

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Merrimack Superior Court
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NOTICE OF DECISION

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Case Name: **Frederick T. Bussiere v. State of NH Real Estate Commission**
Case Number: **217-2013-CV-00645**

Enclosed please find a copy of the court's order of April 17, 2014 relative to:

ORDER

April 21, 2014

William S. McGraw
Clerk of Court

(484)

C: Robert E. Murphy, JR; Amanda C. Godlewski, ESQ

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Frederick T. Bussiere

v.

State of New Hampshire Real Estate Commission

NO. 217-2013-CV-645

ORDER

The Petitioner, Frederick T. Bussiere, appeals an order from the Respondent, New Hampshire Real Estate Commission (the "Commission"), pursuant to RSA 331-A:28, III. Specifically, the Petitioner argues that the Commission erred in denying his motion to dismiss and further argues that RSA 331-A:26, XXVII is unconstitutionally vague as applied to him. Because the Court finds that the Commission erred in denying his motion to dismiss, the Court vacates the Commission's Final Decision and Order.

I

The record establishes the following pertinent facts, which the Court must accept for purposes of this appeal. RSA 541:13. The Petitioner was the principal broker of a licensee, Kevin Shultz, a salesperson. On July 16, 2013, the Commission conducted a hearing, in part, to determine whether the Petitioner, as a principal broker, failed to exercise reasonable supervision over the activities of a licensee, contrary to RSA 331-A:26, XXVII. C.R. at 37. Specifically, the notice of hearing read as follows: "Whether Frederick Bussiere as principal broker failed to exercise reasonable supervision over the activities of licensees and any unlicensed staff, **in violation of RSA 331-A:26, XXVII.**" C.R. at 37 (emphasis in original).

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After receipt of the charges, Petitioner wrote to the Commission requesting the definition of “reasonable supervision” to determine the meaning of the charges against him. Supp. CR at 1. On November 21, 2012, the Commission responded that “the Commission decided [that] since reasonable supervision is fact dependent that the Commission could not broadly defined reasonable supervision, and therefore declined to issue a declaratory ruling.” Supp. C.R. at 3. The Commission Investigator prosecuting the complaint did not list or call a standard of care expert to define “reasonable supervision,” and the Commission denied Petitioner’s motion to dismiss for failure to introduce expert testimony to establish the standard of care was denied. C.R. at 632.

At the hearing, the Commission heard testimony from the Petitioner as well as the Petitioner’s expert witness, Mr. James T. DeStefano. The Petitioner testified extensively regarding how he supervises his agents. He stated that he is a hands-on broker, holds office meetings with his agents every Wednesday, and has an open door policy with his agents so that they may discuss any issues they may have. C.R. at 633. The Petitioner testified that he normally only requires new agents, who have been working less than six months, to submit their work for review. C.R. at 633. He stated that he does not believe it is his responsibility to review all transactions while they are in process, nor does he believe that it is imperative for a supervising broker to review all commitment letters, home inspections, septic inspections, or appraisal reports. C.R. at 633.

Mr. DeStefano testified that he reviewed materials related to the Petitioner’s supervisory role, including the Petitioner’s policy and procedures manual, training materials, and office checklist. C.R. at 635. Mr. DeStefano testified that he reviewed RSA Chapter 331-A, the Administrative Rules Rea 100–700, and the National Association of

Realtors Code of Ethics, as well as real estate laws and rules in other jurisdictions. During his research, Mr. DeStefano could not find a definition of "reasonable supervision." C.R. at 635. Mr. DeStefano testified that it is an important role to monitor a transaction in progress to identify potential problems or to deal with changes in a contract, but felt that it is impossible to do this on every transaction. C.R. at 635. Accordingly, Mr. DeStefano believed that the Petitioner was being a proactive broker providing supervisory service to his office. C.R. at 635. Hearing counsel for the Commission did not provide any evidence or testimony regarding the applicable standard of care for what constitutes reasonable supervision under RSA 331-A:26, XXVII.

In its order, the Commission found that "New Hampshire law does not require the presentation of expert testimony on whether the [Petitioner] violated his duty of supervision." C.R. at 632. The Commission concluded that the Petitioner failed to exercise reasonable supervision:

[The Petitioner] failed to exercise reasonable supervision over the activities of Kevin Shultz by not reviewing the transaction while it was in progress, and if he had done so he would have recognized the discrepancy between the communication from the buyer's lender which was forwarded to Kevin Shultz from the buyer by e-mail and the addendum prepared by Kevin Shultz, as well as the low invoice of \$271 for an inspection and repair by a mold specialist. Therefore, the Commission rules that [the Petitioner] did violate RSA 331-A:26, XXVII.

C.R. at 636. This appeal followed.

II

RSA 331-A: 28, III outlines the method by which a party may appeal the Commission's decision to the Superior Court. Under the statute, an aggrieved party may appeal the Commission's decision to revoke, suspend, or deny a license or accreditation,

or levy a fine, to the superior court within 30 days of the final decision. RSA 331-A:28, III. Accordingly, “[t]he superior court may confirm, reverse, or modify the commission’s decision, or order a trial de novo without a jury as justice may require.” *Id.* However, a reviewing court is limited to reviewing the case for errors of law. See RSA 541:13.

In appealing the Commission’s decision, the Petitioner makes two arguments. First, he argues that the Commission erred in denying his motion to dismiss. Second, he argues that RSA 331-A:26, XXVI is unconstitutionally vague as applied to him. In response, the Respondent asserts that it did not err in denying the motion to dismiss and further asserts that the statute is not unconstitutionally vague. The Court addresses the parties’ arguments below.

The requirement that a broker must exercise “reasonable supervision” over activities a licensee cannot be considered unconstitutionally vague. Every professional is responsible for exercising reasonable care in providing professional services. See, e.g., McLaughlin v. Sullivan, 123 N.H. 335, 340 (1983). For that matter, every person owes a duty of reasonable care to avoid causing bodily injury to other persons. See, e.g., Conway Nat’l Bank v. Pease, 76 N.H. 319 (1912). However, in virtually all cases, expert testimony is required when the subject presented is related to some science, profession, or occupation as to be beyond the ken of the average lay person. Wong v. Eckberg, 148 N.H. 369, 373 (2002). Further, even in an ordinary negligence case, the act that is alleged to have constituted a breach of the duty of ordinary care must be explicitly stated in a complaint.

In the present case, hearing counsel for the Commission had the burden of proof. See N.H. Admin. Rules, Rea 205.14 (“The party asserting a proposition shall bear the burden of proving the truth of the proposition by a preponderance of the evidence.”). As

a preliminary matter, neither the statutory scheme nor the regulations define what constitutes reasonable supervision. The only witnesses were the Petitioner and the Petitioner's expert witness, who both testified that the Petitioner's conduct constituted reasonable supervision as required by the statute. In the circumstances of this case—where the Commission declined to identify the specific facts which it alleged were a failure to provide reasonable supervision—the Commission cannot use its expertise to create a standard of care and then insert missing evidence of the standard of care.

Illustrative is Appeal of Kelly, 158 N.H. 484 (2009). In Kelly, the Board of Mental Health Practice (“Board”) held a hearing to determine whether the petitioner engaged in professional misconduct, contrary to the *Ethical Principles of Psychologists and Code of Conduct*, when he interviewed a patient. 158 N.H. at 488. At the hearing before the Board, the petitioner was the only witness and the parties stipulated to all exhibits. Id. at 488. Hearing counsel for the Board presented no witnesses and no evidence as to the appropriate standard of care under the *Ethical Principles of Psychologists and Code of Conduct*. Id. at 489. The petitioner testified that he had satisfied the criteria in the *Ethical Principles of Psychologists and Code of Conduct*. Id. at 493. Although the Board found that the petitioner had engaged in misconduct, the New Hampshire Supreme Court reversed. While noting that expert testimony is not necessary in all cases to establish the applicable standard of care, the Court found that under the administrative rules, the burden of proof rested on hearing counsel for the Board, and hearing counsel failed to meet that burden because it presented no evidence to establish a violation of the applicable standard of care. Id. at 493. Implicit in the Court's opinion is a recognition that where a generalized standard—that the psychologist “shall adhere to the ethical principles of the profession . . . as adopted by the American Psychological

Association”—is applied, expert testimony is necessary to explain how a person accused of violating that standard did so.

Appeal of Boulard, 165 N.H. 300 (2013) requires no different result. In that case, the petitioner, a dentist, was accused of practicing with a moderate sedation permit, which allowed him to use anesthesia on patients to perform certain dental procedures, without being equipped to handle a sedation emergency. The criteria the Board of Dental Examiners (“Board”) considered to be misconduct were objective: failing to maintain an operable automated external defibrillator (“AED”); maintaining an emergency medical care kit that was missing certain required medications and contained expired medications that are required for moderate sedation; and assigning duties to assistants that they were not trained to perform correctly. Boulard, 165 N.H. at 302. The petitioner objected to the findings of the Board, alleging that the Board lacked expertise to evaluate the petitioner’s conduct because not all Board members were trained in moderate sedation, and that expert testimony was required to establish the standard of care. Id. at 305. In rejecting the petitioner’s claim, the Court stated “[w]e conclude that the petitioner’s violations — failing to have a required medications and adequately trained staff — are not so complex as to be outside the competence of the Board to decide without the aid of expert testimony.” Id.

Similarly, in Appeal of Beyer, 122 N.H. 934 (1982), while the issue was whether or not the defendant dentist had committed malpractice, the issue before the Board was narrow and discrete: whether the dentist had placed an implant in a patient’s mouth which damaged the roots of the teeth adjacent to the implant, and that the implant was improperly contoured, causing severe periodontal damage. Beyer, 122 N.H. at 937–38. While the dentists on the Board could rely on their expertise in deciding whether the

dentist had provided services with reasonable competence with respect to this transaction, the defendant was not prejudiced, because he could produce his own testimony and evidence regarding a discrete and specific transaction. See id.; see also Petition of Grimm, 138 N.H. 42, 45 (1993) (no expert testimony required where allegation of violation of professional standards was engaging in sexual intercourse with a patient).

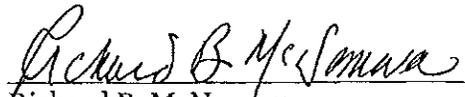
The contrast to the instant case is stark. Here, the Petitioner was forced to respond to an allegation that he had failed to provide “reasonable supervision.” The Commission refused to define what it believed constituted “reasonable supervision,” and it provided no expert testimony which could be cross-examined on the issue. While the Petitioner produced expert testimony of his own that his conduct constituted reasonable supervision, he had no way of knowing whether or not the Commission rejected his expert’s opinion of what due care required or applied a different standard of what constitutes “reasonable supervision.”

For these reasons, the Commission should have granted the Petitioner’s motion to dismiss. Therefore, the Court vacates the Commission’s Final Decision and Order.

SO ORDERED.

DATE

4/17/14


Richard B. McNamara,
Presiding Justice