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Sep 25 2024

SC Court of Appeals

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

South Carolina Department of Consumer
Affairs,

Petitioner,

vs.

Lavisha Green,

Respondent.

Docket No. 23-ALJ-30-0335-CC

FINAL ORDER AND DECISION

APPEARANCES: For the Petitioner:

Zachary A. Passmore, Esq.
James C. Copeland, Esq.

For the Respondent:

Pro se

STATEMENT OF THE CASE

This case is before the Administrative Law Court (ALC or court) pursuant to a request for a contested case hearing filed by Lavisha Green (Respondent) on August 8, 2023. The Respondent challenges the determination of the South Carolina Department of Consumer Affairs (Department) that she failed to timely submit her mortgage log and its decision to impose a \$9,000.00 fine as a result. Generally, the Respondent does not dispute that she failed to timely file the mortgage log but maintains that it was an innocent mistake as a new broker and that the penalty imposed is excessive under the circumstances.

A hearing in this matter was held on November 14, 2023, at the ALC in Columbia, South Carolina. After careful consideration of the evidence presented, the applicable law, and the arguments of the parties, the court upholds the penalty imposed by the Department.

FINDINGS OF FACT

Having carefully considered all testimony, exhibits, and arguments presented at the hearing in this matter, and considering the credibility and accuracy of the evidence, the court makes the following findings of fact by a preponderance of the evidence:

1. The Respondent has a mortgage broker license in South Carolina, operating under the entity Fab Seven, LLC. That entity was first issued its license on July 1, 2021, and has been continuously licensed since.

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2. On January 23, 2023, the Department notified the Respondent via email at “realtorlavishagreen@gmail.com” informing her that she is required by law to file a mortgage log by March 31, 2023.
3. On February 15, 2023, the Department again notified the Respondent at the aforementioned email address that a mortgage log or a written attestation of “no activity” needed to be submitted by the March 31st deadline.
4. On March 14, 2023, the Department once again notified the Respondent via email that she was required to file a mortgage log by March 31st. This notice further provided that, pursuant to South Carolina law, a fine of \$100 per day would be imposed for late or incomplete submissions.
5. On April 6, 2023, the Department notified the Respondent that it had not received her mortgage log for 2022. The notice included a reminder regarding the \$100 per day late fee imposed for failing to timely file mortgage logs.
6. By email to the Respondent dated June 30, 2023, the Department notified the Petitioner that it did not receive her mortgage log by the March 31, 2023, deadline. The notice provided that the Department had imposed a statutory penalty of \$100 for each day the mortgage statement was late, resulting in a \$9,000.00 accrued fine as of the date of the notification. This email was sent to the same “realtorlavishagreen@gmail.com” email address used by the Department for its earlier correspondence to the Respondent regarding her mortgage log. The email also indicates that this notice was sent via U.S. mail as well.
7. By email dated July 5, 2023, the Respondent reached out to the Department seeking assistance regarding the penalty imposed. As part of this correspondence, the Respondent forwarded emails from 2022 between her and the Department expressing confusion over the mortgage log filing process. The email address used by the Respondent in the 2022 emails is the same email address used by the Department in their notices regarding her mortgage log submission for 2023.¹
8. Thereafter, on August 8, 2023, the Respondent filed a request for a contested case hearing with this court.
9. At the hearing, Karri Boyer Hawley testified on behalf of the Department. Ms. Hawley is a licensing attorney at the Department and assists license examiners with compliance issues

¹ It is unclear from the exhibit submitted which email the Respondent used to send the July 5, 2023, correspondence.

and application renewals. She testified to the requirements regarding the annual submission of a mortgage log and the training that mortgage broker licensees participate in regarding that requirement, among other things. Ms. Hawley testified that the Respondent was sent notices regarding the requirement in January, February, March, and April. She stated that the notices were sent to the email provided to the Department, and to the Multiple Listing Service (MLS), by Ms. Green and that she received no indication that the notices were undeliverable. Ms. Hawley noted that the Respondent timely submitted her 2021 mortgage log in 2022, which would have been the first year she was required to file a log following her licensure in 2021.

10. Ms. Green also testified at the hearing. She did not dispute that she failed to submit her mortgage log by the March 31st deadline, but noted that it was only her second year in business and that she was confused by the continuing education materials regarding the requirement. Ms. Green also testified that she changed her email since she filed the prior year, but acknowledged receiving the June 30, 2023, notice regarding the fine and conceded that she did not update her email in the MLS system. She argued that the fine was unreasonable, particularly given the fact that she was not notified of the fine until after ninety (90) days had passed and \$9,000.00 in penalties had accrued. Given that, she asked for the fine to be reduced.

CONCLUSIONS OF LAW

Based upon the above findings of fact, the court concludes the following as a matter of law:

1. Section 1-23-600 of the South Carolina Code grants jurisdiction to this court to hear contested cases under the Administrative Procedures Act. S.C. Code Ann. § 1-23-600 (Supp. 2023). Specifically, Section 40-58-90 grants the ALC the authority to hold contested case hearings in matters arising from the Department. S.C. Code Ann. § 40-58-90(A) (2011).
2. Unless otherwise required by law, the standard of proof in an administrative proceeding, such as this, is by a preponderance of the evidence. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2023); *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (citation omitted). A “preponderance of the evidence” is evidence which convinces as to its truth. *Frazier v. Frazier*, 228 S.C. 149, 168, 89 S.E.2d 225, 235 (1955).

3. In this state, the Department is charged with regulating mortgage broker licensees, and every person acting as a mortgage broker in South Carolina must be licensed by the Department. *See* S.C. Code Ann. § 40-58-30(A) (2011).
4. Licensed mortgage brokers must submit a mortgage log containing certain information to the Department by March 31st of each year. *See* S.C. Code Ann. § 40-58-65(A) (Supp. 2023); *see also* S.C. Code Ann. Regs. 28-400(D)(1) (Supp. 2023) (noting the requirement for mortgage brokers to file a mortgage log with the Department).
5. Pursuant to statute, “[t]he licensee *shall* pay a fine of one hundred dollars a day for late or incomplete data submissions.” S.C. Code Ann. § 40-58-65(A) (emphasis added). “Ordinarily, the use of the word ‘shall’ in a statute means that the action referred to is mandatory.” *S.C. Dep’t of Highways and Pub. Transp. v. Dickinson*, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986) (citation omitted); *see also Collins v. Doe*, 352 S.C. 462, 470-71, 574 S.E.2d 739, 743 (“Under the rules of statutory interpretation, use of words such as ‘shall’ or ‘must’ indicates the legislature’s intent to enact a mandatory requirement.”) (citations omitted).

DISCUSSION

In this case, the Respondent does not dispute that she did not file her 2022 mortgage log by the March 31, 2023, deadline. Rather, she argues that she is a new licensee who was confused by or not fully aware of the filing requirements and made a mistake. The Respondent contends that the penalty is unreasonable and asks this court for leniency with respect to the amount imposed by the Department. Though the court is inclined to agree that the monetary penalty imposed in this case for a new licensee with no prior disciplinary infractions seems disproportionate to the Appellant’s conduct in this case, as set forth below, the court regrettably finds that it lacks discretion to reduce the penalty.

Pursuant to Section 40-58-65(A) of the South Carolina Code, licensees “*shall* pay a fine of one hundred dollars a day for late or incomplete data submissions.” S.C. Code Ann. § 40-58-65(A) (emphasis added). The statute does not provide for any lesser or alternative penalties, and the use of the word “shall” implies a mandatory requirement. *See S.C. Dep’t of Highways and Pub. Transp.*, 288 S.C. at 191, 341 S.E.2d at 135 (citation omitted); *Collins*, 352 S.C. at 470-71, 574 S.E.2d at 743. Thus, this court is without authority to alter the mandatory statutory penalty of one hundred dollars (\$100) a day for late submissions.

Here, the Respondent does not dispute that she failed to timely file her 2022 mortgage log and offers no explanation for this failure other than a lack of experience and some confusion regarding the filing requirements. While it is clear that the Respondent's omission in this case was due in large part to her inexperience, the court is without discretion to reduce or alter the penalty in any way given the statute's mandatory language. Consequently, the court is constrained to uphold the \$9,000.00 penalty imposed by the Department on the Respondent for her failure to timely file her 2022 mortgage log.

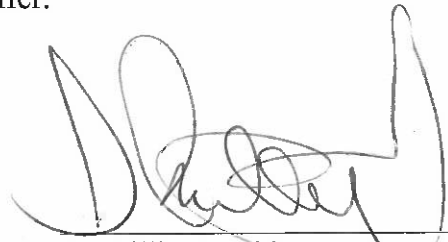
ORDER

Based upon the foregoing findings of fact and conclusions of law, the court finds that the Department's decision to impose a \$9,000.00 fine for the Respondent's failure to timely file her mortgage log must be upheld.

IT IS THEREFORE ORDERED that the Respondent shall pay the Department the penalty imposed in the amount of \$9,000.00, subject any payment plan, penalty modifications, or alternative arrangements the Department may offer.²

AND IT IS SO ORDERED.

August 2, 2024
Columbia, South Carolina

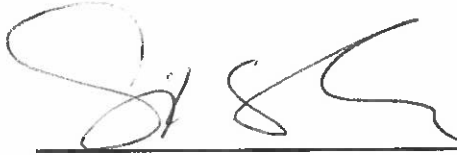


S. Phillip Lenski
Administrative Law Judge

² The court appreciates the candor of Ms. Green and is sympathetic to the financial difficulties resulting from the imposition of such a substantial fine. Following closing argument, the court asked counsel for the Department for its position on the penalty amount and whether leniency was allowed under the statute. The Department took the position that it was just enforcing the statute as written and had no authority to deviate from the one hundred dollar (\$100) per day penalty imposed by the statute. While the court's ability to offer leniency in this case is foreclosed by the mandatory statutory language regarding the penalty, the court rejects the idea that the Department—as the licensing authority in this matter—could not stipulate to a reduced number of days as part of settlement negotiations with the Respondent, suspend some portion of the penalty, or offer a long-term payment option to her. Given the facts of this case, the Respondent's neophyte status and her otherwise clean record, the court encourages the Department to work with the Respondent so as not to create an unsurmountable financial barrier to her returning to practice as a mortgage broker.

CERTIFICATE OF SERVICE

I, Erika S. Easler, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in black ink, appearing to read 'Erika S. Easler', is written over a horizontal line.

Erika S. Easler
Judicial Law Clerk

August 2, 2024
Columbia, South Carolina

