or that he was the person who signed the subject appraisal. While Exhibit 2 purports to be the appraisal at issue in this matter, it was not a certified copy nor was there any evidence presented regarding its chain of custody, thus calling its authenticity into question. As a consequence, it is unknown whether these are legitimate documents upon which one can rely. In addition, there was no evidence that Mr. Patterson had been served with the Complaint, only that it was sent to his last known address. Mail sent to Mr. Patterson from the Division of Enforcement via both certified mail and by regular U.S. mail was returned. It therefore appears as if Mr. Patterson may have been unaware of the disciplinary proceedings against him.

Making a default finding is discretionary. In order to make such a finding, the respondent either has to fail to file an Answer or has to fail to appear at the hearing. In this case, Mr. Patterson not only failed to answer the Complaint, but he also failed to appear at the scheduled hearing. However, it appears as if Mr. Patterson may not have had actual notice of either the Complaint or the hearing date and was therefore unable to respond to the Complaint or appear at the hearing. Additionally, s. RL 2.14, Wis. Admin. Code, provides that while a disciplinary authority may make findings and enter an order, it must be based not only on the complaint but also upon “other evidence.”

The evidence in this case plainly suggests that Mr. Patterson was not in violation of Uniform Standards of Professional Appraisal Practice, Standards Rule 1-5. In order to sustain the credibility of the regulatory boards and in order to ensure the integrity of the disciplinary process, it is imperative to present a prima facie case against those individuals who are facing disciplinary action. Mr. Gruenisen’s opinion was clearly at odds with the allegations. Also, utilizing exhibits whose origin and authenticity are unknown and unexplained is not a sustainable basis for issuing a disciplinary order, particularly when the respondent may not have had actual notice of either the underlying complaint or the scheduled hearing date. For these reasons, the Motion for Default is denied.

It is also important to note that Mr. Gruenisen opined during the evidentiary hearing that he believed Mr. Patterson’s conduct violated Uniform Standards of Professional Appraisal Practice, Standards Rule 1-1 and 2-1, rather than 1-5 as originally alleged in the Complaint. Tr. at 24. Thereafter, the Division of Enforcement moved the undersigned “to amend the violation to conform to the proof” in this matter. Id at 25. That motion is denied on the basis of the decision issued in

Darlene Bracegirdle was a nurse charged by the Board of Nursing for using excessive force on a nursing home patient while removing his dentures. But what the parties tried during Ms. Bracegirdle's hearing was not what the Board of Nursing ultimately decided. *Id.* at 418. According to the court, fundamental fairness required that the Board decide Bracegirdle's "guilt" or "innocence" on the charges that were originally filed against her in the Complaint, **not** on the charges that the Board first announced in its final decision. *Id.* (emphasis added) Because the Board failed to base its decision on what was contained in the Complaint and instead substituted an alternative finding of its own, the court concluded that the Board of Nursing had denied Bracegirdle with procedural due process. Indeed, the court cited several Wisconsin Supreme Court decisions to support its conclusion.

One of the cases it cited, for instance, was *General Electric Company v. Wisconsin Employment Relations Board*, 3 Wis. 2d 227, 88 N.W.2d 691 (1958). In that case, the union charged General Electric with violating the seniority and transfer provisions of a collective bargaining agreement. The Employment Relations Board concluded that General Electric had not violated those provisions, but had violated the wage supplement provision of the agreement. The court held that the Employment Relations Board was not entitled to make a finding with respect to a situation not in issue. Regarding the substitution, the court said:

The principle of fair play is an important factor in a consideration of due process of law. Parties in a legal proceeding have a right to be apprised of the issues involved, and to be heard on such issues. A finding or order made in a proceeding in which there has not been a "full hearing" is a denial of due process and is void.

Id. at 18-19. (citations omitted)

Here, as in the *General Electric* case, the Real Estate Appraisers Board is being asked to violate due process by substituting the original violation against Mr. Patterson with two alternative ones. If the Real Estate Appraisers Board was to make such a substitution, it would violate the principles of fair play which are essential to affording due process to those who come before it. Mr. Patterson has a right to be apprised of the actual charges against him, not ones that "conform to the evidence" or ones that are announced for the first time in the Board's decision. To do so would result in a decision in which there had not been a full hearing thereby denying Mr. Patterson of his due process rights. When a board fails to issue an order in which there has not been a full hearing, it not only denies licensees their due process, but it also voids any underlying orders that it issues in those circumstances.

Without sufficient evidence to support the allegations contained in the complaint, neither a default judgment can be made nor a disciplinary order issued against Mr. Patterson. Furthermore, in light of the *Bracegirdle* decision, it would be a violation of due process to substitute one violation for one or more alternative ones. Consequently, because there is insufficient evidence to show that Brian A. Patterson engaged in unprofessional conduct it is strongly recommended that this matter be dismissed.

Dated at Madison, Wisconsin, this 19th day of December, 2008.

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Jacquelynn B. Rothstein
Administrative Law Judge