

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael Paolucci,	:	
	:	
Appellant-Appellant,	:	
	:	No. 09AP-450
v.	:	(C.P.C. No. 08CVF-07-10761)
	:	
Ohio Division of Real Estate,	:	(REGULAR CALENDAR)
	:	
Appellee-Appellee.	:	

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D E C I S I O N

Rendered on October 20, 2009

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*Michael Paolucci, Esq., pro se.*

*Richard Cordray, Attorney General, Cheryl R. Hawkinson  
and Janyce C. Katz, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Appellant-appellant, Michael Paolucci, appeals from the judgment of the Franklin County Court of Common Pleas affirming the order of the Ohio Real Estate Commission ("commission") that denied appellant's application to sit for the Real Estate Broker's License Examination ("broker examination").

{¶2} On February 4, 2008, appellant, who is an attorney admitted to the Ohio, Kentucky, United States Supreme Court, and Patent Bars, submitted an application to take the broker examination. Per letter from the Superintendent dated May 14, 2008, appellant's application was denied due to a lack of evidence that appellant completed at

least 20 real estate transactions and thereby met the requirements of R.C. 4735.07(B)(5). Appellant timely requested a hearing before the commission, and on July 7, 2008, the commission conducted a hearing. Rejecting appellant's argument that, although he did not have the minimum number of real estate transactions as required by R.C. 4735.07(B)(5)(a), he did have "equivalent experience" as allowed by R.C. 4735.07(B)(5)(b), the commission denied appellant's application to take the broker examination on July 18, 2008, stating that it did not find evidence that appellant met the requirements of R.C. 4735.07.

{¶3} In accordance with R.C. 119.12, appellant appealed the commission's decision to the Franklin County Court of Common Pleas. The matter was stayed pending a conditional remand to the commission for reconsideration. After a reconsideration hearing on September 4, 2008, the commission affirmed its decision denying appellant's application to take the broker examination. The trial court rendered a decision on April 14, 2009, finding that the commission's decision denying appellant's application to sit for the broker examination was supported by reliable, probative, and substantial evidence and was in accordance with law. Consequently, the trial court affirmed the order of the commission.

{¶4} This appeal followed, and appellant brings the following three assignments of error for our review:

#### **First Assignment of Error**

The Common Pleas Court improperly relied on R.C. 4735.01(l)(1) and (4) in reaching the conclusion that the applicant's past experience was not applicable and that the Commission could properly reach a decision "regardless of what is meant by equivalent experience."

### **Second Assignment of Error**

The Common Pleas Court decision fails to address the impact of this Court's prior decision and the mandates of the R.C. 4735.08(B)(5)(b) when the Commission failed to define the term "equivalent experience."

### **Third Assignment of Error**

The Order of the Ohio Real Estate Commission is not supported by reliable, probative and substantial evidence and is against the manifest weight of the evidence in that all of the evidence produced, without contradiction, indicates that Applicant has sufficient "equivalent experience" to qualify him for the Broker's Examination.

{¶5} In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶6} Reliable, probative, and substantial evidence has been defined 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.

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.

{¶7} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas' determination that the commission's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the commission's order was in accordance with law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶8} While all three assigned errors challenge the commission's decision denying appellant's application to sit for the broker examination, it is appellant's first assigned error that is dispositive. To be eligible to sit for the broker examination, R.C. 4735.07(B)(5) provides, in relevant part:

No applicant for a real estate broker's license shall take the broker's examination who has not established to the satisfaction of the superintendent that the applicant:

\* \* \*

(5) *Has been a licensed real estate broker or salesperson for at least two years; during at least two of the five years preceding the person's application, has worked as a licensed real estate broker or salesperson for an average of at least thirty hours per week; and has completed one of the following:*

(a) At least twenty real estate transactions, in which property was sold for another by the applicant while acting in the capacity of a real estate broker or salesperson;

(b) Such equivalent experience as is defined by rules adopted by the commission.

(Emphasis added.)

{¶9} Though the parties focus much of their attention on subsections (a) and (b) of R.C. 4735.07(B)(5) and discuss whether "equivalent experience" has been properly defined, and whether appellant's submitted experience constitutes "equivalent experience," the trial court held subsections (a) and (b) need not be contemplated here because appellant failed to provide evidence that he meets the requirement of (B)(5), i.e., that he worked for the requisite time as a licensed real estate broker or salesperson for an average of at least 30 hours per week. In other words, the trial court found the discussion regarding subsections (a) and (b) to be irrelevant because, regardless of whether (a) and/or (b) were satisfied, appellant did not meet the requirement of (B)(5), and, thus, appellant was not eligible to take the broker examination. Though appellant contends this is error, we agree with the trial court.

{¶10} It is clear from reading R.C. 4735.07(B)(5) that as is relevant here, to be eligible to take the broker examination, appellant, during at least two of the five years preceding his application, must have "worked as a licensed real estate broker or salesperson for an average of at least thirty hours per week." As defined in R.C. 4735.01(l), the terms "real estate broker" and "real estate salesperson" do not include those who perform any of the specified acts or transactions:

(1) With reference to real estate situated in this state or any interest in it owned by such person, partnership, association, limited liability company, limited liability partnership, or corporation, or acquired on its own account in the regular course of, or as an incident to the management of the property and the investment in it;

\* \* \*

(4) As an attorney at law in the performance of the attorney's duties[.]

{¶11} As the trial court found the record is clear and undisputed that appellant had an interest in the vast majority of the transactions he completed and also that he worked on the legal aspect of transactions. These undeniably are precluded from consideration under R.C. 4735.01(l)(1) and (4), and, therefore, appellant could not meet the requirement of R.C. 4735.07(B)(5), rendering it unnecessary to even consider whether appellant met the requirements of subsections (a) or (b).

{¶12} Though in his first assignment of error appellant argues there are no grounds for reaching such a conclusion and contends this is an unreasonable reading of the statute, we disagree. We understand appellant's position and the frustration he expresses as a result of the decisions from the trial court and the commission; however, it is important to remain mindful of the judiciary's responsibility with respect to statutory interpretation. When this court is called on to give effect to an act of the General Assembly, a standard of judicial restraint has developed when the wording of the enactment is clear and unambiguous. *Bernardini v. Bd. of Edn. for Conneaut Area City School Dist.* (1979), 58 Ohio St.2d 1. This court is required to look at the statute itself to determine the intent of the General Assembly, and if the intent is clearly expressed in the statute, the statute may not be enlarged or abridged. *Athens Cty. Bd. of Commrs. v.*

*Schregardus* (1992), 83 Ohio App.3d 861, 866, citing *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143. In ascertaining the legislative intent of a statute, it is the duty of this court to give effect to the words used in the statute and not to delete words used, or to insert words that are not used. *Id.*, citing *Columbus-Suburban Coach Lines v. Pub. Utilities Comm.* (1969), 20 Ohio St.2d 125.

{¶13} Though appellant makes provocative arguments for why there should be a different interpretation, the statute at issue is clear. Thus, while there may be policy reasons that dictate a change in the statute's language, a change in the language of the statute is beyond the purview of this court. We are constrained by the plain language of the statute and, accordingly, must overrule appellant's first assignment of error. Our finding that appellant did not meet the requirements of R.C. 4735.07(B)(5) renders the arguments contained in his second and third assignments of error moot and we need not render an opinion as to them. *GMAC, L.L.C. v. Greene*, 10th Dist. No. 08AP-295, 2008-Ohio-4461, ¶29, citing *Schaeffer v. Schaeffer*, 1st Dist. No. C-020721, 2004-Ohio-2032, ¶37 (stating that "[i]t is well settled \* \* \* that appellate courts do not grant advisory opinions or prospective relief"); *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, ¶10 (fn. omitted) (stating that "[t]he duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case").

{¶14} Because the trial court did not abuse its discretion in finding the commission's order was supported by reliable, probative, and substantial evidence and is accordance with law, we overrule appellant's first assignment of error, rendering moot

appellant's second and third assignments of error, and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BRYANT and KLATT, JJ., concur.

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