

November 5, 1996

TO WHOM IT MAY CONCERN:

Please note changes on the cover page of an opinion filed October 25, 1996 re: *Porter Williams v. Real Estate Appraisal Commission for the State of Tennessee*. The attorney's have been reversed to correctly reflect the record.

PORTER WILLIAMS,)	
)	
Petitioner/Appellant,)	Appeal No.
)	01-A-01-9604-CH-00177
v.)	
)	Davidson Chancery
REAL ESTATE APPRAISAL)	No. 94-1089-I
COMMISSION FOR THE)	
STATE OF TENNESSEE,)	
)	
Respondent/Appellee.)	

<p>FILED</p> <p>October 25, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

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AFFIRMED AND REMANDED

O P I N I O N

Petitioner/appellant, Porter Williams, appeals the chancery court's judgment which confirmed the decision of respondent/appellee, the Real Estate Appraisal Commission for the State of Tennessee, and denied appellant relief under a writ of certiorari. The facts out of which this matter arose are as follows.

In late 1991, petitioner applied to respondent for certification as a certified general appraiser. Although respondent approved petitioner's application, he still had to pass the appraiser's certification examination before respondent could certify him. Petitioner then sat for the examination in February 1992, but was unsuccessful. He tried three more times in the next ten months, but never passed the certification examination.

While attempting to pass the examination and despite the fact that it was illegal, petitioner appraised a residence located in Hendersonville, Tennessee. Petitioner then took an appraisal certificate belonging to one Luther Bratton, with whom he had been formally associated, and altered it so that it represented petitioner as certified residential appraiser number 621. Petitioner used the forged certificate to collect the fee for the Hendersonville appraisal.

Respondent became aware of petitioner's activities and filed a complaint against him in August 1992. When confronted by respondent, petitioner admitted that he preformed the Hendersonville appraisal and that he altered Mr. Bratton's certificate. After receiving petitioner's response to the complaint and considering his actions, respondent denied petitioner certification and referred the matter to the district attorney's

office for criminal prosecution. The district attorney's office criminally prosecuted petitioner who ultimately plead guilty to appraising without a license. Petitioner was not formally convicted. Instead, the case was diverted and a probationary restraint instituted.

In January 1993, petitioner moved respondent to "reconsider" its denial of certification. Respondent met the following month and reconsidered its earlier decision. Because of petitioner's previous acts, it approved certification conditioned on petitioner successfully completing his criminal probation. Respondent incorporated the decision into a consent order and presented the consent order to petitioner for his approval and signature. Petitioner refused to sign the consent order, but continued his appraisal business.

On 20 September 1993, a Mark McKenzie filed a complaint with respondent alleging that petitioner had incompetently appraised his property located in Franklin, Tennessee. Respondent did not refer the McKenzie complaint to the district attorney's office because petitioner did not actually write the McKenzie appraisal report. Respondent did conclude, however, that at a minimum petitioner had improperly involved himself in the McKenzie appraisal and that his firm documentation and letterhead could misrepresent to the public that he was a certified appraiser. Based on these conclusions, respondent issued a cease and desist letter to petitioner instructing him to correct his firm's documentation.

Petitioner submitted a second application for certified residential appraisal certification on 2 February 1994. Respondent considered petitioner's second application at its meeting and voted unanimously to disapprove it. Respondent based its decision on

their review of petitioner's file and their consideration of his entire course of conduct during the previous three years.

Petitioner did not seek a rehearing before respondent, but filed a petition in the Davidson County Chancery Court. He alleged that respondent had arbitrarily and capriciously denied his application and that respondent's decision was not supported by material evidence. Respondent moved to dismiss the petition for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. Respondent argued that petitioner was not entitled to review in the chancery court because respondent's decision did not derive from a contested case proceeding. Petitioner responded by moving to amend his petition to allege a cause of action and sought a writ of certiorari. The chancellor denied petitioner's motion to amend. Although petitioner had not specifically stated that he was proceeding under the Uniform Administrative Procedures Act, the chancellor treated the petition as one brought under that act and ruled that the UAPA did not entitle petitioner to judicial review of respondent's decision.

Petitioner then moved the court to alter or amend its judgment and again requested leave to proceed pursuant to a writ of certiorari. On 17 January 1990, petitioner filed a "First Amended Petition for Writ of Certiorari and Supersedeas." On 16 August 1995, the chancellor dismissed the petition for writ of certiorari and supersedeas because petitioner did not timely file his brief. Petitioner then moved to reinstate the petition and the chancellor entered an order granting reinstatement.

Following the reinstatement of the case, respondent answered the petition. Petitioner then contended that he was proceeding under a statutory writ of certiorari rather than a common law writ.

Subsequently, the court confirmed the matter was proceeding under the common law writ.

The chancellor heard final arguments and issued a memorandum opinion denying petitioner the relief requested in the writ. The chancellor held that respondent's denial of petitioner's second application was supported by substantial and material evidence and that petitioner had not proved that respondent exceeded its jurisdiction or acted capriciously, illegally, or arbitrarily by denying the application. Petitioner then filed his notice of appeal to this court. Petitioner presented one issue: "Whether [respondent] exceeded its jurisdiction or acted illegally or arbitrarily by denying petitioner's application for licensure as a state certified residential real estate appraiser, or whether [respondent] had substantial and material evidence before it to justify denial of petitioner's application."

Appellate review of actions brought under a common law of writ of certiorari is narrow and limited to a determination of whether the agency exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily. ***Powell v. Parole Eligibility Review Bd.***, 879 S.W.2d 871, 873 (Tenn. App. 1994). This court can not consider the intrinsic correctness of respondent's decision to deny petitioner's second application because it is beyond our scope of review. ***Henry v. Board of Claims***, 638 S.W.2d 825, 827 (Tenn. App. 1982). If respondent's order is not supported by material evidence it is arbitrary and void. ***Hoover Motor Express Co. v. Railroad & Pub. Utils. Comm'n***, 195 Tenn. 593, 606, 261 S.W.2d 233, 238-40 (1953).

We are of the opinion following a complete review of this record that respondent denied petitioner's second application for certification based on the totality of petitioner's conduct for the

three years prior to his application. Respondent's administrative director at the time respondent denied petitioner certification explained: "[Petitioner's] reapplication was denied on February 14, 1994 The denial was based on the [petitioner's] course of conduct over the previous years, which in the Commission's discretion constituted dishonest acts, or those involving misrepresentation, in accordance with T.C.A. § 62-39-326(4), as well as his refusal to comply with the conditions contained in the consent order, which [petitioner] never signed." This finding was confirmed by the chancellor. The chancellor found after argument by counsel for each of the parties and careful consideration of petitioner's allegations that respondent had denied the second application based on petitioner's entire course of conduct over the previous three years. This course of conduct included violating Tennessee Code Annotated section 62-39-103 by appraising a Hendersonville residence without being licensed, violating Tennessee Code Annotated section 62-39-326 by intentionally altering and using Mr. Bratton's appraisal certificate to collect a fee, improperly involving himself in the McKenzie appraisal, and using potentially misleading firm documentation.

Respondent has the power to approve or disapprove applications for appraiser licensure and certification. Tennessee Code Annotated section 62-39-316 specifically authorizes respondent to deny an appraiser certificate to an applicant on any grounds set forth in title 62, chapter 39. Tenn. Code Ann. § 62-39-316 (Supp. 1995). Tennessee Code Annotated section 62-39-326(4) provides:

Violations - Revocation or suspension. - The rights of any applicant or holder under a certificate as a state licensed or certified real estate appraiser may be revoked, suspended, or restricted, or the owner of the certificate may be assessed a civil penalty of up to one thousand dollars (\$1,000) per violation, or otherwise disciplined in accordance with the provisions of this chapter, upon any of the following grounds:

. . . .

(4) An action or omission involving dishonesty, fraud or misrepresentation;

Tenn. Code Ann. § 62-39-326(4)(Supp. 1995). This section, in conjunction with Tennessee Code Annotated section 62-39-316, authorizes respondent to consider an applicant's acts of dishonesty when deciding whether to approve or disapprove an application or when exercising its disciplinary and regulatory jurisdiction. Twice within the three years prior to reapplying petitioner had been the subject of complaints filed with respondent. Both of the complaints involved acts of dishonesty or misrepresentation. Thus, respondent acted within its statutory authority when it considered petitioner's previous conduct and denied his second application.

Petitioner claims that respondent based its decision on an erroneous conclusion. To explain, petitioner answered "no" to a question on the application which asked: "[H]ave you ever been convicted or, plead guilty, or plead no contest to any criminal offense, or is there any criminal charge now pending against you?" It is petitioner's contention that he answered the question truthfully because he was not formally convicted and the charge was expunged and dismissed, but that respondent believing petitioner had lied decided to deny his application on that basis.

Petitioner's argument rest on the single statement of a member of respondent. This argument is contradicted by the record and derives from petitioner's misapprehension of the facts. Respondent's members were aware of the legal effect of petitioner's guilty plea and the subsequent criminal diversion and restraint. The record reveals that respondent was repeatedly advised concerning the legal effect of the guilty plea and that respondent's members understood why petitioner answered "no" to the question on the application. In addition, the record only contains one comment by a single member of respondent indicating that respondent even took notice of the way petitioner answered that

particular question on the application. That comment was immediately countered by the comment of another member who pointed out that petitioner had attached a statement explaining his answer to the question. After this exchange between respondent's members, legal counsel advised respondent that they had grounds to deny petitioner's second application based on the entire course of his conduct during the previous three years. It was on this basis that respondent voted to deny petitioner's second application.

Petitioner also argues that respondent exceeded its jurisdiction because it certified another individual who had appraised without a license. The heart of petitioner's argument is that because a Mr. Meeks and petitioner both appraised without a license they must be similarly situated, and therefore, respondent must treat them exactly the same. We respectfully disagree. The fact that Mr. Meeks and petitioner shared one experience does not make them similarly situated and it does not require respondent to treat them identically.

The only significant commonality shared by Mr. Meeks and petitioner is that they both appraised without a license. When one examines the circumstances under which Mr. Meeks obtained transitional licensure, one finds fundamental differences which preclude a finding that petitioner and Mr. Meeks are similarly situated. The distinction between Mr. Meeks and petitioner include: 1) petitioner was criminally prosecuted for his violation of the appraisal statute and Mr. Meeks was not; 2) Mr. Williams demonstrated an intent to violate the law by fraudulently altering and then using Mr. Bratton's appraisal certificate, but the district attorney determined that Mr. Meeks did not intend to violate the law and declined to prosecute; and 3) Mr. Williams had an additional complaint filed against him after appraising without

a license and Mr. Meeks did not. In addition, Mr. Meeks agreed to conditional licensure, an alternative refused by petitioner.

Petitioner and Mr. Meeks were not similarly situated and there is no merit to petitioner's argument that respondent exceeded its jurisdiction. There are fundamental distinctions between the two situations. We are of the opinion that respondent has properly exercised its jurisdiction in this matter and not acted in excess of it.

Petitioner's final argument is that respondent could not rely on the complaint because he was not involved in performing the McKenzie appraisal. The record clearly shows that petitioner participated in the appraisal and misrepresented his status. An associate of petitioner, Eunice Newsom, went to the McKenzie property with petitioner to perform the appraisal. Petitioner admits that while he was at the property he measured the dwelling that was the subject of the appraisal and collected data necessary to the appraisal process. Petitioner's involvement was confirmed by Ms. Newsom.

Despite petitioner's presence at the property, his active involvement in measuring the residence, his collecting other data necessary to issue the appraisal report, and the fact that petitioner as principal of the appraisal firm was ultimately responsible for the completion of the appraisal, petitioner would have us find that he simply was not involved in the McKenzie appraisal. While petitioner did not write the appraisal report, the evidence clearly demonstrates that he was involved in the appraisal process. Moreover, it was the aspect of the appraisal that petitioner admitted being involved in, the measurement of the dwelling, that Mr. McKenzie claimed was performed incompetently. Moreover, as a principal of Williams and Associates, petitioner's

presence at the McKenzie property during the appraisal in conjunction with his misleading firm letterhead and documentation constituted at least a silent misrepresentation to Mr. McKenzie that petitioner was a certified appraiser. Petitioner was involved in the McKenzie appraisal and it was within respondent's jurisdiction to consider that fact when denying petitioner's second application.

Our review of this record reveals that respondent acted within its jurisdiction and based its denial of petitioner's second application on substantial and material evidence that included multiple violations of the appraisal statutes. Throughout the pendency of petitioner's two applications, respondent acted fairly with respect to petitioner and endeavored to give petitioner the benefit of the doubt. This record shows that respondent fairly and properly exercised the disciplinary jurisdiction granted it by the General Assembly.

The decision to deny petitioner's second application is affirmed with costs on appeal assessed to petitioner/appellant, Porter Williams. The cause is remanded to the chancery court for any further necessary proceedings.

SAMUEL L. LEWIS, JUDGE

CONCUR:

HENRY F. TODD, P.J., M.S.

