

BEFORE THE MISSISSIPPI REAL ESTATE COMMISSION

MISSISSIPPI REAL ESTATE COMMISSION

COMPLAINANT

VS.

NO. 155-0912

KIM WADE, BROKER

RESPONDENT

ANSWER TO COMPLAINT

COMES NOW, Respondent, Kim Wade, and files his Answer to Complaint and states as follows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted. As such, Respondent requests that the complaint is dismissed.

SECOND DEFENSE

Answering the allegations of the Complaint paragraph by paragraph, this Respondent states as follows:

I.

The allegations of paragraph I of the complaint are accurate to the extent they indicate Respondent is an adult resident of Mississippi who holds a real estate broker license issued by the Mississippi Real Estate Commission and is subject to the Mississippi laws which govern the sale and transfer of real estate and the licensing of real estate brokers.

II.

The allegations of paragraph II of the complaint are accurate to the extent they indicate Complainant received correspondence from John Eubanks setting forth his

dissatisfaction with the professional services provided to him by Respondent during the sale of his property located at 1268 Lewis Lane, Terry, Mississippi 39170. It is also accurate that Respondent entered into a listing agreement with John Eubanks on July 5, 2009. The listing agreement is a *preprinted form* copyrighted by the Mississippi Association of Realtors which states, "*Broker is a participant of the J.A.R. Multiple Listing Service (MLS) and this listing information will be provided to the MLS to be published and disseminated to its participants. The Listing Broker is also authorized to report the sale, when it occurs, including price, terms and financing for the publication, dissemination, information and use by authorized members, MLS participants and Subscriber.*" All other allegations are expressly denied and strict proof is demanded.

III.

Respondent can neither admit or deny the allegations of paragraph III of the complaint since he has no personal knowledge of the investigation conducted by Complainant in this matter.

IV.

The allegations of paragraph IV of the complaint are accurately stated to the extent they indicate that Respondent was associated with Ann Prewitt and on or about June 17, 2009, he terminated his relationship with Ann Prewitt and sought a principal broker license with the Mississippi Real Estate Commission. The Commission issued a license to Kim Wade Real Estate on June 19, 2009. On or about July 9, 2009, the property owned by John Eubanks was entered into the Multiple Listing Service, hereinafter "*MLS*", by Melissa Reese

and she was identified as a listing agent. All other allegations are expressly denied and strict proof is demanded.

Complainant, *in error*, alleges that Respondent, upon terminating his relationship with Ann Prewitt, was required to reapply for membership in the Jackson Association of Realtors, hereinafter “*JAR/MLS*”. The Bylaws for JAR/MLS established two relevant classes of membership – REALTOR member and REALTOR member (non-principal). REALTOR members are sole proprietors, partners, corporate officers, or branch office managers, which are “*engaged actively in the real estate profession, including buying, selling, exchanging, renting or leasing, managing, appraising for others for compensation, counseling, building, developing or subdividing real estate, and who maintain or are associated with an established real estate office in the state of Mississippi.*” JAR Bylaws, p. 2.

A REALTOR members (*non-principal*) are “*individuals who are engaged in the real estate profession other than as sole proprietors, partners, corporate officers, or branch office managers and are associated with a REALTOR Member and meet the qualifications set out in Article V.*” Id.

According to Section 6 of the JAR Bylaws, when a REALTOR changes the conditions under which he holds membership, “*he shall be required to provide written notification to the Board within 30 days through the Licensee Status Form. A REALTOR (non-principal) who becomes a principal in the firm with which he has been licensed or, alternatively, becomes a principal in a new firm which will be comprised of REALTOR principals may*

be required to satisfy any previously unsatisfied membership requirements applicable to REALTOR (principal).” Members “shall, during the period of transition from one status of membership to another, be subject to all of the privileges and obligations of a REALTOR (principal).” If the Realtor (non-principal) does not satisfy the requirements established in the Bylaws for the category of membership to which they have transferred within 30 days of their change in status, their membership will be terminated automatically. Id. at p. 9.

According to the JAR Bylaws, Respondent, Kim Wade, when he terminated his relationship with Ann Prewitt on June 17, 2009, he had up to and including July 17, 2009, to provide written notification to JAR of the change to his membership status via the Licensee Status Form. During this transition period, pursuant to Section 6 of the JAR Bylaws, Respondent had “*all of the privileges and obligations of a REALTOR (principal).*” Therefore, Respondent was a member of JAR/MLS on July 5, 2009, when he entered into a listing agreement with Mr. Eubanks and there was no substantial misrepresentation by Respondent of his status with JAR/MLS.

V.

The allegations of paragraph V of the complaint are expressly denied and strict proof is demanded. Respondent vehemently denies that he misrepresented his status with JAR/MLS to Mr. Eubanks and because the licensure statutes and regulations at issue are penal, this Commission is required to prove its case against Kim Wade by clear and convincing evidence. Mississippi Real Estate Commission v. McCaughan, 900 So.2d 1169, 1173 (Miss.

2004). The statutes and regulations at issue must be strictly construed in favor of Mr. Wade. Id. Furthermore, ambiguities in a regulation should be construed against the agency where the agency seeks to apply its interpretation retroactively. State v. Beebe, 687 So.2d 702 (Miss. 1996).

Clear and convincing evidence is the weight of proof that produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. It is evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, as to the truth of the asserted facts. Moran v. Fairley, 919 So.2d 969 (Miss. Ct. App. 2005); Sumler v. East Ford, Inc., 915 So.2d 1081, 1088 (Miss. Ct. App. 2005). Clear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same level. Id. The clear and convincing standard is where the evidence is of such real and substantial nature that impartial men of sound judgment would reasonably believe it. Aponaugh Mfg. Co. v. Collins, 42 So.2d 431, 479 (Miss. 1949).

In short, the Commission should only sanction Mr. Wade if it finds there exists clear and convincing evidence to support a violation of Mississippi Code Annotated § 73-35-21(a) by Mr. Wade. The decision by this Commission must be (1) supported by substantial evidence, (2) not be arbitrary or capricious, or (3) beyond the power of the administrative agency to make, or (4) violate some statutory or constitutional right of the complaining party.

The Commission's decision to sanction Mr. Wade would be considered arbitrary if "it is not done according to reason and judgment, but depending on will alone." Miss. State Dept. of Health v. Natchez Cmty. Hosp., 743 So.2d 973 (Miss. 1999). A capricious action is defined as being "done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles."

Id.

McGowan v. Miss. State Oil & Gas Bd., 604 S0.2d 312, 322 (Miss. 1992), defines arbitrary and capricious as follows:

"Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone – absolute in power, tyrannical, despotic, non-rational – implying either a lack of understanding of or a disregard for the fundamental nature of things.

"Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlled principles.

It is clear that *Section 6* of the JAR Bylaws gives REALTORS a thirty day transition period to change their status and complete any additional membership qualifications. Therefore, Mr. Wade was a member of JAR/MLS at the time in question. Any other interpretation of *Section 6* is arbitrary and capricious and subject to judicial review. The plain language reading of *Section 6* provides REALTORS with a thirty day transition period to change their status and any other reading would be irrational, fickle and arbitrary.

Membership in a Board of REALTORS has been recognized by the courts as a valuable property right. Morf v. North Central Mississippi Board of Realtors, Inc., 27 So.3d 1188 (Miss. Ct. App. 2009). As such, any action affecting the rights and privileges of a member must be justified both substantively and procedurally. Id. An association has a right to fix penalties and terminate membership, but penalties and termination must be determined according to some method, to which the member has agreed. Multiple Listing Service of Jackson v. Century 21 Cantrell Real Estate, Inc., 390 So.2d 982 (Miss. 1980). Otherwise, the association would be allowed to arbitrarily terminate memberships and assess fines which are clearly unjust and improper. Id. To allow an association to act in such an arbitrary and capricious manner would “*work serious loss to members and invite an abuse of authority.*” Id. at 985.

In Century 21, the Mississippi Supreme Court held that private organizations, like JAR/MLS, have a right to discipline and terminate its members but a member can only be disciplined and terminated where there is written documentation regarding discipline and termination, which each member agreed to be bound by when joining the association. Id. To hold that an association might arbitrarily terminate memberships would “*invite an abuse of authority.*” Id. at 986.


In the case *sub judice*, effective July 9, 2009, there existed no JAR/MLS rules or regulations which would have placed Mr. Wade or any other REALTOR on notice that their membership with JAR/MLS terminated prior to the thirty day transition period set forth in

Section 6 of the bylaws when they disassociated with another REALTOR and changed their status. This premise is further supported by the December 16, 2009, email from Jo Usry of JAR/MLS to Kim Wade in which she states, “*I was wrong about your membership status. I was thinking that the mere fact that you paid REALTOR dues for 2009 your REALTOR status was still intact with your new company.*” A copy of the email is attached as Exhibit “A”. It is reasonable to presume that if Mrs. Usry, CEO of JAR/MLS, was unclear about Mr. Wade’s status on July 9, 2009, that the rules and regulations do not effectively place members on notice as to when their membership terminates when they disassociated with another REALTOR and changed their status, making it arbitrary and capricious.

Because membership in JAR/MLS is a property right, JAR/MLS has a heightened duty to insure that its members are aware of the means in which their membership may be terminated. At the time in question, JAR/MLS had no rule or regulations which would support the termination of Mr. Wade’s membership prior to July 19, 2009, which was thirty days after he terminated his relationship with Ann Prewitt and the Commission issued a license to Kim Wade Real Estate. As such, Mr. Wade was still a member of JAR/MLS and not in violation of Mississippi Code Annotated § 73-35-21(a) on July 9, 2009. Therefore, this Commission should immediately dismiss the charges against Mr. Wade.

This the 14th day of June, 2010.

Respectfully submitted,
KIM WADE, RESPONDENT

BY: 

Kim Wade