

## Appellate Court Relaxes Ohio Division of Real Estate Investigation Timeframes, Accords Commission Broad Authority in Determining Violations



By: **Cynthia A. Lammert**

In a recently-published opinion, *Boggs v. Ohio Real Estate Commission*, 186 Ohio App.3d 96, 2009-Ohio-6325, the 10<sup>th</sup> District Court of Appeals addressed the timeframes under which the Ohio Division of Real Estate & Professional Licensing (the "Division") may pursue license law charges against Ohio real estate licensees, whether brokers or salespersons. In the same case, it also considered how much discretion should be accorded the Ohio Real Estate Commission (the "Commission") in deciding what constitutes a breach of license law.

First, the Court considered whether the Division's failure to follow post complaint timelines precluded it from prosecuting a license law complaint against a real estate licensee. Ohio law stipulates that a Division investigator shall file a written report about the investigation within sixty days from the filing of a complaint. Within fourteen days after the investigator's report is completed, the Superintendent then must determine whether there is "reasonable and substantial" evidence that the licensee violated applicable law. Within seven days after concluding that evidence supports a violation, the Superintendent must notify the complainant and the licensee of the date of an administrative hearing to be conducted pursuant to Ohio Revised Code Chapter 119. In each instance, the statute specifies that the Commission "shall" comply with the each of these deadlines.

In *Boggs*, however, the Division took eleven months to notify licensee Robbie Boggs that the investigation was completed and that the Superintendent had determined that there was reasonable and substantial evidence of a license law violation. It also did not notify Boggs and the complainant of the hearing with the timeframe set forth in the statute.

While nothing in the statute indicates that the Division loses jurisdiction if these deadlines are not met, *Boggs* appealed and asserted that the case must be closed in these circumstances. The 10<sup>th</sup> District Court of Appeals disagreed, holding that that the time limitations set forth in the statute governing complaint procedures were "directory", rather than "mandatory". This means that the statutory timeframes are simply advisory, and not compulsory. Accordingly, it held that the Division does not lose jurisdiction for failing to act within the statutory time periods in a disciplinary proceeding against a licensee. It also found that *Boggs* was not prejudiced by any delays in the proceedings.

Next, the Court considered *Boggs*' appeal of the Ohio Real Estate Commission's determination that she had breached her fiduciary duty to buyer clients when she did not disclose the prior sale price of property on which her clients were bidding.

In assessing comparables, *Boggs* had limited her multiple listing service search to properties within \$20,000 of the \$79,000 listing price of the property that her clients wanted to buy. In doing so, she did not discover the 2006 sale price of \$50,000 for the subject property. Because there is no specific statute, administrative rule, or canon of ethics imposing a duty upon a licensee to disclose a prior sale price, *Boggs* claimed that this finding against her was not supported by reliable, probative and substantial evidence.

In its opinion, the Court reviewed the general fiduciary duties delineated in Ohio real estate license law, and specifically R.C. 4735.62, which requires an Ohio real estate licensee to use best efforts to further the interest of the client and to perform all duties in a manner loyal to the interests of the client. The Court also referenced the obligation of a licensee to disclose to clients any material facts of the transaction of which the licensee is aware or *should be aware* in the exercise of reasonable skill and care and that are not confidential.

The Court ultimately rejected *Boggs*' argument, concluding that the Commission may rely on its own expertise in determining whether a licensee engages in conduct that violates the laws, rules, or standards of the real estate industry, including breach of fiduciary duty. This case underscores the Commission's autonomy in deciding what constitutes a license law violation and the Court's reluctance to overturn the Commission's decisions.

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