

**COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION**

Tony V. Sekulovski, :  
Appellant, : CASE NO. 17CV-10-9600  
-vs- : **JUDGE SERROTT**  
Ohio Real Estate Commission, :  
Appellee. :

**DECISION AND ENTRY REVERSING THE OHIO REAL ESTATE COMMISSION**

Rendered this 12<sup>th</sup> day of February, 2018.

**SERROTT, JUDGE.**

**I. FACTS AND PRELIMINARY STATEMENT**

Appellant perfected this R.C. §119.12 Appeal from a decision of The Ohio Real Estate Commission (hereinafter the Commission) revoking Appellant’s inactive real estate license. The matter is fully briefed and ready for decision. The Appellant a thirty year licensee, with no prior discipline, was an Ohio real estate salesperson in 2013-2014 that held a license that was in “inactive status.”<sup>1</sup>

However, the Appellant was licensed in Arizona as a real estate broker in good standing in 2013 and 2014. The Appellant had an office in Arizona and intended to relocate to Arizona and had in 2007 moved his family to Arizona. Because Appellant had a broker’s license in Arizona he put his Ohio real estate license into an inactive status. Appellant used his Arizona broker’s license in representing properties across the United States including two in Ohio. In 2013, Appellant entered into an agreement with Chris Brigdon, an Ohio licensed real estate broker, to sell two pieces of property that are the subject of the alleged violations herein.

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<sup>1</sup> 2013-2014 are the dates of the two transactions forming the basis for Appellant’s discipline.

Both properties were sold and the commission/fees were paid to Appellant who paid a fee to Brigdon pursuant to their agreement. The commission/fees were not placed in escrow nor in any national title company account. However, the commission/fees were earned by the Appellant and Brigdon at the time paid and the funds were not “escrow funds or security deposits.”

As a result of those two transactions, the Commission issued a Notice of Charges and opportunity for a hearing to the Appellant. The gravamen of the charges was that Appellant was not eligible to engage in the two transactions as an “out of state” broker because he maintained an inactive real estate salesperson license and resided in and had an office in Ohio. The Commission also alleged Appellant did not comply with all the requirements of R.C. §4735.022(A) which lists seven requirements before an out of state broker can collect a fee or commission. The Commission’s notice did not detail which of the (7) subsections Appellant allegedly violated and instead merely referenced the statute.

Appellant demanded a hearing, at which the Commission presented evidence and argued that the Appellant did not qualify as an out of state broker under the code; that Appellant did not deposit the commissions/fees into Brigdon’s escrow account; and that Appellant failed to provide a “Certificate of Good Standing from Arizona” to Brigdon to establish his Arizona broker’s license was valid.<sup>2</sup>

Following the hearing, the Hearing Officer issued a report finding the above violations. Despite Appellant’s thirty-year spotless record, the Commission revoked Appellant’s inactive license. This revocation will no doubt cause Arizona to discipline Appellant and affect his Arizona broker’s license. Appellant then timely filed this appeal to this Court.

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<sup>2</sup> Appellant’s license was valid and Arizona did not have any document it could issue as a “Certificate of Good Standing” because such a document does not exist in Arizona, but Arizona did issue proof of good standing and Appellant provided evidence his license was at all times valid in Arizona.

**II. STANDARD OF REVIEW**

In a R.C. 119.12 appeal, the Court must affirm the order of the Commission if it is supported by substantial, reliable, and probative evidence. *Our Place, Inc. v. Ohio Liquor Control Comm’n*, 63 Ohio St.3d 570 (1992). “The Ohio Supreme Court has defined reliable, probative, and substantial evidence as follows: (1) ‘Reliable’ evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) ‘Probative’ evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) ‘Substantial’ evidence is evidence with some weight; it must have importance and value.” *Keydon Mgmt. Co. v. Liquor Control Comm’n*, 10th Dist. No. 08AP-965, 2009-Ohio-1809, at ¶5 (quoting *Our Place*, supra, at 571).

“[D]etermining whether an agency order is supported by reliable, probative and substantial evidence essentially is a question of the absence or presence of the requisite quantum of evidence.” *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111(1980). “To some extent, this standard of review permits the court of common pleas to substitute its judgment for that of the administrative agency.” *Dep’t of Youth Servs. v. Mahaffey*, 10th Dist. Nos. 14AP-389 and 14AP-396, 2014-Ohio-4172, ¶13. “The court must, however, ‘give due deference to the administrative resolution of evidentiary conflicts.’” *Id.*, quoting *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980). However, “[w]hile the court must give due deference to the administrative tribunal, it need not rubber stamp an erroneous decision.” *Decree v. Columbus*, 10th Dist. No. 89AP-247 (Aug. 17, 1989), citing *Conrad*.

**III. THE COMMISSION’S NOTICE OF VIOLATIONS TO APPELLANT WAS INSUFFICIENT NOTICE OF THE ALLEGED VIOLATIONS PURSUANT TO R.C. §119.07 AND WAS IN VIOLATION OF THE APPELLANT’S CONSTITUTIONAL DUE PROCESS RIGHTS TO BE PUT ON NOTICE OF THE CHARGES SO THAT APPELLANT COULD PRESENT A DEFENSE**

The notice of the charges to Appellant is set forth verbatim as follows:

**You, Tony Sekulovski, a licensed real estate salesperson (License # 000034422), did the following between approximately February of 2013 and approximately September of 2014 with respect to one or more of the following properties: 246 Lincoln Circle, Gahanna, Ohio; 6355 Sawmill Road, Dublin, Ohio:**

**Due to your arrangement or relationship with Christopher Brigdon (Brk # 2009001773) failing to comply with one or more requirements found in Ohio Revised Code Section 4735.022(A), you acted like an Ohio broker even though you did not maintain an Ohio broker’s license and/or you acted like an active Ohio real estate licensee even though your Ohio real estate salesperson license was inactive. This conduct constitutes a violation of Ohio Revised Code Section 4735.18(A)(6), misconduct as that section incorporates Ohio Revised Code Section 4735.02(A) which provides that no person shall act as a real estate broker without being licensed pursuant to Chapter 4735 Ohio Revised Code Section 4735.18(A)(6), misconduct, as that section incorporates Ohio Revised Code Section 4735.02(A) which provides no person shall provide services that require a license pursuant to Chapter 4735 when the licensee’s license is inactive.**

As set forth above, the notice merely alleged a violation of “one or more of the requirements in R.C. §4735.022(A).” The notice provided no specific information as to which of the (7) subsections of the statute Appellant allegedly violated. The only specific information referenced was the two transactions and that the Appellant allegedly acted like an Ohio broker even though he did not have an Ohio broker’s license. The notice contains no specific facts or allegations as to why Appellant as a licensed out of state broker did not meet the (7) requirements for an out of state broker.

R.C. §4735.022(A)(1-7) provides the following verbatim:

**(A) An out-of-state commercial broker\*, for a fee, commission, or other valuable consideration, or in the expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration, may perform those**

acts that require a license under this chapter, with respect to commercial real estate, provided that the out-of-state commercial broker does all of the following:

- (1) Works in cooperation with an Ohio real estate broker who holds a valid, active licensee issued under this chapter;**
- (2) Enters into a written agreement with the Ohio Broker described in division (A)(1) of this section that includes the terms of cooperation and compensation and a statement that the out-of-state commercial broker and its agents will agree to adhere to the laws of Ohio;**
- (3) Furnishes the Ohio broker described in division (A)(1) of this section with a copy of the out-of-state commercial broker's current certificate of good standing from any jurisdiction where the out-of-state commercial broker maintains an active real estate license\*;**
- (4) Files an irrevocable written consent with the Ohio broker described in division (A)(1) of this section that legal actions arising out of the conduct of the out-of-state commercial broker or its agents may be commenced against the out-of-state commercial broker in the court of proper jurisdiction of any county in Ohio where the cause of action arises or where the plaintiff resides;**

\*-The asterisked provisions are the provisions at issue in the Commission's discipline of Appellant. The Hearing Officer found that Appellant complied with all other requirements of the Statute.

- (5) Includes the name of the Ohio broker described in division (A)(1) of this section on all advertising in accordance with section 4735.16 of the Revised Code;**
- (6) Deposits all escrow funds, security deposits, and other money received by either the out-of-state commercial broker or Ohio broker described in division (A)(1) of this section in trust or special accounts maintained by the Ohio broker\*;**
- (7) Deposits all documentation required by this section and records and documents related to the transaction with the Ohio broker described in division (A)(1) of this section. The Ohio broker described in division (A)(1) of this section shall retain the documentation that is provided by**

**the out-of-state commercial broker as required under division (A)(7) of this section, and the records and documents related to a transaction, for a period of three years after the date the documentation is provided, or the transaction occurred, as appropriate.**

The Commission's notice required that Appellant "guess" as to which of the (7) subsections he violated and did not allow him to garner evidence in his defense. Appellant knew he had a valid out of state broker's license and that he had also utilized an Ohio broker for the transactions. How was Appellant to know that the Commission interpreted "out of state" broker to mean a person living in another state that held a valid out of state broker's license?<sup>3</sup>

Had Appellant known this was the issue he could have presented evidence of his connections to and possible proof of residence in Arizona. Instead, Appellant was unaware this was one of the specific charges and was blindsided when the Commission presented evidence he "resided" in Ohio and that he had automobiles titled in Ohio.

The notice also did not mention the issue of the certificate of good standing subsection nor did it raise the deposit of the commission/fees as an issue. Again, Appellant could have prepared a more detailed effective defense to these allegations had he known the specifics of the charges.

A licensee is entitled to statutory notice of charges as set forth in R.C. §119.07, which provides that the notice:

**"Shall include the charges or other reasons for the proposed action, the law or rule directly involved and a statement informing the party that the party is entitled to a hearing..." (R.C. 119.07)**

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<sup>3</sup> The Court notes nothing in R.C. §4735.01 nor R.C. § 4735.022 requires an "out of state broker" to actually live in another state. R.C. §4735.01 in its express and plain language defines out of state commercial broker as "any person or [company] that is licensed to do business as a real estate broker in a jurisdiction other than Ohio." The Appellant clearly met this clear and unambiguous definition of an out of state broker.

The mandatory language of the statute, “shall”, requires the Commission to give notice of the “law directly involved,” not just notice of the law but the law directly involved. “Directly” is defined in multiple dictionaries as meaning “exactly.” Therefore, the plain language of the notice statute requires the Commission to specify the subsections of the law that are directly or exactly involved.

This requirement makes logical sense in that the Commission has months and even years to investigate and compile evidence of the specific violations. Fundamental fairness requires that a licensee be given exact notice of the sections alleged so that the licensee can prepare an adequate and effective defense. The Commission knows the specific acts alleged and it is not burdensome for the agency to give the licensee notice of the exact violations and the law directly involved.

Moreover, this interpretation of R.C. §119.07 is consistent with the plain express language of the statute and also comports with constitutional due process notice requirements. Constitutional due process is implicated when the State seeks to infringe on a protected property interest such as a professional license. Sohi v. State Dental Board (1998), 130 Ohio App.3d 414. Due process notice requires that an “individual receive fair notice of the precise nature of the charges that will be raised at a disciplinary hearing.” John v. State Med. Bd. Of Ohio 10<sup>th</sup> Dist. App. 98 AP-1324.

In all the cases relied upon by the Commission regarding this issue, the Court notes that the notice given in those cases by the agency gave a detailed description of the alleged specific conduct and gave the exact detailed section of the law directly involved. See i.e. Griffen v. State Med. Bd. Of Ohio, 10<sup>th</sup> Dist. No. 11AP-174, 2011-Ohio-6089.

In the Sohi case, relied upon by Appellant, the Appeals Court found the notice insufficient because the allegations of misconduct failed to name the specific patients involved. The Court ruled that fundamental fairness requires a detailed notice of the charges to allow the licensee to present a specific defense to the exact charges leveled.

In the case at bar, the Commission did not give a detailed precise description of the conduct alleged to have violated R.C. §4735.022 and failed to give notice of which of the subsections it alleged Appellant violated. Appellant was left to guess which of the (7) subsections he violated and was never put on notice of any of the details of the alleged conduct violating the statute.<sup>4</sup>

The notice failed to comport with the mandatory requirements of R.C. §119.07 and due process requirements. The Appellant was prejudiced as a result because the Appellant could have produced evidence of his “residency” in Arizona. Residency may or may not be defined solely by the actual physical abode where one lives. At a minimum, Appellant could have produced documentary evidence of his residency and connections to Arizona. The Commission knew this was a key issue in the charges because it produced detailed evidence of automobiles titled in Ohio in Appellant’s name and other documentary evidence of his residency in Ohio. Appellant was entitled to know this was an issue and was prejudiced in preparing a full and effective defense of the charges.

Therefore, the Commission’s action and revocation in this case was contrary to law and therefore this Court **REVERSES** and vacates the Commission’s order. This Court will also analyze the other assignments of error because those assignments of error also mandate a **REVERSAL** of the Commission’s order.

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<sup>4</sup> The Commission failed to notify Appellant of the “deposit” issue, the “residency issue”, or “Certificate” issue and instead gave a conclusory “shot gun” notice of the alleged violations.



**IV. THE COMMISSION’S FINDING THAT R.C. §4535.022 DID NOT AUTHORIZE APPELLANT TO ENGAGE IN THE TWO TRANSACTIONS AT ISSUE WAS CONTRARY TO LAW AND NOT SUPPORTED BY THE EVIDENCE.**

The Commission’s determination that Appellant was in violation of R.C. § 4735.02(A) because he did not meet the requirements of R.C. § 4735.022 is not supported by substantial, reliable, and probative evidence and is contrary to law.

The Hearing Officer and the Commission in adopting his report found that Appellant violated R.C. §4735.02(A) because he did not meet three of the seven requirements. The Commission ruled that (1) Appellant did not qualify as an “out of state broker” because he “lived” in Ohio; (2) Appellant did not provide a “Certificate of Good Standing” from Arizona at the time of the transaction; and (3) the commissions/fees were not put into Brigdon’s escrow account and instead were paid by Appellant to Brigdon. The Commission ruled these violations warranted the “death penalty” (revocation) for a thirty year licensee with a spotless record. The Court notes no client complained, no client was harmed, and the violations at best were hyper-technical. This Court cannot modify the sanction but can reverse the decision if it is contrary to law. The Commission’s decision was contrary to law because the Commission interpreted the statutes in a way that contravenes the plain express language of the statute. First, as noted in footnote 3 of this opinion, an “out of state broker” is expressly defined for purposes of the real estate code.

R.C. § 4735.01(S) contains the definition and the following verbatim:

**(S) “Out-of-state commercial broker” includes any person, partnership, association, limited liability company, limited liability partnership, or corporation that is licensed to do business as a real estate broker in a jurisdiction other than Ohio.**

The language of subsection (S) is clear and unambiguous. The definition does not require an out of state broker to live out of state. Had the legislature intended out of state

residency as a requirement it could have expressly written that provision into the statute. The Commission is not permitted to rewrite the law and artificially add an additional residency requirement to the statute when the legislature expressly failed to do so.

The Commission compounded its misinterpretation of the statute by failing to give notice to Appellant that this was a cornerstone of the charges against him. No licensee reading the definition set forth in R.C. §4735.01(S) would be on notice that he had to “live in Arizona” in order to qualify as an out of state broker entitled to do business in Ohio pursuant to R.C. §4735.022. Pursuant to the express terms of R.C. §4735.01(S) Appellant qualified as an out of state broker and was entitled to engage in the two transactions pursuant to R.C. §4735.022 provided he met the other requirements of the statute<sup>5</sup>.

Next, The Commission ruled that Appellant failed to provide a “Certificate of Good Standing” from Arizona to the Ohio broker. The Court notes that no one, not even the Commission, disputes the fact that at all times relevant the Appellant was a licensed broker in good standing in Arizona. At the time of the transactions, the Appellant requested from the State of Arizona a Certificate of Good Standing. He was informed by Arizona that it did not have any such document. Instead, he was told to print out a screen shot of the website showing his Arizona license was current and valid and that no disciplinary actions were pending. The Commission did not contest this evidence and does not contest the fact that Arizona does not have a document labelled “Certificate of Good Standing”. The Appellant did after several requests obtain a document from Arizona that the Commission felt was the functional equivalent of the Certificate set forth in the code. Yet, despite all the above, the Commission concluded that the Appellant still should have produced a document that did not exist from

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<sup>5</sup> The Hearing Officer and The Commission found that he met all the requirements except for the three outlined in this decision.

Arizona. The Commission could not reasonably expect the Appellant to produce a document that did not exist. He did provide the functional equivalent.

A licensee cannot be disciplined for failing to produce a document that did not exist. The purpose of the requirements of the statute is to ensure an out-of-state broker's license is current and valid. Appellant's out-of-state license was current and valid. The Commission does not contest this fact.<sup>6</sup> Therefore, this Court concludes the Commission's order was not supported by substantial, reliable, and probative evidence and was contrary to law.

The last issue relied upon by the Commission to discipline Appellant was its claim Appellant failed to deposit the commission/fees into Brigdon's escrow accounts. (Report p.11) R.C. §4735.022 (A)(6) provides the following verbatim:

**Deposits all escrow funds, security deposits, and other money received by either the out-of-state broker in trust or special accounts maintained by the Ohio broker.**

The obvious plain language of this section establishes that it only applies to funds that do not belong to either broker. The funds would be monies paid as escrowed or security deposits for the transactions. The term "other money received" is a subcategory for like monies, i.e. deposits or funds that do not belong to the broker but instead are to be paid to the seller or buyers upon closing or applied to the purchase price. The intent and purpose of an escrow account is to hold funds belonging to another in trust.

This interpretation is consistent with other provisions of the code which specifically reference commissions and fees. For example, R.C. §4735.022(A) provides "**An out-of-state broker, for a fee, commission or other valuable consideration: perform acts as a broker...**" Had the legislature intended that fees or commissions be placed in the broker's

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<sup>6</sup> As noted by Appellant, The Commission did not even address this issue in its brief thus implicitly indicating to the Court the Commission agrees with the Appellant's position on this issue.

trust account it could have explicitly used those terms in subsection (A)(6) of the same statute. The omission of these terms indicate that the legislature did not intend to require fees or commissions to constitute funds that had to be placed into escrow.

Furthermore, this Court’s interpretation is supported by logic and contract/property law. Pursuant to contract, commissions and fees are only paid upon the closing of the transaction. Upon closing the transaction, the commission and fees have been earned by the broker and become an earned property interest of the broker. It would make no sense to require earned fees to be placed into an escrow account. The State would be interfering with a vested property right of the broker. Once fees and commissions are earned, they may be paid in any manner the broker desires, those funds belong to the broker. The Commission cannot, and did not, advance a single reason as to why fees or commissions have to be placed in trust. The Commission’s interpretation of the statute expands the statute and ignores the express language of both part (A) and (A)(6) of the statute. Thus, the Commission’s order with regard to this issue is not supported by substantial, reliable and probative evidence and is contrary to law.

**V. CONCLUSION**

The Court summarizes its order and decision as follows:

- (1) The Commission’s notice to Appellant violated R.C. §119.07 and Appellant’s due process rights to a detailed description of the charges and deprived the Appellant of a fair opportunity to marshal all the evidence in his defense of the charges;
- (2) The above conclusion mandates reversal of the Commission’s order but the Court also elected to address the other issues in the case. The Court concludes that the Commission’s interpretation of the statutes at issue was contrary to law and the

Commission's order revoking Appellant's license was not supported by substantial, reliable, and probative evidence.

For all these reasons, the Court **REVERSES** the order of the Commission and remands the case for dismissal of all charges against the Appellant.

IT IS SO ORDERED.

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Franklin County Court of Common Pleas

**Date:** 02-12-2018  
**Case Title:** TONY V SEKULOVSKI -VS- OHIO REAL ESTATE COMMISSION  
**Case Number:** 17CV009600  
**Type:** DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, "Mark Serrott", is written over a circular official seal. The seal is partially obscured by the signature and contains some illegible text around its perimeter.

/s/ Judge Mark Serrott

Court Disposition

Case Number: 17CV009600

Case Style: TONY V SEKULOVSKI -VS- OHIO REAL ESTATE  
COMMISSION

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes