Before the
Administrative Hearing Commission
State of Missouri

MISSOURI REAL ESTATE APPRAISERS COMMISSION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 13-1110 RA
	)	
MICHAEL A. TERRELL,	)	
	)	
Respondent.	)	

DECISION

Michael A. Terrell is subject to discipline for errors he made in performing and supervising a residential real estate appraisal.

Procedure

On June 18, 2013, the Missouri Real Estate Appraisers Commission ("MREAC") filed a complaint seeking to discipline Terrell. On August 5, 2013, Terrell was personally served with a copy of the complaint and our notice of complaint/notice of hearing. On March 13, 2014, we held a hearing. Assistant Attorneys General Craig H. Jacobs and Todd C. Lucas represented the MREAC. David F. Barrett represented Terrell. The matter became ready for our decision on August 28, 2014, the date the last written argument was filed.

On August 28, 2014, the case was transferred to Commissioner Karen A. Winn, who, having read the full record including all the evidence, renders the decision. Section 536.080.2;[1] *Angelos v. State Bd. of Regis'n for the Healing Arts*, 90 S.W.3d 189 (Mo. App., S.D. 2002).

Findings of Fact

1. Terrell is certified by the MREAC as a state-certified residential real estate appraiser. His certification is and was, at all relevant times, current and active.

2. In March 2006, Joseph Boyd owned and operated a real estate appraisal business, Residential Appraisal Specialists, LLC ("RAS"). RAS's office was located in Boyd's basement. All records for RAS were kept at that office and there was space for other appraisers to work. There was a computer for the use of all appraisers.

3. At that time, Boyd was a real estate appraiser trainee and performed appraisals for RAS under the supervision of certified appraisers Terrell and Mark Stuart.

4. Terrell worked with RAS as an independent contractor. For his work as a supervisor, he was paid approximately 60% of the fee charged for the appraisal. Terrell was paid in cash, check, or COD (paid by the homeowner at the time of the appraisal). When Terrell was paid COD, the money was paid directly to him and did not pass through RAS's accounts. RAS reduced other payments it owed Terrell to adjust for the COD payments. RAS did not keep complete records of the adjustments.

5. From 2003 to 2006, RAS paid Terrell $27,038.75 by checks.[2]

6. Boyd, Terrell, and Stuart communicated in person, by telephone, and by e-mail about the appraisals. The appraisals were transferred among them by e-mail.

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[1] Statutory references, unless otherwise noted, are to the 2013 Supplement to the Revised Statutes of Missouri.

[2] There is nothing in the record to indicate how much Terrell was paid in cash or COD payments.

7. Boyd kept a log of his appraisals, which included those Terrell supervised. Terrell also kept an appraisal log, but his log did not show all of the RAS appraisals.

8. Signatures were affixed to the documents electronically. Terrell's signature was password protected. Terrell never provided a signature to anyone at RAS so that his signature could only be affixed by him.

9. Karen Townsend was the secretary for RAS. She sometimes affixed Boyd's signature to a document with his permission, which was possible because Boyd's signature was not password protected. She never affixed Terrell's signature to any documents.

10. On March 23, 2006, Boyd and Terrell inspected residential real estate located at 4864 Amy Clark Road, Hillsboro, Missouri ("the Amy Clark Road Property"). Boyd did most of the work in completing the summary appraisal report for the property.

11. The effective date of the Amy Clark Road Property appraisal report was March 23, 2006. The Amy Clark Road Property appraisal report was prepared for Community First Mortgage and valued the property at $358,000.

12. On March 28, 2006, Terrell, as the supervisory appraiser, and Boyd, as the trainee, signed the Amy Clark Road Property appraisal report.

13. At the time of the Amy Clark Road Property appraisal report, the property was a 35-year-old, two-story, eight-room residential property on an approximately ten-acre site. The residential property included four bedrooms and 2.5 baths, with 2,086 square feet of living space. Two outbuildings also existed on the property. There was a relatively small body of water on or near the Amy Clark Road Property, but it was unclear whether it was visible from the property.

14. Terrell was required to develop and report the results of the Amy Clark Road Property appraisal in compliance with the Uniform Standards of Professional Appraisal Practice ("USPAP"), 2005 Edition.

15. In appraising the Amy Clark Road Property and preparing the appraisal report, Terrell failed to:

(a) prepare and retain a work file for the appraisal report;

(b) sufficiently describe and analyze two outbuildings located on the subject property's land by failing to consider factors such as size, age, and type of construction; and

(c) sufficiently support and analyze a finding of the subject property's condition as "average" when it was inconsistently described in the sales comparison approach grid as in "good" condition; and sufficiently support and analyze finding an effective age of only 5-7 years when the property was 35 years old.

16. In the preparation and reporting of the sales comparison analysis in the Amy Clark Road appraisal report, Terrell:

a. used comparable sale 1, a two-year-old home, which was not comparable to the subject property, a 35-year old home.

b. failed to accurately describe and adequately analyze the adjustments for comparable sale 1, as follows: 1) no support for the relatively small $5,500 negative adjustment for the significant 33-year age difference; 2) a positive adjustment for a large front porch when the MLS records indicate the comparable sale had a superior porch; 3) no adjustment for the comparable sales' oversized garage and workshop; 4) no adjustment for the comparable sales' superior kitchen with custom maple cabinets, tile floors, and a breakfast bar; 5) misstated the acreage for the comparable sale property as 4.3 acres when the MLS data showed 12.69 acres;

c. used comparable sale 2, a one-year-old lakefront home in a lake community on a 10,800 sq.-foot lot, which was not properly comparable to the subject property, a 35-year-old home on 10 acres with outbuildings suitable as a horse property;

d. failed to accurately describe and adequately analyze the adjustments for comparable sale 2, as follows: 1) no support for the $20,000 positive adjustment for site; 2) no support for the relatively small ($5,500) negative adjustment for the significant 34-year age difference; 3) no adjustment for the comparable sales' waterfront location, view, or available amenities (clubhouse, pool, and golf), instead describing its view and location as identical to the subject property;

e. used comparable sale 3, a 17-year old lakefront home in a lake community on a 12,160 sq.- foot lot, which was not properly comparable to the subject property, a 35-year old home on 10 acres with outbuildings suitable as a horse property;

f. failed to accurately describe and/or adequately analyze comparable sale 3, including the following characteristics: its location in a lake community; its waterfront location; the amenities available to the property through its subdivision; the presence of a boat slip, boat house, and large patio off the water; and its "beautiful views of water in every room from the back of the house," instead describing its view and location as identical to the subject property;

g. used comparable sale 4, a seven-year old home with a private stocked lake and island accessible by an arched bridge, which was not properly comparable to the subject property, a 35-year old home on 10 acres with only a remote water view;

h. failed to accurately describe and/or adequately analyze comparable sale 4, including its following characteristics: its pasture; a "well stocked lake, with a private island accessible by an arched bridge"; and its garage with electricity, an office, and a workshop;

i. used comparable sale 5, a seven-year-old home with a private stocked lake and island accessible by an arched bridge, which was not properly comparable to the subject property, a 35-year-old home on 10 acres with only a remote water view;

j. failed to accurately describe and adequately analyze comparable sale 5, including the following characteristics: 1) the comparable sale's 8.5-acre site and the subject property's 10-acre site, which are treated as equal so that an adjustment was not necessary; 2) the subject property's two outbuildings and the comparable sale's horse barn, screened gazebo, deck, boat dock, guest house with rooms, a screened porch, a four seasons room, and guest cottage with a screened porch; and 3) the comparable sale's dominant lake view and the limited remote water view, if any, of the subject property;

k. failed to make any adjustments for the location differences between the lake front comparable sales and the subject property;

l. failed to use any of 13 comparable sales ranging in value from $84,500 to $324,000 that sold in the year prior to the effective date of the Amy Clark Property appraisal report that were from 20 to 45 years old, on 5- to 15-acre sites, in the same Hillsboro School District, and more similar in design;

m. failed to provide adequate support and/or analysis for adjustments made for the comparable sales with respect to differences in their design, site size, features, age, view, and/or quality of construction.

17. In the preparation and reporting of the cost approach in the appraisal report, Terrell failed to sufficiently support and analyze the site value of $100,000, describing the method used

to derive the value as "market extraction of land sales or lot pricing within the subject's market." Ex. 3 at 12.

18. On August 2, 2006, Tracy Newhouse, on behalf of the lender, sent RAS a request for copies of Boyd's and Terrell's appraiser licenses since both signed the appraisal report. Townsend forwarded this to Terrell and asked him to send Newhouse a copy of his certification. On August 9, 2006, Terrell responded back:

> Its [sic] been taken care of. I forwarded an e-mail of my license just minutes ago.
>
> However, my records do not reflect any payment to me for this file. Can you please check on this file as well as any others which may have fallen between the cracks utilizing the same diligence to handle this matter.

Ex. 20.

19. On August 11, 2006, at 11:11 a.m., Terrell sent the following e-mail to Townsend:

> Does Mark currently have access to all of the necessary records, this file, as well as all files associated with my name in order to make any necessary corrections of compensation due to American Appraisal/Michael Terrell.

Id. At 12:48 p.m., Terrell sent another e-mail to Townsend stating:

> We checked with Mark and checked our records.
>
> We were advised that there were:
> 19 done in January
> 14 done in February
> 19 done in March
> 21 done in April
> 21 done in May
> 12 done in June.
>
> Mark does not know how many were done in July nor [sic] August.
>
> We have check [sic] our records and we have only received two checks from Residential Appraisal Specialist, and those were check # 5945 dated 12/30/05 and check #5 969 dated 2/1/06 both for a payment of $330.00.
>
> Thanks in advance, Karen for your assistance.

Ex. 20A.

20. By letter dated February 24, 2010, Chase Home Lending asked Terrell to address a list of deficiencies in the Amy Clark Road Property appraisal report, and to do so within 21 days. Terrell did not respond. By letter dated April 12, 2010, Chase notified Terrell that his appraiser status had been changed to "Ineligible for Chase." Ex. 14. The letter informed Terrell that Chase would no longer accept appraisal reports submitted in his name or performed by him. Terrell did not respond to this letter.

21. On June 22, 2010, Chase Home Lending filed a complaint with the MREAC against Terrell.

22. By letter dated June 25, 2010, the MREAC informed Terrell of the complaint filed against him and requested all pertinent documents for the Amy Clark Road Property appraisal, including a full copy of the appraisal report, the work file, and the appraisal request. The MREAC requested this information no later than July 25, 2010.

23. Terrell requested an extension of time to respond and was granted until August 10, 2010. On August 5, 2010, the MREAC received Terrell's response, in which Terrell:

> (a) denied inspecting, reviewing, or serving as a supervisor in the appraisal of the Amy Clark Property;
>
> (b) denied affixing his signature to the Amy Clark Property appraisal report; and
>
> (c) denied having any record, work file, or appraisal request for the Amy Clark Property appraisal.

24. On September 17, 2010, the MREAC sent Terrell a letter by certified mail asking to meet with Terrell at its next scheduled meeting on November 8, 2010. Terrell asked for his appearance to be rescheduled, and it was rescheduled for the February 1, 2011, MREAC meeting. Terrell did not appear. The MREAC rescheduled Terrell's appearance for March 15, 2011.

25. When he appeared at the March 15, 2011 MREAC meeting, Terrell:

(a) denied involvement with the Amy Clark Road Property appraisal report;

(b) denied signing the Amy Clark Road Property appraisal report;

(c) denied ever seeing the Amy Clark Road Property;

(d) denied that he had ever been out in the field, looked at properties, or done anything else with Boyd.

26. In April and May of 2011, Terrell exchanged e-mails with the MREAC. Terrell stated he did not have the work files for the Amy Clark Road Property appraisal.

27. The Amy Clark Road Property appraisal report does not appear in Terrell's personal appraisal logs, but he did not keep a record of all RAS appraisals. However, Boyd's appraisal log contains information about appraisals that Terrell performed with him, and it includes the Amy Clark Road Property.

28. On June 18, 2013, the MREAC filed a complaint seeking to discipline Terrell. June 18, 2013, was less than three years after June 22, 2010.

Conclusions of Law

We have jurisdiction to hear this case. Sections 339.532; 621.045. The MREAC bears the burden of proving that Terrell's license is subject to discipline by a preponderance of the evidence, *see Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App., W.D. 2012) (dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not." *Id*. at 230.

I. Credibility

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App., W.D., 2001). Even when credibility is a

factor, a Commissioner may decide the case after reading the full record but without hearing the evidence. *Angelos*, 90 S.W.3d at 192-94.

We must make a credibility determination between the testimony of Boyd and Terrell. Their testimony is directly contradictory. Boyd testified that he and Terrell worked together on the Amy Clark Road Property appraisal, inspected the property together, and both signed the appraisal report. Terrell testified that he knew nothing about the appraisal and did not sign or cause his signature to be affixed to the report.

At the time of the Amy Clark Road Property appraisal, Boyd was not licensed or certified as a real estate appraiser. In order to conduct and prepare the appraisal, he was required to be supervised by a state certified real estate appraiser. The appraisal report had to be reviewed and signed by the certified appraiser. Section 339.501.3, RSMo 2000.

Boyd testified he followed the above procedure with the Amy Clark Road Property appraisal. He testified that both Terrell and Stuart were hired by RAS to supervise trainees, including him. Terrell attacks Boyd's credibility by noting that there is no evidence that Terrell was paid by check for the Amy Clark Road appraisal. Boyd counters that Terrell was often paid in cash – and it often was the difference between what Terrell collected COD and what he was owed from RAS. He admits that his record keeping was less than professional: "It was a family company. I treated [sic] and thought we were close. We were family. I didn't write everything down." Tr. at 95.

Boyd specifically testified that both his and Terrell's signatures were on the appraisal report when it was sent to the client. He countered Terrell's contention that the signature was a forgery by testifying that placement of Terrell's signature on the document required a password and neither he nor Townsend had access to that password. Tr. at 90-91. Townsend corroborated his testimony that she did not apply anyone's signature without permission and never applied

Terrell's signature to any document. With respect to Terrell's signature, she could not do so. Terrell's suggestion that Boyd used scanners and old signatures to forge the signature raises the question of why he would do so. There was no evidence of animosity between the two men at time of the appraisal (although this appeared to develop later), and no evidence of any motive for Boyd to have forged Terrell's signature at that time. Boyd's testimony is more credible – that the two worked together as they had in other appraisals and both signed the appraisal report.

The MREAC points to a series of e-mails concerning the Amy Clark Road Property appraisal in which Terrell was asked to provide a copy of his license. The MREAC notes that Terrell did not deny participating in the appraisal, but instead asked for payment. Terrell argues that the Amy Clark Road Property appraisal does not appear in his personal logs, but he admitted that he did not keep a record of all RAS appraisals.

Most damaging to Terrell's credibility is that, in his testimony before the MREAC, he denied ever working with Boyd:

> Mr. Harris: Had you ever been out in the field and looked at properties with [Boyd], accompanied him or done anything with him?
>
> Mr. Terrell: No. I hadn't ever done anything with him.

Exhibit 18 at 20. Boyd's appraisal logs list appraisals in which Terrell participated, and they specifically include the Amy Clark Road Property. In his testimony before this Commission, Terrell admitted to supervising Boyd. Boyd testified that Terrell worked with him on the Amy Clark Road Property appraisal by performing final editing on the report and decisions about how to direct the appraisal, and that both he and Terrell inspected the Amy Clark Road Property and the comparable sales properties. Boyd described how they would discuss the appraisal by telephone or by sending documents by e-mail.

We find Boyd to be the more credible witness, and our Findings of Fact reflect our determination.

II. Challenge to USPAP

Terrell argues that the USPAP has not been adopted as a legal standard in Missouri because the MREAC failed to follow the rule-making procedures in Chapter 536, RSMo.

The USPAP is incorporated by reference into the MREAC's regulation. 20 CSR 2245-3.010(5)(B). Regulations promulgated pursuant to statutory authority have the force and effect of law. *Killion v. Bank Midwest, N.A.*, 886 S.W.2d 29, 32 (Mo. App., W.D. 1994). We cannot change and must follow regulations that are consistent with the statutes. *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990). We have no power to vary the statutes the legislature has enacted. *Id*.

If a regulation is inconsistent with a statute, we follow the statute. But Terrell has shown no such inconsistency. To the contrary, § 339.535, RSMo 2000, states:

> State certified real estate appraisers and state licensed real estate appraisers shall comply with the Uniform Standards of Professional Appraisal Practice promulgated by the appraisal standards board of the appraisal foundation.

The legislature has also made failure to comply with USPAP standards cause for discipline under § 339.532.2(7).

Terrell argues that the legislature and the MREAC have improperly delegated the authority to set standards for appraisers' conduct to the creator of the USPAP, the Appraisal Standards Board of the Appraisal Foundation, which is overseen by the Appraisal Subcommittee, which is overseen by the U.S. Congress.

The MREAC argues that the non-delegation doctrine was not violated, citing *Menorah Medical Center v. Health and Educ. Facilities Authority*, 584 S.W.2d 73 (Mo. banc 1979). In that case, the Court noted the general requirement that when a statute vests discretion in

administrative officials, it must include standards for their guidance. The Court then noted the exceptions:

> Three general exceptions to the requirement of standards in statutes delegating decisions to administrative agencies were set forth in the *ABC* case at 524-25.
>
> (1) [W]here the ordinance or statute deals with situations which require the vesting of some discretion in public officials, and where it is difficult or impracticable to lay down a definite, comprehensive rule; (2) where the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare; (3) where personal fitness is a factor to be taken into consideration.

Id. at 83-84 (quoting *ABC Security Services, Inc. v. Miller*, 514 S.W.2d 521 (Mo. 1974) (other citations omitted).

We agree that the first two factors are present in this case. The professional standards would be difficult for the legislature to create and maintain. And the primary purpose of professional licensing is to protect the public. *Lane v. State Comm. of Psychologists*, 954 S.W.2d 23, 25 (Mo. App., E.D. 1997).

We find there has been no improper delegation.

III. Statute of Limitations

Terrell argues that the case is barred by the statute of limitations, § 516.120, RSMo 2000, entitled, "**What actions within five years**":

> Within five years:
>
> ***
>
> (2) An action upon a liability created by a statute other than a penalty or forfeiture;
>
> ***
>
> (4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated[.]

But there is a specific statute of limitations for licensing cases, § 324.043, which states:

> 1. Except as provided in this section, **no disciplinary proceeding** against any person or entity licensed, registered, or certified to practice a profession within the division of professional registration **shall be initiated unless such action is commenced within three years of the date upon which the licensing, registering, or certifying agency received notice** of an alleged violation of an applicable statute or regulation.
>
> 2. For the purpose of this section, **notice shall be limited to**:
>
> (1) **A written complaint**;
> (2) Notice of final disposition of a malpractice claim, including exhaustion of all extraordinary remedies and appeals;
> (3) Notice of exhaustion of all extraordinary remedies and appeals of a conviction based upon a criminal statute of this state, any other state or the federal government;
> (4) Notice of exhaustion of all extraordinary remedies and appeals in a disciplinary action by a hospital, state licensing, registering or certifying agency, or an agency of the federal government.
>
> 3. For the purpose of this section, an action is commenced when a complaint is filed by the agency with the administrative hearing commission, any other appropriate agency, or in a court; or when a complaint is filed by the agency's legal counsel with the agency in respect to an automatic revocation or a probation violation.

(Emphasis added.) When a law provides a specific statute of limitations, it prevails over the general statute of limitations. *Airis v. Metropolitan Zoological Park & Museum Dist*., 332 S.W.3d 279, 281 (Mo. App. E.D. 2011) (citing § 516.300). Exhibit 14 is a written complaint to the MREAC that was received by that agency on June 22, 2010. The MREAC filed its complaint with this Commission on June 18, 2013. The statute of limitations does not prevent us from hearing this case.

Terrell also argues that the parties were prejudiced by the time period between the conduct and the filing of the complaint and hearing. Laches is an equitable defense. *UAW-CIO Local #31 Credit Union v. Royal Ins. Co.*, 594 S.W.2d 276, 281 (Mo. 1980). As an

administrative agency, we have no authority to apply the doctrines of equity. *Soars v. Soars-Lovelace, Inc*., 142 S.W.2d 866, 871 (Mo. 1940).

IV. Objection to Exhibit 3

Terrell objected to Petitioner's Exhibit 3, the appraisal report, because it was not the "best evidence" of the original appraisal. This Commission accepted the exhibit subject to the objection. The best evidence rule "requires the original document be submitted to prove operative terms or content that are at issue." *Hale & Hale, Ltd. v. Arnold & Jeanie Pettit Declaration of Trust Dated 2/1/95*, 298 S.W.3d 104, 108 (Mo. App., W.D. 2009). There is an exception if the original is shown to be unavailable for a reason other than the fault of the party offering the document. *State v. Foulk*, 725 S.W.2d 56 (Mo. App., E.D. 1987).

In administrative hearings, § 536.070(9) governs:

> Copies of writings, documents and records shall be admissible without proof that the originals thereof cannot be produced, if it shall appear by testimony or otherwise that the copy offered is a true copy of the original, but the agency may, nevertheless, if it believes the interests of justice so require, sustain any objection to such evidence which would be sustained were the proffered evidence offered in a civil action in the circuit court, but if it does sustain such an objection, it shall give the party offering such evidence reasonable opportunity and, if necessary, opportunity at a later date, to establish by evidence the facts sought to be proved by the evidence to which such objection is sustained[.]

The court in *Sprague v. City of Springfield*, 641 S.W.2d 814 (Mo. App., S.D. 1982) considered how § 536.070 "modifies the best evidence rule in administrative cases" in determining that exhibits were properly before the agency. *Id*. at 818 n.2.

The MREAC's employee testified that the agency had received the copy from Chase Home Lending as part of its initial complaint. Boyd testified that it was a true and correct copy of the Amy Clark Road Property appraisal report that he completed, both he and Terrell signed, and that was sent to the client. Tr. at 66. We accept Boyd's testimony and find that it properly authenticated the report. Therefore, we admit Exhibit 3 into the record.

V. Cause for Discipline

The MREAC argues there is cause for discipline under § 339.532:[3]

2. The commission may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any state-certified real estate appraiser, state-licensed real estate appraiser, state- licensed appraiser trainee, state-certified residential appraiser trainee, state-certified general appraiser trainee, state -licensed appraisal management company that is a legal entity other than a natural person, any person who is a controlling person as defined in this chapter, or any person who has failed to renew or has surrendered his or her certificate or license for any one or any combination of the following causes:

***

(5) Incompetency, misconduct, gross negligence, dishonesty, fraud, or misrepresentation in the performance of the functions or duties of any profession licensed or regulated by sections 339.500 to 339.549;

(6) Violation of any of the standards for the development or communication of real estate appraisals as provided in or pursuant to sections 339.500 to 339.549;

(7) Failure to comply with the Uniform Standards of Professional Appraisal Practice promulgated by the appraisal standards board of the appraisal foundation;

(8) Failure or refusal without good cause to exercise reasonable diligence in developing an appraisal, preparing an appraisal report, or communicating an appraisal;

(9) Negligence or incompetence in developing an appraisal, in preparing an appraisal report, or in communicating an appraisal;

(10) Violating, assisting or enabling any person to willfully disregard any of the provisions of sections 339.500 to 339.549 or the regulations of the commission for the administration and enforcement of the provisions of sections 339.500 to 339.549;

***

(14) Violation of any professional trust or confidence [.]

[3] Because there are no significant substantive changes, we cite to the current version of the statute.

A. USPAP Violations

As noted above, § 539.535 requires real estate appraisers to comply with the USPAP. USPAP Standard 1, regarding the development of an appraisal, states:

> In developing a real property appraisal, an appraiser must identify the problem to be solved and the scope of work necessary to solve the problem, and correctly complete research and analysis necessary to produce a credible appraisal.

Ex. 12 at 16. Terrell overvalued the Amy Clark Road Property at $358,000 by characterizing it as lakefront property when it was merely located near a small body of water remote enough from the house that it was unclear whether it could be seen from the house. Terrell used superior and dissimilar comparable sales, two of which were lakefront properties on a 125-acre lake when there were 13 comparable sales that were closer in age, site size and design, and located in the same Hillsboro school district. These 13 sales ranged in price from $84,500 to $324,000. Terrell violated USPAP Standard 1.

USPAP Standard 2, regarding the reporting of an appraisal, provides:

> In reporting the results of a real property appraisal, an appraiser must communicate each analysis, opinion, and conclusion in a manner that is not misleading.

Id. at 22. Comparing the Amy Clark Road Property to superior properties resulted in an inflated value and thus was a misleading appraisal report. Terrell violated USPAP Standard 2.

USPAP Standard 1 and Standards Rule ("SR") 1-1(a) states:

> In developing a real property appraisal, an appraiser must:
>
> (a) be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;
>
> (b) not commit a substantial error of omission or commission that significantly affects an appraisal; and
>
> (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

Id. at 16. The MREAC's expert witness, Cheryl Kunzler, testified that Terrell violated subsection (a) because the comparison of newer properties to the Amy Clark Road Property demonstrated that he did not understand the principle of "social change." Tr. at 181-82. She described this as the changes in bedroom count and size, room configuration, floor plan, size of closets, and types of kitchen that would have been acceptable 35 years ago but would not necessarily be acceptable now. Kunzler testified that Terrell violated subdivision (b) because he failed to identify some components affecting value in the comparable properties – differences such as waterfront property and additional amenities, and this was a material omission. He also failed to use more similar properties as comparable sales. Kunzler testified that Terrell violated subdivision (c) because his adjustments in the sales comparison approach do not have adequate support for adjustments for site difference, age difference, and location, in the case of sales that were in a lakefront community.

Terrell violated USPAP SR 1-1(a), (b), and (c).

USPAP Standard 1 and SR 1-2(e) state:

In developing a real property appraisal, an appraiser must:

> (e) identify the characteristics of the property that are relevant to the type and definition of value and intended use of the appraisal, including:
>
> (i) its location and physical, legal, and economic attributes[.]

Ex. 12 at 17. Terrell's description of the Amy Clark Road Property as lake view property, when it was not, with an effective age of seven years, when it was 35 years (without sufficient explanation), violated this SR.

USPAP Standard 1 and SR 1-4(a) and (b) state:

> In developing a real property appraisal, an appraiser must collect, verify and analyze all information applicable to the appraisal problem, given the scope of work identified in accordance with Standards Rule 1-2(f).

> (a) When a sales comparison approach is applicable, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.
>
> (b) When a cost approach is applicable, an appraiser must:
>
> (i) develop an opinion of site value by an appropriate appraisal method or technique[.]

Id. at 19. In the sales comparison approach, Terrell failed to use properties that were much more similar to the Amy Clark Road Property in terms of type, location and age than the ones in the report. He failed to provide sufficient support and analysis for the adjustments made to the comparable sales.

Kunzler testified that Terrell failed to properly explain the technique or method he used to arrive at the site value of $100,000. He wrote that he derived the site value "through market extraction of land sales or lot pricing within the subject's market." Ex. 3 at 12. As Kunzler noted, those are two separate methods, and the appraisal report does not specify which was used. Also, lot pricing is not an acceptable method for determining site value because asking price does not necessarily reflect market value, as selling price does.

Terrell violated USPAP SR 1-4(a) and (b)(i).

USPAP Standard 2 and SR 2-1 states:

> Each written or oral real property appraisal report must:
>
> (a) clearly and accurately set forth the appraisal in a manner that will not be misleading;
>
> (b) contain sufficient information to enable the intended users of the appraisal to understand the report properly [.]

Id. at 22. We have already found the appraisal report to be misleading for the reasons stated above. Kunzler testified as to her opinion that it did not contain sufficient information:

> A: . . . Again, given the information in the appraisal, number one, the inconsistencies, the lack of support for adjustments and the entire report, none of

> the adjustments had reasonable market support. It did not, in my opinion, contain sufficient information to understand the report properly.

Tr. at 189. Terrell violated USPAP SR 2-1(a) and (b).

USPAP SR 2-2(b)(ix) states:

> (b) The content of a Summary Appraisal Report must be consistent with the intended use of the appraisal and, at a minimum:
>
> (ix) summarize the information analyzed, the appraisal procedures followed, and the reasoning that supports the analyses, opinions, and conclusions [.]

Ex. 12 at 27. Terrell failed to provide adequate reasoning for his adjustments in valuation using the sales comparison approach, or for his determination of a $100,000 site value. He violated SR 2-2(b)(ix).

USPAP Ethics Rule states:

> An Appraiser must prepare a workfile for each appraisal, appraisal review, or appraisal consulting assignment. The workfile must include:
>
> the name of the client and the identity, by name or type, of any other intended users;
>
> true copies of any written reports, documented on any type of media;
>
> summaries of any oral reports or testimony, or a transcript of testimony, including the appraiser's signed and dated certification; and
>
> all other data, information, and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with this Rule and all other applicable Standards, or references to the location(s) of such other documentation.
>
> *An appraiser must retain the workfile for a period of at least five (5) years after preparation or at least two (2) years after final disposition of any judicial proceeding in which the appraiser provided testimony related to the assignment, whichever period expires last.*
>
> *An appraiser must have custody of his or her workfile, or make appropriate workfile retention, access, and retrieval arrangements with the party having custody of the workfile.*

(Emphasis added.) Section 339.537, RSMo Supp. 2005, provides:

> State-certified real estate appraisers and state licensed real estate appraisers shall retain originals or true copies of contracts engaging an appraiser's services for appraisal assignments, specialized appraisal services, appraisal reports, and supporting data assembled and formulated in preparing appraisal reports, for five years. The period for retention of the records applicable to each engagement of the services of the state-certified real estate appraiser or state-licensed real estate appraiser shall run from the date of the submission of the appraisal report to the client. Upon requests by the commission, these records shall be made available by the state-certified real estate appraiser or state-licensed real estate appraiser for inspection and copying at his or her expense, by the commission on reasonable notice to the state-certified real estate appraiser or state-licensed real estate appraiser. When litigation is contemplated at any time, reports and records shall be retained for two years after the final disposition.

Both of these laws require records to be retained for at least five years. When the MREAC requested records from Terrell, he failed to provide them, arguing that he had not performed the appraisal. But we have found that he did participate in the appraisal. Given that, even if the records had been retained by Boyd rather than Terrell, he should have had arrangements with Boyd for retention, access, and retrieval. Terrell violated these two provisions.

B. Statutory Grounds for Discipline

i. Gross Negligence, Misconduct, Dishonesty, Fraud, Misrepresentation, and Incompetency – § 339.532.2(5)

The MREAC alleges there is cause for discipline under § 339.532.2(5) because Terrell's conduct demonstrated incompetency, misconduct, gross negligence, dishonesty, fraud and/or misrepresentation in the performance of the functions or duties of a real estate appraiser.

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation. "Incompetent," if used in a context relating to actual occupational ability, refers to "the actual ability of a person to perform in [the] occupation." Section 1.020(9). We also look to the analysis of incompetency in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Regis'n for the Healing Arts*,

293 S.W.3d 423 (Mo. banc 2009). Incompetency is a "state of being" showing that a professional is unable or unwilling to function properly in the profession. *Id*. at 435.

Misconduct means "the willful doing of an act with a wrongful intention[;] intentional wrongdoing." *Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524 (Mo. App., E.D. 1988). Misrepresentation is "a falsehood or untruth made with the intent of deceit rather than inadvertent mistake." *Hernandez v. State Bd. of Regis'n for the Healing Arts,* 936 S.W.2d 894, 899 n. 2 (Mo. App., W.D. 1997), quoted in *Kerwin*, 375 S.W.3d at 229. Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him. *Id.* It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 650 (unabr. 1986).

The Appraisal

The shortcomings we have found appear in one appraisal. Many problems involve providing insufficient explanation. The more serious problem is Terrell's failure to use better comparables which may have resulted in an inflated appraised value of the subject property. Despite this, we do not find that these deficiencies are sufficient to show he was incompetent. Kunzler could not testify as to whether the report involved fraud or dishonesty. She stated, "I don't have enough information to indicate either of those." Tr. at 192. We find no other evidence of any intentional wrongdoing or dishonesty on Terrell's part as to the report.

We do not find him subject to discipline for fraud, misconduct, dishonesty, or misrepresentation for his preparation of the appraisal report.

Gross negligence is an act or course of conduct constituting such a gross deviation from the standard of care a reasonable professional would exercise under the circumstances that it

demonstrates a conscious indifference to a professional duty. *Duncan***,** 744 S.W.2d at 533, quoted in *Kerwin*, 375 S.W.3d at 226.

We believe the evidence of problems such as failure to use more similar comparables, failing to provide support for his calculations, and inaccurate description of the property with reference to its "lake view" and effective age demonstrate a conscious indifference to his professional duties. We find Terrell was grossly negligent.

Statements to the MREAC

In its written argument, the MREAC does not argue that Terrell's false statements before it are cause for discipline. In its complaint, however, it alleges he made misrepresentations to the Board. Complaint at ¶ 18. Then it alleges that "Terrell's conduct, as alleged in this Complaint, demonstrates incompetency, misconduct, gross negligence, dishonesty, fraud, and/or misrepresentation" and references § 339.532.2(5). Complaint at ¶ 32. Since the conduct and law are set forth, we find Terrell was on sufficient notice to satisfy the *Duncan* standard that he was subject to discipline for his misstatements.

Terrell's false statements to the MREAC in which he denied participating in the Amy Clark Road Property appraisal and even denied that he had worked with Boyd were misrepresentations and constitute misconduct and dishonesty.

Terrell is subject to discipline under § 339.532.2(5) for misrepresentation, gross negligence, misconduct, and dishonesty.

ii. Violation of Statutory Standards for Appraisals – § 339.532.2(6)

Section 339.535 mandates compliance with USPAP, and § 339.532.2(6) authorizes discipline for a violation of such standards. Because we have found several violations of such standards by Terrell in relation to the appraisal, we conclude that Terrell is subject to discipline under § 339.532.2(6).

iii. Failure to Comply with USPAP – § 339.532.2(7)

Based on the violation of USPAP Standards and Standards Rules already set out above, we find Terrell subject to discipline under § 339.532.2(7).

iv. Reasonable Diligence – § 339.532.2(8)

Reasonable diligence is defined as:

> A fair, proper and due degree of care and activity, measured with reference to the particular circumstances; such diligence, care or attention as might be expected from a man of ordinary prudence and activity.

BLACK'S LAW DICTIONARY 457 (6th ed. 1990). Terrell made a number of errors in completing the appraisal, including the significant ones we set forth above. These show that he was not attentive or persistent and that he did not exercise a fair degree of care in performing the appraisal. He is subject to discipline under § 339.532.2(8).

v. Negligence or Incompetence – § 339.532.2(9)

Negligence is defined as "the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of [the] . . . profession." *Mirth v. Regional Bldg. Inspection Co.*, 93 S.W.3d 787, 789 (Mo. App., E.D. 2002). This subdivision of § 339.532.2 varies from subdivision (5) by providing cause to discipline upon a finding of negligence or incompetence in developing *an* appraisal, in preparing *an* appraisal report, or in communicating *an* appraisal – it does not require an assessment of overall performance.

USPAP reminds us that "[p]erfection is impossible to attain." SR 1-1(c) Comment – Exhibit 12 at 16. But the problems in the appraisal report were more than minor. We find that Terrell displayed incompetence as an appraiser. We also find that Terrell was negligent in developing, preparing, or communicating the appraisal. He made significant errors by failing to use similar comparables, which resulted in overvaluing of the subject property. He failed to explain how he arrived at his determinations such as the site value and the effective age of the improvements. We find cause for discipline under § 339.532.2(9).

vi. Violating Statutes or Regulations – § 339.532.2(10)

As described above, we have found that Terrell failed to comply with USPAP standards and rules as is required under § 339.535. Therefore, we find Terrell is subject to discipline under § 339.532.2(10) for violating § 339.535.

vii. Violating Professional Trust – § 339.532.2(14)

Professional trust or confidence is the reliance on the special knowledge and skills that professional licensure evidences. *State v. Pappas*, 337 N.W.2d 490, 495 (Iowa 1983). It is based on the power imbalance in matters within the knowledge of the licensed profession between the professional and client. *See Siegel v. Kranis*, 288 N.Y.S.2d 831, 835 (N.Y. App. Div. 1968). A professional trust or confidence is engendered by a party's reliance on the special knowledge and skills evidenced by professional licensure. *Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943). Reliance on a professional's special knowledge and skills creates a professional trust, not only between the professional and his clients, but also between the professional and his employer and colleagues**.** *Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App., E.D. 1989).

Terrell neglected to use his specialized knowledge and skills to prepare a credible and not misleading appraisal report. He violated the professional trust of his clients. He is subject to discipline under § 339.532.2(14).

Summary

Terrell is subject to discipline under § 339.532.2(5), (6), (7), (8), (9), (10) and (14).

SO ORDERED on December 22, 2014.

\\ *Karen A. Winn*
KAREN A. WINN
Commissioner