

MINUTES OF MEETING

Kansas Real Estate Commission

August 21, 2014

The Kansas Real Estate Commission held its regular meeting on Thursday, August, 21, 2014, at 9:00 a.m. at Three Townsite Plaza, Suite 200, 120 S.E. 6th Avenue, Topeka, Kansas.

Commissioners Present:

Errol Wuertz, Chairperson
Sue Wenger, Vice Chairperson
Joseph Vaught, Member
Shirley Cook, Member

Staff Present:

Sherry C. Diel, Executive Director
Alexandra Blasi, Disciplinary Counsel
David Pierce, Director of Enforcement
Kelly White, Director of Education
Sam Blasi, Law Clerk
Wendy Alkire, Compliance Supervisor
Mitzi Dodds, Legal Assistant

Kansas Real Estate Commission Legal Counsel Present:

Sarah Fertig, Assistant Attorney General
Lisa Mendoza, Assistant Attorney General

Members of the Public Present:

John C. Waters, Jr.
Diane Waters

Call to Order

Mr. Wuertz called the KOMA meeting to order at 9:15 a.m.

Approval of the June 18, 2014 Meeting Minutes

Motion was made by Mr. Vaught, seconded by Ms. Wenger to approve the minutes of the June 18, 2014 meeting. Motion carried unanimously.

Commissioner Training on Factors Considered for Felony Cases

Ms. Fertig provided training for the Commissioners on what factors are considered for applicants or licensees with felony charges. K.S.A. 58-3043 is the applicable statute when considering applicants/licensees with felonies. An applicant can be barred from getting a real estate license depending on the type of felony they were convicted of and how long it has been since the applicant completed their terms of sentencing. If an individual was convicted of an offense which required registration under the Kansas Registered Offender Act (i.e., violent crimes, sex offenses, etc.), they are not eligible to obtain a real estate license for at least 15 years following completion of their sentencing requirements. Individuals convicted of other types of felonies are barred from obtaining a real estate license for at least 5 years

following completion of their sentencing requirements. These two situations provide no discretion for the Commission to approve these applicants.

The Commission does have discretion to grant a license if an applicant's felony falls outside the barred period. K.S.A. 58-3043 lists factors to be considered when reviewing an applicant with a felony, including: the applicant has the burden of proof to establish their honesty, integrity, trustworthiness and competence (HITC) to conduct the business of real estate; the nature of the offense; whether there were aggravating or extenuating circumstances; the amount of time elapsed since the felony; any rehabilitation or restitution performed by the applicant; and any other factors deemed relevant by the Commission. The Commission must weigh all evidence – whether in support of or against issuing a license. This also applies to an individual whose license was revoked, they were convicted of a felony, and they are now requesting a new license.

If an individual's license was revoked because of a felony tied directly to their real estate business, the Commission would consider factors addressed in the Kansas Supreme Court case titled *Vakas*. The *Vakas* factors include the following: present moral fitness of the applicant; demonstrated consciousness of the wrongful conduct and disrepute which the conduct has brought to the profession; character, maturity and experience at the time of revocation; and present competence in real estate.

As stated earlier, the burden of proof to demonstrate HITC falls on the applicant. Factors to be considered include: extent and nature of past activity; age at the time the crime was committed; amount of time elapsed since the applicant's last criminal activity; applicant's conduct and work activity before and after the criminal incident; evidence of the applicant's efforts at rehabilitation; and all other evidence of the applicant's fitness for licensure.

The Commission must consider the circumstances surrounding the crime and who the individual is now, not just the behavior exhibited at the time the crime was committed.

The Commission discussed the length of time courts keep their criminal history records. While access to records of expungement may be limited to certain individuals, most court records are available for an extended period of time.

With the increase in applicants who have been convicted of a felony, the Commission discussed what supplemental documentation could be provided for their review. Ms. Fertig reported the Commission could direct what specific type of documentation should be required for different categories of applicants. Ms. Blasi reported multiple attempts to inform applicants with felony records what documentation should be provided to the Commission. Ms. Blasi explained that revising the current application would take some time and would add an additional page to the application. Motion was made by Mr. Vaught, seconded by Ms. Wenger to require that education providers emphasize to present and potential licensees who have felony histories the importance of providing required documentation with a license application. Motion carried unanimously. Once the application form is revised, the issue will be brought back before the Commission for review. Once the revisions to the application are approved by the Commission, providing the pertinent felony documentation will become a mandate.

Mr. Wuertz recessed the KOMA meeting at 9:46 a.m. for KAPA Proceedings.

Ms. Bittenbender arrived at 11:27 a.m.

Mr. Wuertz reconvened the KOMA meeting at 11:33 a.m.

Staff Presentation on Tracking Issuance of Orders through Compliance

Ms. Blasi and Mr. Blasi presented to the Commission an explanation of how staff tracks orders that are issued as well as an individual's compliance with an order. If the Commission renders a decision regarding a Licensing issue that requires an order, a new docket number is assigned in the Docket Information Management System (DIMS). DIMS provides the mechanism by which staff can track various factors related to each order as well as any time staff has invested in the preparation and distribution of the order. DIMS also provides reports and information which allow staff to track specific variables, i.e., effective dates, restricted/conditioned dates and hearing dates, just to name a few. Staff also utilizes DIMS to obtain statistics that are used in the budget-building process.

If a Summary Proceeding Order (SPO) is issued, this type of order contains Findings of Fact, Applicable Law, Conclusions of Law, Order and Request for Relief sections. An SPO is considered an effective order, becoming effective 15 days (plus the time allowed for mailing) following the date of issuance. Applicants can be denied or approved with restrictions and/or conditions and fined. If a request for hearing is received, that request is acknowledged in writing. All hearings are conducted according to the Kansas Administrative Procedure Act (KAPA). The Commission's Chair or the Commission serve as the Presiding Officer for hearings held before the Commission. Upon the conclusion of the hearing, the Commission renders its decision and a Final Order is issued. If the Respondent is not satisfied with the Final Order, they have other opportunities to request relief, including review and/or reconsideration, appeal to district court, appeal to the Kansas Court of Appeals and, if accepted, appeal to the Kansas Supreme Court. This is also tracked in DIMS.

If an applicant is fined but does not have the financial resources to remit the entire payment at one time, a Consent Agreement and Final Order (CAFO) can be issued instead of an SPO. The CAFO would specify a due date for the fine, but may allow the applicant to remit the payment all at once or through multiple payments.

Complaints received by the Commission are prioritized according to a Guidance Document approved by the Commission and are entered into and tracked via the Complaint Management System (CMS). The statute of limitations for issuing an order is three years. If the statute of limitations will expire in six months or less, issuing an order becomes a priority. The CMS entry is closed and a DIMS entry is created so the order and potential hearing request can be tracked. An SPO issued in regard to a Disciplinary issue is similar to one issued for a Licensing matter, but is generally more detailed. K.S.A. 58-3050 can be referenced in orders for both Licensing and Disciplinary issues, but K.S.A. 58-3062 can only be referenced for Disciplinary issues. If an order is issued regarding a Disciplinary or audit issue and a hearing is requested, the Commission requests a Presiding Officer from the Office of Administrative Hearings (OAH) handle the hearing process. The Presiding Officer from OAH issues an Initial Order. If the Respondent or agency is not satisfied with the Initial Order, they have other opportunities to request relief, including review and/or reconsideration, appeal to district court, appeal to the Kansas Court of Appeals and, if accepted, appeal to the Kansas Supreme Court. This is also tracked in DIMS.

It was brought to the Commission's attention that if an individual was licensed prior to the implementation of the fingerprint requirement, the only way the Commission would find out about the applicant's criminal

history is if the applicant self-reports their criminal history. Therefore, the Commission may, if appropriate, condition the license to require a fingerprint background history report.

The Commission expressed interest in seeing information on any cases that have been considered by the Kansas Supreme Court.

Ms. Blasi reported that \$94,000 in fines has been collected since April 1, 2014, when she and Mr. Blasi returned to the Commission.

The Commission complimented Ms. Blasi and Mr. Blasi on their presentation and indicated this type of information would be very helpful when presenting material to others.

Mr. Wuertz recessed the KOMA meeting at 12:30 p.m. for lunch.

Mr. Wuertz reconvened the KOMA meeting at 2:15 p.m.

Executive Session to Discuss a Personnel Matter

Based upon a motion made by Ms. Wenger, seconded by Mr. Vaught, Mr. Wuertz recessed the KOMA meeting at 2:16 p.m. for 20 minutes to enter into an executive session to discuss a personnel matter. Those in attendance include the Commissioners, Ms. Diel, Ms. Blasi, Ms. Fertig and Ms. Mendoza. Motion carried unanimously.

Mr. Wuertz reconvened the KOMA meeting at 2:36 p.m.

Executive Session to Discuss a Personnel Matter

Based upon a motion made by Mr. Vaught, seconded by Ms. Wenger, Mr. Wuertz recessed the KOMA meeting at 2:37 p.m. for 20 minutes to enter into an executive session to discuss a personnel matter. Those in attendance include the Commissioners, Ms. Diel, Ms. Blasi, Ms. Fertig and Ms. Mendoza. Motion carried unanimously.

Mr. Wuertz reconvened the KOMA meeting at 3:00 p.m.

Discussion Regarding Certifications of Licensure History from Other Jurisdictions

Length of Time Other Jurisdictions Maintain Records

Ms. Diel reported that Brooke Daniels, Senior Administrative Assistant in the Licensing Division, has assembled a notebook containing certifications of licensure history from other states. This provides a reference staff can use to verify requirements for licensure certifications from various jurisdictions.

Method of Transmission by Applicant

Ms. Diel reported that the Commission's rule has been that the certificate had to be an original certification of licensure history, i.e., the official seal, original signature, etc. Texas now emails certificates upon request and staff request direction on whether or not Kansas can accept the emailed certificate from the applicant. The Commission gave staff the authority to accept electronic certifications emailed directly from the applicant.

Clarification of Director Authority for Processing Transfers, Deactivations or Affiliation Removals if Supervising Broker Will Not or Cannot be Located to Sign Paperwork

Ms. Diel reported a situation had recently occurred wherein a licensee could not locate and/or get their supervising broker to sign a deactivation and transfer. The licensee was instructed to document their attempts to obtain the supervising broker's signature and submit that information to the Commission. Staff then processed the affiliated licensee's license change request and referred the supervising broker's lack of action to the Disciplinary Committee for review. The Commission indicated this practice was still appropriate. The Commission also recommended this scenario be included in a newsletter article.

Broker Supervision Pending Request for Transfer of a Restricted License

Ms. Diel reported that staff are reporting issues when a restricted licensee wants to transfer to another supervising broker. Although the Order details the requirements for transfer, staff are contacted for documentation that the next supervising broker should obtain from the affiliated licensee. Licensing staff spend time compiling required documentation so that a transfer can be considered by the Commission. Problems or complaints arise when the process takes time to be completed because the licensee and supervising broker do not understand Commission approval and an Order are required. If the new proposed supervising broker decides not to supervise a licensee, the licensee is forced to locate another supervising broker, leaving the current supervising broker "on the hook" until a new supervising broker is located. Sometimes the current supervising broker does not want to remain in that position and staff assist with a deactivation request. The Commission decided a standard form letter detailing what is required of a supervising broker will be sent out with each restricted license. Staff will draft a letter and bring it back to the Commission for review.

Mr. Wuertz declared a 10 minute break at 3:19 p.m.

Mr. Wuertz reconvened the meeting at 3:29 p.m.

Staff Report on Nonresident Licensees

As an informational item requested at the July 10, 2014 meeting, Ms. Blasi prepared a report on the percentage of applications received from out-of-state applicants. It appears the majority of out-of-state applicants hold active licenses and were from Missouri, Oklahoma, Nebraska and Colorado.

Budget Report

The Budget Report was received by the Commissioners. Ms. Diel reported the following:

Expenditures

On the FY 2015 Expenditure Report, the spreadsheet reflects "DIVO" in the "% Expended" column. Until the budget is completed, there will be no appropriation figures. All that will be available is what has been spent. For FY 2013 - FY 2015 expenditures reflect flat spending for the three-year period.

Encumbrances

Total encumbrances are \$51,376. The majority of the encumbrances are for testing of the Online Licensing Management System (OLMS) when it is ready to go "live" and for maintenance of the licensing system.

This brings the available Fee Fund down from \$318,358 to \$266,982.

Receipts

The Receipts Report will include a new category as of July 1, 2014. The amount of monies retained from fines will be reflected on this report.

For FY 2015, KREC has transferred 10% of receipts, or \$6,806, to the State General Fund, retained 90% of receipts, or \$61,255, for the KREC Fee Fund. A total of \$6,295 in fines was received in July 2014, with \$4,745 transferred to the State General Fund and \$1,550 retained by the agency. The retained amount includes only a base amount entered for the time to draft the Order when the billing process was begun. As staff time for investigations and audits is included in the billing, the billable charges will increase and the amount of fines retained will increase.

For FY 2013, which should be equivalent to FY 2015 because odd-numbered years are compared, receipts were approximately \$51,780. For July 2014, receipts were \$4,421 ahead of expenditures. This amount includes the fine money retained.

Ms. Diel reported she will know if a deficit will occur when she begins entering expenditures and anticipated receipts for the FY 2015 – FY 2017 budget. She will budget for some travel in FY 2016 and FY 2017. Ms. Diel sees a reasonable increase in receipts and expenditures for the next few years. If the budget does not balance, she will make cuts and add the items back as an Enhancement Request to return to previous service levels.

Why the amount paid to the KBI is included on the Receipts Report was clarified. This amount does not show up on the Expenditures Report.

Recovery Fund

The balance in the Recovery Fund is \$323,644.

Staff Report on I-Team Statistics

The Commission received the staff report on I-Team statistics, the first report of the Fiscal Year. Ms. Blasi offered that if the Commissioners would like more information provided in these reports, please let staff know.

An Emergency Order was issued on August 15, 2014 suspending Brenda Wood immediately. A hearing will be held on October 15, 2014 to determine further proceedings. Ms. Wood was given an extended deadline for providing paperwork to allow Athena Thompson to take over as the supervising broker of Ms. Woods' companies.

Education Report

The Commissioners received the Education Report.

Director's Report

The Commissioners received the Director's report. Ms. Diel reported that there was one complaint filed with a legislator that came through the Kansas Legislative Research Department alleging an individual

could not use the Commission's automated phone system. Ms. Diel tested the system, provided information on how to use the phone system and how to access the complaint form on the web site to file a complaint against a licensee, and offered that the person could contact her directly, but she did not hear anything further on the matter.

Ms. Diel reported that total active licensees are up when compared to last year. The lowest level of licensees was approximately 13,200. Currently, there are 13,663 licensees, which is the highest that number has been for several years.

Ms. Diel reported a complaint concerning the schedule for the reminder process posted in the July newsletter. A licensee alleged the Commission does not notify licensees in time to prevent a late fee being charged. The posted schedule stated a reminder postcard is sent three weeks before the renewal date. If there is no response, an email is then sent 10 days before the expiration date. This procedure will be changed so that an email is sent 10 days prior to the renewal date, which is the Commission's current practice.

Ms. Diel reported the 2007 Ford Taurus was sent to Surplus.

Ms. Diel reported that additional information clarifying the deadlines utilized when an individual files an online application has been added to the web site. The time stamp on an email and the time stamp on the banner of a fax are considered the "received" date. In addition, Ms. Diel clarified why various credit cards can be utilized for payment when filing an online application and why only a Discover card can be used as payment when filing an application via hand-delivery, mail, or fax. This involves requirements of Mastercard and Visa and the inability of the Commission to absorb the convenience fees charged.

Ms. Diel reported that by sending the "new license" letter by email has saved \$121.10 in postage. In addition, of the 110 emails sent to agents, only 5 have requested law books. Normally, the law books are ordered in quantities of 2,000 – 3,000.

The Commission discussed the article in ARELLO® reporting that Virginia has implemented voluntary mandatory reporting for licensees.

Executive Session to Discuss an Attorney-Client Privilege Matter

Based upon a motion made by Mr. Wuertz, seconded by Ms. Wenger, Mr. Wuertz recessed the KOMA meeting at 3:56 p.m. for 25 minutes to enter into an executive session to discuss an attorney-client privilege matter. Those in attendance include the Commissioners, Ms. Fertig and Ms. Diel. Motion carried unanimously.

Mr. Wuertz reconvened the KOMA meeting at 4:26 p.m.

Reorganization of the Commission

Based upon a motion made by Mr. Vaught, seconded by Mr. Wuertz, Ms. Wenger was nominated as the Commission Chair. Motion carried unanimously.

Based upon a motion made by Ms. Wenger, seconded by Mr. Wuertz, Mr. Vaught was nominated as the Commission Vice Chair. Motion carried unanimously.

There will be no meeting in September. The October 9, 2014 meeting will be held in-person, the November 13, 2014 meeting will be held in-person and the December 11, 2014 meeting will be held via teleconference.

Ms. Wenger will remain on the Disciplinary Committee.

Ms. Wenger requested a brief presentation be prepared of the Disciplinary Committee set-up, Ms. Fertig's role as Commission counsel, Ms. Blasi's role as Disciplinary Counsel and Ms. Mendoza's role as Disciplinary Counsel.

Public Comments

There were no public comments.

Upon a motion from Mr. Vaught, seconded by Ms. Wenger, the meeting was adjourned. Motion carried unanimously.

Adjournment

Mr. Wuertz adjourned the meeting at 4:30 p.m.