

IN THE MATTER OF
THE REAL ESTATE ACT c.R-2.1

AND

IN THE MATTER OF SHAHZAD AHMED

DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE

Before: C.E. Thompson, Deputy Superintendent of Real Estate

Appearances: SHAHZAD AHMED
Ed Miller, on behalf of the Saskatchewan Real Estate Commission
L. Stewart, on behalf of Shahzad Ahmed

Hearing Date: Mar 23, 2010

Decision Date: Apr 4, 2011

DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE

This decision addresses the appeal by Shahzad Ahmed ("Mr. Ahmed"), as allowed pursuant to section 43 of *The Real Estate Act* (the "Act"), of the decision of the Saskatchewan Real Estate Commission (the "Commission") in the Matter of Shahzad Ahmed, dated December 2, 2009 (the "Decision").

At the time of the hearing, Mr. Ahmed was registered as a salesperson with Re/Max Saskatoon.

I. Facts

For convenience, I will summarize the facts admitted to by Mr. Ahmed in the Statement of Facts and Admissions, provided in the record, and accepted at appeal:

Mr. Ahmed was charged with, and admitted to, breaching the Act by having committed acts amounting to professional misconduct, as described pursuant to section 39(1)(c) of the Act, when he breached subsection 55(2) of the Act, which prohibits a salesperson from advertising a trade in real estate without indicating the name of the brokerage on the advertisement; and when he breached bylaw 729, which requires all salespersons to submit advertising to his or her broker or branch manager for approval prior to publication. Both of these breaches were admitted to have occurred between June 27 and July 17, 2009.

Prior to the posting of the advertisement, Mr. Ahmed had hired an assistant. The assistant was terminated approximately 25 days after he hired her in mid June, before Mr. Ahmed was notified of the posting by the Commission's staff, in July, 2009.

At the time of the relevant advertisement posting, Mr. Ahmed knew of the requirement to include the brokerage name on all advertisements as well as the requirement to have all advertisements reviewed by the branch manager or broker because he had been warned about this rule by the Commission's employees in the past.

Larry Stewart, broker and owner of Re/Max Saskatoon testified under oath that Mr. Ahmed was diligent about having his advertisements reviewed and characterized the diligence as being "almost to the point he was bugging". At the Commission hearing Anne Odishaw, Re/Max Saskatoon's branch manager, made similar comments.

Mr. Ahmed insisted under oath, at appeal, that the only explanation he could think of for the posting was that his assistant had posted the relevant advertisement on-line without his knowledge. He further asserted, under oath, that although his assistant had the access required to have posted the advertisement, she had not been directed to place the advertisement and did not inform Mr. Ahmed that it had

been posted, despite the requirement that she report to him daily as to her activities.

Mr. Ahmed testified that he executed the Statement of Facts and Admissions, assuming full responsibility for publication because he was directed to do so, on the advice of experienced registrants, including a Commission member, and because he did accept ultimate responsibility for the breach.

Mr. Ahmed claims that once the Statement of Facts and Admissions was executed, both he and Ms. Odishaw notified the Director of Investigations and the Investigation Committee Representative (the "ICR") who presented at the hearing, that there were other facts that might be relevant to assessing penalty, including the fact that Mr. Ahmed was unaware of the posting until the Commission notified him that it existed and also that he suspected that his former assistant had posted the advertisement on-line without his knowledge.

On appeal I received the *Investigation Committee Representative Submission to Registrant Appeal at Superintendent of Real Estate* (the "Submission") and was informed that the appellant had reviewed the Submission as well.

The Submission affirmed that the ICR who presented the Investigation Committee's case to the Commission hearing knew that Mr. Ahmed and Ms. Odishaw had provided verbal submissions to the Director of Investigations and that the ICR knew that Mr. Ahmed and Ms. Odishaw both claimed that the only explanation for the posting was that Mr. Ahmed's assistant had posted the advertisement without Mr. Ahmed's knowledge.

Despite receiving this information, the ICR chose to exclude the new information and not to amend the Statement of Facts and Admissions.

The ICR also chose not to investigate Mr. Ahmed's explanation for the posting and left it to Mr. Ahmed to obtain an admission from the assistant, whom he had terminated before he knew that the advertisement had been published.

At the hearing the ICR denied having knowledge of Mr. Ahmed's explanation for the posting. The hearing transcript cites the ICR as follows:

The new information [the theory that Mr. Ahmed's assistant placed the advertisement without his knowledge] that is being brought forward with respect to it is not my fault someone else did it was never brought forward during the course of the review at all, nor was it put into the Statement of Facts and Admissions. This is brand new evidence that is being brought forward at this time.

II. The Commission's Decision

A Mitigation Hearing took place on November 19, 2009. The Commission accepted the Statement of Facts and Admissions wherein Mr. Ahmed acknowledged the violations and heard representations as to the appropriate sanctions.

On December 2, 2009, the Commission rendered its Decision wherein it stated:

In accordance with *The Real Estate Act* and regulations, the Committee made the following orders

Count 1

- a) Shahzad Ahmed receive an order of reprimand for the violation of 55(2) of the *Act*;
- b) Shahzad Ahmed, prior to February 1, 2010, pay to the Saskatchewan Real Estate Commission, a \$2,000.00 fine for the said violation of the *Act*; and
- c) Shahzad Ahmed's registration shall be suspended if he fails to pay any portion of the fine within the said period of time;

Count 2

- d) Shahzad Ahmed receive an order of reprimand for the violation of Bylaw 729;
- e) Shahzad Ahmed, prior to February 1, 2010, pay to the Saskatchewan Real Estate Commission, a \$2,000 fine for the said violation of the *Act*; and
- f) Shahzad Ahmed's registration shall be suspended if he fails to pay any portion of the fine within the said period of time.

The Commission's rationale for these penalties is as follows:

The Committee, in considering the disciplinary action, considered Shahzad Ahmed's lack of previous sanction history and the length of time he has been in the real estate industry.

The Hearing Committee felt that the breach of the *Act* and Bylaw was serious and must be addressed appropriately. Mr. Ahmed was aware of the requirements to submit his advertising to his broker for approval and to ensure his brokerage was shown in the advertisement. This had been reinforced to him in writing and by his broker. It is his responsibility to ensure that his staff members know these requirements and the consequences of not following the requirements. The registrant is the person responsible for the ads going out in their name and any breach becomes their responsibility. Mr. Ahmed clearly understands this and acknowledged that he must bear the consequences for the breaches which clearly occurred.

The advertising in this matter was an isolated incident and will hopefully not be repeated. Mr. Ahmed should certainly be aware of what steps he must take in placing advertising, as both the Commission and his brokerage have brought it to his attention. The Hearing Committee does differentiate between the Schriml case and Mr. Ahmed because of the number of incidents involved in the Schriml matter. However, there is some similarity as Mr. Ahmed had the advertising process brought to his attention in a formal manner from the Commission before this and yet the advertising still went out in an improper manner.

The growing use of the internet as an advertising tool does not diminish the need for registrants to ensure that the proper approval and brokerage identification is obtained in all advertising. The Commission will ensure that breaches of these sections are addressed appropriately. The sanction in this matter is meant to reflect the seriousness of the failure of Mr. Ahmed to follow proper protocol in his advertising. It is also intended to illustrate that when Mr. Ahmed was specifically reminded of these requirements, he must remember to follow these steps. It is important that Mr. Ahmed understand that he should not breach the *Act* in this manner again. All advertising must be reviewed and it must refer to the brokerage.

These sections are for the protection of the public. The sanctions imposed in this matter are intended to reflect the seriousness of the breach. They must also give the public

confidence that advertising has to comply with the Act so as not to confuse the public. All registrants must feel confident that such a breach will be dealt with seriously.

The Hearing Committee reminds all registrants that advertising rules must be adhered to or there will be serious sanctions imposed.

It should also be noted that the Hearing Committee, once the Statement of Facts and Admissions has been accepted, can only rely on the facts as are provided to them in the sworn Statement of Facts and Admissions. If factual matters are raised at the hearing, we cannot rely on them unless the Investigation Committee representative acknowledges them. It is important that registrants carefully review the statement before they swear as to the contents. The specific wording is what the Hearing Committee will use in determining the sanction to be imposed.

III. Appeal

Mr. Ahmed's appeal hearing took place at the Office of the Superintendent of Real Estate on March 23, 2010. Mr. Ahmed represented himself and Mr. Larry Stewart appeared on his behalf as well. Ed Miller was present on behalf of the Commission.

At the hearing, Mr. Ahmed explained that he was appealing the quantum of the penalty imposed by the Commission because:

1. The Commission acted unfairly when it refused to consider relevant evidence that was not contained in the Statement of Facts and Admissions;
2. Mr. Ahmed should not be held accountable for the breach of Bylaw 729 because he did not know about the advertisement and so was never in a position to have considered submitting it to his broker for review; and
3. The Facts of the case against Mr. Ahmed are sufficiently different from the facts of the *Schriml* (Decision of the Commission upheld by the Deputy Superintendent of Real Estate *In the Matter of Gary Schriml*, #08-54) decision so as to render it irrelevant in assessing quantum in this case.

a. Issues

To assess this case, I view the following issues as determinative:

1. Did the Commission meet its Duty of Fairness when it refused to consider facts alleged by Mr. Ahmed's that were not contained in the Statement of Facts and Admissions?
 - i. What is the applicable standard of review for these arguments?
2. Should Mr. Ahmed be held accountable for breach of Bylaw 729?
3. Is the *Schriml* case determinative in assessing the penalty considering the facts of this case?

b. Analysis

1. Did the Commission meet its Duty of Fairness when it refused to consider facts alleged by Mr. Ahmed's that were not contained in the Statement of Facts and Admissions?

i. What is the Applicable Standard of Review?

In all appeals a standard of review analysis is required to determine the boundaries of the review process. There are currently two standards of review "reasonableness" and "correctness". The reasonableness standard requires a more deferential review in recognition of a tribunal's expertise. Generally speaking, this standard is typically applied to assess the reasonableness of findings that are not procedural or jurisdictional in nature.

The other standard of review is "correctness". A correctness standard is used to assess issues that are not within the expertise of the tribunal *per se*, such as matters having to do with procedure (duty of fairness, notice, disclosure, delay, bias and independence of the tribunal members) and jurisdiction (the limits of a tribunal's authority according to the grant of authority). When the correctness standard applies, the reviewing body assesses whether the tribunal has decided the question in a dispute correctly and, if not, substituting its own decision.

In this case the merits of the decision depend on the fairness of the process that was used in assessing the tribunal's jurisdiction to hear new evidence at the mitigation or penalty phase of the hearing. This means that if the Commission's decision not to hear evidence at the penalty/mitigation phase of the hearing is determined to have been unfair, the appropriate standard of review is correctness and I have the authority to substitute my own decision for the Commission's.

The Saskatchewan Court of Appeal's decision in *S.T.F. v. Munro*, 105 D.L.R. (4th) 342 (*Munro*) is instructive in explaining the duty of fairness owed by both the investigating body that makes recommendations (like the Investigations Committee) and by the body that receives the facts for the purpose of assessing a penalty (like the Commission).

In *Munro* the Saskatchewan Court of Appeal determined that a teacher was denied the opportunity to answer the case against him when he did not receive the recommendation of a disciplinary committee (investigative body similar to the Investigations Committee) before a disciplinary decision was made by an adjudicative body (the adjudicative body is referred to as the Executive in the quote below and is analogous to the Commission).

In considering whether the teacher should have been able to review the recommendation and answer the case made in the report, the Saskatchewan Court of Appeal commented on the scope of the right to be heard at a penalty hearing. These comments are relevant in ascertaining the scope of the opportunity to be heard on penalty as set out in regulation 9 of *The Real Estate Regulations*:

15 As noted, the Federation emphasized the limited adjudicative role that the Executive plays in the hearing of a complaint against one of its members. **It was argued that the Executive must accept the findings of the Discipline Committee regarding the teacher's misconduct and that the only actual role for the Executive was to reprimand and/or recommend a penalty. Given this narrow mandate, the Federation submitted, the duty to act fairly owed to Mr. Munro by the Executive was minimal to the point of non-existence.**

16 **In our respectful view, this submission must, too, be rejected. "Sentencing" (if that term may be used in relation to a disciplinary proceeding) is an integral part of the adjudicative process vis-à-vis the individual. It is the natural conclusion derived from the determinations of fact found during the "conviction" process. This proposition applies with no less force in a statutory scheme such as the one under consideration here, where the finder of fact is distinct from the party imposing (or, here, imposing or recommending) sentence. To be fair and just, the consequences meted out by the Executive must bear, in our view, a close relation to the determinations of fact found by the Discipline Committee. In this respect, we note the following words (though spoken in a criminal law context are apposite here) of Dickson J. (as he then was) in *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 415:**

To my mind, the facts which justify the sanction are no less important than the facts which justify the conviction; both should be subject to the same burden of proof. Crime and punishment are inextricably linked. "It would appear well established that the sentencing process is merely a phase of the trial process" (Olah, [Sentencing: The Last Frontier of the Criminal Law] (1980), 16 C.R. (3d) 97] at p. 107). ***Upon conviction the accused is not abruptly deprived of all procedural rights existing at trial: he has a right to counsel, a right to call evidence and cross-examine prosecution witnesses, a right to give evidence himself and to address the court.*** (emphasis added)

17 Sentencing is a critical area for the individual, often *the* critical area, as it is the consequences of an authority's decision that have the most direct impact on the individual concerned. Again, we transplant the words of Dickson J. in the criminal context of *R v. Gardiner* at p. 414 into the current context of administrative law:

One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to trial. **Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be**

accurate and reliable.
(*Munro* at paras 15 to 17)

The foregoing passages identify principles that are applicable to the penalty hearing phase of the Commission's disciplinary process as follows:

1. The penalty hearing phase is an integral part of the Commission's adjudicative process, including the situation where the finder of facts (the Investigation Committee) is distinct from the party imposing sentence (the Commission).
2. Information obtained for a penalty hearing should be accurate and reliable.
3. To be fair and just, the consequences meted out by the Commission must bear a close relation to the determinations of fact found by the Investigation Committee; and
4. The penalty/mitigation process is merely a phase of the hearing process and upon a finding of breach the registrant is not abruptly deprived of all procedural rights existing at hearing and he has a right to call evidence.

If we apply the foregoing principles to Mr. Ahmed's penalty hearing, a question arises as to whether he was treated fairly. Of most concern to me is the question as to the accuracy and reliability of the information on which the penalty decision was based and the fact that Mr. Ahmed was denied the right to call evidence at this stage, despite a suggestion from more than one person that relevant information had not been included in the Statement of Facts and Admissions.

A review of the hearing transcript confirms that the Commission questioned whether the allegation about the assistant's involvement in the advertisement was new to the ICR at the Commission hearing. The Submission provided to me at the appeal hearing confirms that the Commission now believes the ICR misled the Commission as to the timing of when the ICR learned of the allegation about the assistant's involvement, at the hearing. Finally, the Commission determined that it could not hear new evidence at the hearing. I find the Commission's position that it is limited to relying on facts in the Statement of Facts and Admissions perplexing for the reason that this position contravenes the very purpose of the opportunity to be heard that is accorded by regulation 9(5) of the Act. Regulation 9(5) prohibits the Commission from making an order prior to providing a registrant that has waived his right to a full hearing with an opportunity to be heard on the penalty assessment, which in some cases could involve the introduction of new evidence.

In my view the Commission made an error of law when it determined that it could not hear evidence at the mitigation. Admittedly, in a typical case the penalty hearing phase will not involve questions of fact and should be limited to arguments on penalty only. If the Commission wants to avoid factual challenges at the stage of the mitigation hearing, then the Statement of Facts and Admissions must accurately reflect the facts which the registrant views to be pertinent. If there are relevant factual omissions in the Statement of Facts and Admissions,

then a registrant may be in a stronger position to challenge decisions based upon these facts.

If there are facts in dispute that go to an argument as to the appropriate penalty, these facts should be properly investigated and determined prior to the hearing so that the Commission is in a position to make a decision that reflects an appropriate penalty. In cases where material allegations of fact are not properly investigated by the time of the mitigation hearing then the Commission has a few choices: it can determine whether to adjourn until a more fulsome investigation is conducted, it can make a finding that the allegation of fact, if established, is not pertinent, or it can hear evidence at the hearing and draw its conclusions accordingly.

This case is unusual because the registrant and his branch manager both claimed that information had been provided to the ICR before the hearing. The ICR denied knowledge of this information at the hearing and the Commission accepted the ICR's position at the time of its Decision. After the Decision, however, the Commission determined that the ICR's testimony had been misleading.

Admittedly the problems created by the Commission's decision not to hear evidence or to reopen the investigation in this case became augmented when the Commission determined that the ICR had misled the Commission when he claimed not to have had knowledge of the potentially material allegation that Mr. Ahmed was unaware that the posting had occurred.

In sum, I conclude that the applicable standard of review is correctness, since the Commission erred at law when it refused to consider alleged facts that were not identified in the Statement of Facts and Admissions.

In light of my finding I have determined that this is an appropriate case to vary the order of the Commission and to substitute my own decision for the decision of the Commission, as is allowed pursuant to clauses 43(6)(d) and (e) of the Act. It is on this basis that I will proceed to address the remaining issues:

2. Should Mr. Ahmed be accountable for breach of Bylaw 729?
3. Is the *Schriml* case determinative in assessing the penalty considering the facts of this case?

2. Should Mr. Ahmed be accountable for breach of Bylaw 729?

I accept that Mr. Ahmed is responsible for a breach of section 55(2) of the Act. It is my finding that someone in his office posted an advertisement of a trade in real estate without indicating the name of the brokerage.

The question is whether Mr. Ahmed should also be charged with a breach of bylaw 729.

At the appeal I heard testimony from both Mr. Ahmed and Mr. Stewart. Mr. Ahmed testified under oath that he was not aware of the advertisement until Commission informed him that it had been posted.

In reference to Mr. Ahmed's diligence in ensuring the brokerage reviewed his advertisements, Mr. Stewart, also under oath, characterized Mr. Ahmed's behaviour prior to the event of the advertisement as "diligent", "almost to the point he was bugging us."

Similarly, at the Commission hearing Anne Odishaw testified as follows: "Shah has been very good with any of his new ads or anything like that. He emails them to me. He emails them to Larry Stewart. We check them. We email back as to what, if there are any problems or, yes, we give him the go ahead."

Taken together, Mr. Stewart's testimony at appeal, Ms. Odishaw's similar testimony at the Commission hearing and Mr. Ahmed's sworn testimony that he did not know about the posting until he was notified by the Commission, leads me to accept Mr. Ahmed's argument that he was unaware of the advertisement until he was notified by the Commission. I have also inferred from Mr. Stewart's and Ms. Odishaw's testimony that if Mr. Ahmed had known of the posting he would have run the advertisement by them before allowing it to be posted.

From the foregoing, I have concluded that Mr. Ahmed never had the opportunity to meet the requirements of bylaw 729 because he never knew that the posting had occurred.

To completely strike the charge in this case is not appropriate because that would send a message to registrants that a failure to supervise staff could result in a lesser penalty. In acknowledging that Mr. Ahmed breached bylaw 729, however, it is important to note that I view Mr. Ahmed's history of diligence in having his supervisors review his advertisements to be a significant mitigating factor on the question of penalty.

3. Is the *Schriml* case determinative in assessing the penalty considering the facts of this case?

In the *Schriml* decision, which was upheld on appeal to the Deputy Superintendent of Real Estate, the Commission charged Mr. Schriml \$2,000 for breach of 55(2) and \$3,000 for breach of bylaw 729, along with orders of reprimand for each charge.

Although there are a few similarities to the present case, the relative culpability of the registrants and the relative severity of the breaches are vastly different. Mr. Schriml was responsible for 42 separate advertisements over the course of two weeks. The Commission found that Mr. Schriml had been reminded of his obligation to have the branch manager review his advertisements only two weeks before these advertisements were published and that he had failed to have reviews

conducted on at least 51 advertisements in the relevant period. In contrast, Mr. Ahmed was responsible for one advertisement, he was unaware that the posting had occurred and had a history of diligently running his advertisements by his broker and branch manager.

For these reasons I consider the *Schriml* decision to be helpful in determining that Mr. Ahmed ought to receive a lesser penalty than Mr. Schriml did.

VI. Decision

Having reviewed the records, the Decision and representations at appeal, I find that the Commission erred in law when it decided that it did not have the authority to hear arguments raised by Mr. Ahmed at the mitigation hearing. Although it is a general rule that the facts to be considered at a mitigation hearing should be limited to those identified in the Statement of Facts and Admissions, this case was unusual because the ICR made a unilateral decision to omit information relevant to penalty determination in his submissions to the Commission and mislead the Commission as to his knowledge at the time of the hearing, resulting in a Decision that was unfairly based on facts that were neither accurate nor reliable.

For these reasons I have exercised my authority to vary the Commission's order and to substitute my own decision for the decision of the Commission.

Although the Commission's decision is varied its key messages are still important for registrants. Registrants remain responsible for the activities of their employees when those activities are conducted under the authority of the registrant's licence. I agree with the Commission's statements respecting the growing use of the internet and the associated need to make sure that registrants using this advertising medium ensure that all advertising requirements continue to be met when using it. The Commission's rationale for sentencing remains correct. The advertising requirements are intended to protect the public and to ensure that the public understands who it is dealing with and is not confused by inaccurate advertising. Advertising breaches are serious and registrants are responsible to ensure compliance with the advertising requirements so that the public can be confident that registrants are acting fairly and transparently and registrants can maintain a reputation of professional integrity.

I hereby accept Mr. Ahmed's appeal and vary the Commission's order as follows:

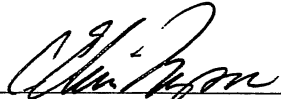
Count #1

- a) Shahzad Ahmed shall receive an order of reprimand and pay to the Saskatchewan Real Estate Commission a fine of \$1,000.00 for violation of section 55(2) by May 30, 2011.
- b) Shahzad Ahmed's registration shall be suspended if he fails to pay any portion of the fine within the said period of time.

Count #2

- a) Shahzad Ahmed shall receive an order of reprimand and pay a fine of \$1,000.00 for violation of bylaw 729 of the Act by May 30, 2011.
- b) Shahzad Ahmed's registration shall be suspended if he fails to pay any portion of the fine within the said period of time.

Dated at Regina, Saskatchewan this 4th day of April, 2011.



C. E. Thompson
Deputy Superintendent of Real Estate