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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1250-21**

**NEW JERSEY REAL ESTATE
COMMISSION,**

Respondent,

v.

**DAVID BEACH, Licensed
New Jersey Real Estate
Broker-Salesperson (Ref.
No. 0124914),**

Appellant.

Submitted May 16, 2023 – Decided June 6, 2023

Before Judges Sumners and Chase.

On appeal from the New Jersey Real Estate Commission, Department of Banking and Insurance, Docket No. GLO-19-026.

Dragon and Dragon, PC, attorneys for appellant (Jeffrey F. Dragon, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Sookie Bae-Park, Assistant Attorney

General, of counsel; Dakar Ross, Deputy Attorney General, on the brief).

PER CURIAM

This appeal raises the issue of whether a real estate agent violated state law by granting his client, the buyer, unsupervised access to a seller's property mere hours before the closing of a real estate transaction. Notwithstanding that the buyer may have been left unattended in the seller's home without their permission for only a brief time, we affirm.

I.

David Beach, a licensed real estate salesperson, represented a buyer of property. The closing was to take place at 1:00 p.m. on May 31, 2019. On the morning of the closing, Beach obtained consent from the sellers to conduct a final walkthrough with his client, while the sellers were not home. During this walkthrough, Beach gave the door passcode to the buyer and demonstrated how the home's electronic door lock keypad system operated, which gave her access to the home prior to the closing. This was not approved by the sellers. After the walkthrough, the buyer reportedly forgot her purse inside the house and, with Beach's knowledge, she re-entered the home using the security code that Beach had provided, even after Beach had left the property. As the buyer exited the

house, the sellers returned home, and a verbal confrontation ensued regarding her unsupervised entry into the home.

After the sellers filed a complaint with the New Jersey Real Estate Commission, the Commission filed an order to show cause (OTSC) alleging Beach violated both N.J.S.A. 45:15-17(e), prohibiting conduct which demonstrates unworthiness, incompetency, bad faith or dishonesty, and N.J.A.C. 11:5-6.4(a), requiring licensees to strictly comply with the laws of agency and the principles governing fiduciary relationships. After Beach filed an answer to the OTSC, and a plenary hearing was held, in which the Commission determined that by providing the buyer with the digital access code to the sellers' electronic lock, and also by permitting the buyer to be unaccompanied inside the sellers' property, Beach demonstrated "incompetency" in violation of N.J.S.A. 45:15-17(e) and "fail[ed] to deal fairly with the [s]ellers," in violation of N.J.A.C. 11:5-6.4(a). Beach's penalties included paying a \$3,250 fine, having his real estate license placed on probation for one year, and requiring him to take six hours of continuing education courses regarding agency and ethics. Beach appeals the violations and penalties.

Beach does not contest the events, but argues in mitigation, that during this time, the buyer's husband was gravely ill in the hospital and died a few days

after closing. Beach claims the buyer's grief was a driving force in his decision to provide her unapproved access to the seller's home. As a result of Beach allowing the buyer access to the home before closing, no damage to the property occurred. The closing went smoothly hours later, and the sellers experienced no tangible injury. It is undisputed that during Beach's twenty-one years as a real estate agent, he has had no record of prior misconduct.

Beach argues the violation was an innocent mistake, not warranting the penalties he received. He relies upon two rulings from other jurisdictions. In re Rendell-Baker, 436 A.2d 739, 110 (1981), the Vermont Supreme Court held "[a] single, innocent mistake in showing the wrong lot to a purchaser and a single failure of the broker to supervise the salesperson does not establish incompetence." And, in McCoy v. Thompson, 677 P.2d 839, 842 (Wyo. 1984), the Wyoming Supreme Court recognized that "a single honest failure in the performance of one's duties does not without more amount to incompetency." However, that argument is unpersuasive because Beach not only failed to supervise the buyer in the sellers' house but also allowed her unfettered access to it before closing via the electronic lock.

II.

A.

The Commission is charged "with the high responsibility of maintaining ethical standards among real estate brokers and salesmen," Goodley v. N.J. Real Estate Comm'n, 29 N.J. Super. 178, 182 (App. Div. 1954), as well as protecting the "public from fraud, misinterpretation, incompetence and unethical practices," In re Appeal of Pipes, 329 N.J. Super. 391, 397 (App. Div. 2005).

"The scope of review in a case involving an appeal from the New Jersey Real Estate Commission is the same as that for other administrative agencies[.]" Morgan v. Saslaff, 123 N.J. Super. 35, 38 (App. Div. 1973). "[We] have 'a limited role' in the review of [agency] decisions." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). "[A] 'strong presumption of reasonableness attaches to [an agency decision]'" In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993)). "In order to reverse an agency's judgment, [we] must find the agency's decision to be 'arbitrary, capricious, or unreasonable, or . . . not supported by substantial credible evidence in the record as a whole.'" Stallworth, 208 N.J. at 194 (quoting Henry, 81 N.J. at 579-80). Our Supreme Court has held, in determining whether agency

action is arbitrary, capricious, or unreasonable, [we] must examine: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. Id. at 194 (quoting In re Carter, 191 N.J. 474, 482-83 (2007)). We "may not substitute [our] own judgment for the agency's, even though [we] might have reached a different result." Ibid. (quoting Carter, 191 N.J. at 483). Furthermore, "[i]t is settled that '[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference.'" E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 355 (App. Div. 2010) (second alteration in original) (quoting Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001)). "Nevertheless, 'we are not bound by the agency's legal opinions.'" A.B. v. Div. of Med. Assistance & Health Servs., 407 N.J. Super. 330, 340 (App. Div. 2009) (quoting Levine v. State Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001)). "Statutory and regulatory construction is a purely legal issue

subject to de novo review." Ibid. Applying the above standards, we discern no reason to reverse.

The Commission may discipline a licensee who it deems guilty of any conduct "which demonstrates unworthiness, incompetency, bad faith or dishonesty." N.J.S.A. 45:15-17(e). Similarly, a real estate professional is obliged to ensure that the interests of his or her principal are paramount and must place the interests of the principal ahead of his or her own. The Commission's rules obligate licensees

to strictly comply with the laws of agency and the principles governing fiduciary relationships. In accepting employment as an agent, the licensee pledges himself to protect and promote, as he would his own, the interests of the client or principal he has undertaken to represent; this obligation of absolute fidelity to the client's or principal's interests is primary but does not relieve the licensee from the obligation of dealing fairly with all parties to the transaction.

[N.J.A.C. 11:5–6.4(a).]

Real estate licensees are "fiduciaries" and "the real estate licensing law is based on a strong public policy of the State." N.J.S.A. 45:15-17 (e) was designed "to create and maintain a commission to scrutinize in general and with care the character, competency, and integrity of license applicants and license holders to the end that in the interest of the public welfare, incompetent,

unworthy and unscrupulous persons would be excluded from the real estate brokerage business." Division of N. J. Real Estate Comm'n v. Ponsi, 39 N.J. Super. 526, 532-533, (App. Div. 1956).

Moreover, an agency has "broad discretion in determining the sanctions to be imposed for a violation of the legislation it is charged with administering." In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). Correspondingly, we have limited "review of an agency's choice of sanction." In re License Issued to Zahl, 186 N.J. 341, 353 (2006). The appropriate test for reversal is "whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." Id. at 354.

B.

First, we address only the reasonableness of the Commission's conclusion. The Commission's final determination that Beach violated both N.J.S.A. 45:15-17(e) and N.J.A.C. 11:5-6.4(a) was not unreasonable where Beach knew that allowing a buyer unsupervised access to the seller's home before closing was a violation of his fiduciary duty. While there was no damage to seller's property, this was Beach's first offense in twenty-one years of practice, and his statement that he was exercising empathy for a grieving client is credible, none of these truths excuse a violation of the rule.

Additionally, Beach's emphasis on the fact that the sale was nearly complete is unpersuasive. It is irrefutable that the sale would not be finalized until 1:00 p.m. on May 31, 2019. The laws concerning real estate transactions are designed to eliminate confusion with respect to ownership. The buyer officially owns, controls, and has full access to the property only after the official closing occurs, and the property is legally transferred. Beach's failure to appreciate a seller's valid concerns when a buyer is granted access to what is legally still the seller's property was properly characterized as a demonstration of incompetence by the Commission. Allowing a buyer access to a seller's home before closing can result in property damage, theft, and other forms of fraudulent behavior that can injure the seller or corrupt the sale in general. In the same vein, the Commission properly deemed Beach's conduct in violation of the "fair dealing" statute. N.J.A.C. 11:5-6.4(a). Beach's argument that there is no rule for digital keypads, but only rules for keys is also without merit as they both function to secure the house.

C.

A real estate licensee found in violation of N.J.S.A. 45:15-17(e) is "subject to suspension, revocation, or probation for any conduct which demonstrates incompetency, bad faith, or dishonesty." N.J.S.A. 45:15-17(e).


Our Supreme Court delineated a list of factors to assist in determining whether an agency's sanction is arbitrary, capricious, or unreasonable: (1) the licensee's good or bad faith; (2) the licensee's ability to pay a financial penalty; (3) the amount of profit earned from wrongful activity; (4) the extent of any injury to the public; (5) the duration of the wrongful activity; (6) the existence of any criminal actions; and (7) the existence of any prior violations. Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987). This court will not disturb the Commission's determination of Beach's penalties as they were reasonable and appropriate under the Kimmelman factors. Where the Commission determined that Beach demonstrated incompetency, its issuance of a year-long probation—the least restrictive penalty that can be applied to an agent's license—was not unreasonable. Additionally, the Commission properly weighed the Kimmelman factors in their final determination when deciding the monetary penalty imposed. Under the Kimmelman factors, the \$3,250 fine imposed was not unreasonable. In Beach's own brief he admitted to having the ability to pay said a fine. Furthermore, the maximum fine the Commission may issue for a first offense is \$5,000. The fine imposed was well below that and, as demonstrated by the Commission, in line with prior infractions of similar degrees.

Beach's contention that his conduct should be considered an exception to the rule due to his empathy for the grieving buyer, the sale being nearly completed, or the buyer simply needing to retrieve her purse, is unpersuasive when we consider the deference owed to the Commission and the policy underlying the violated rules. The policy underlying the rules that Beach violated serve to maintain trust between buying agents and sellers. When real estate procedures are treated as suggestions, and the lines of ownership are blurred due to an agent's misconduct, as is here, that trust erodes. Even absent tangible injury to the seller, when the integrity of real estate licensees comes into question, irreparable injury to the public inevitably follows. We are satisfied there is sufficient credible evidence in the record supporting the Commission's decision under Rule 2:11-3(e)(1)(D), and the decision is not arbitrary, capricious, or unreasonable.

To the extent we have not specifically addressed any of appellant's arguments, we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION