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IN THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
STATE OF FLORIDA

MANUEL RODRIGUEZ, and
CLIVE WELLMAN

Petitioners,

DCA Case No. 04-3117
L.T. No.: 2002002911, &
2002002913

vs.

STATE OF FLORIDA, DEPARTMENT
OF BUSINESS AND PROFESSIONAL
REGULATION, DIVISION OF
REAL ESTATE,

Respondent,

04-1445 PL
LJS-CWS

DIVISION OF
ADMINISTRATIVE
HEARINGS

2004 DEC 16 A 11:08

FILED

PETITION FOR WRIT OF PROHIBITION

Petitioners, Manuel Rodriguez, and Clive Wellman, pursuant to Rule 9.100(e), Florida Rules of Appellate Procedure, file this Petition for Writ of Prohibition, requesting that this Court prohibit the State of Florida Department of Business and Professional Regulation, Division of Real Estate from prosecuting the licenses of Manuel Rodriguez and Clive Wellman, in case numbers 2002002913 and 2002002911. In support of this Petition, Petitioners Manuel Rodriguez and Clive Wellman state:

INTRODUCTION

1. The State of Florida Department of Business and Professional Regulation ("Department") previously filed an Administrative Complaint against the licenses of Manuel

Rodriguez and Clive Wellman ("Rodriguez & Wellman") in case numbers 2002002913 and 2002002911.

2. In response to this first Administrative Complaint, Rodriguez & Wellman denied the allegations, and requested a formal hearing before the Division of Administrative Hearings, pursuant to Section 120.569, Florida Statutes (2003).

3. Just weeks before the formal hearing was to take place, and after Rodriguez & Wellman had spent considerable resources to defend their livelihoods, the Department filed a motion requesting that the Division of Administrative Hearings relinquish jurisdiction over these cases. Over the objection of Rodriguez & Wellman, the Department's Motion to Relinquish Jurisdiction was granted, and the case was closed.

4. Now, the Department has come back and filed an "Amended Administrative Complaint" against Rodriguez & Wellman, in the exact same case numbers which the Department previously requested (and had granted) the relinquishment of jurisdiction.

5. This new prosecution involves the same exact case numbers, the same exact facts, and comes after the Division of Administrative Hearings relinquished jurisdiction over these very cases, at the request of the Department.¹

JURISDICTION

6. This Court has jurisdiction in this matter as "district courts have the power to issue writs of prohibition to administrative agencies to prevent them from exceeding their jurisdiction." Department of Health and Rehabilitative Services v. Career Services Commission, 448 So.2d 18 (Fla. 1st DCA 1984). See also, Hoover v. Department of Professional Regulation, 620 So.2d 805 (Fla. 5th DCA 1993) (Granting a Writ of Prohibition preventing the Department of Professional Regulation from proceeding with a license disciplinary prosecution).

7. Both Rodriguez and Wellman are residents of Miami-Dade County, Florida, and therefore jurisdiction is appropriate in this Court. Section 120.68(2)(a), Florida Statutes (2003).

¹ Both the first Administrative Complaint and the Amended Administrative Complaint involve a single residential real estate appraisal which was performed on January 15, 2002. There have been no new facts uncovered, and there is no good faith basis to amend the initial administrative complaint. The Department had all the information available when it filed the initial Administrative Complaint.

PROCEDURAL BACKGROUND

8. Manuel Rodriguez is a Florida State certified general real estate appraiser, licensed by the Department.

9. Clive Wellman is a Florida state certified general real estate appraiser, licensed by the Department.

10. The Department is the state agency charged with the licensing and regulation of licensed real estate appraisers.

11. On March 25, 2004, the Department filed a twelve (12) count Administrative Complaint, in case numbers 2002002913 & 2002002911, against the real estate appraisal licenses of both Rodriguez & Wellman.² This Administrative Complaint is attached as "Appendix 1."

12. In response to the first Administrative Complaint filed against their respective licenses, Rodriguez & Wellman denied the allegations of fact made against them, and requested a formal administrative hearing before an Administrative Law Judge assigned by the Division of Administrative Hearings. The respective Requests for Formal Hearing are attached as "Appendix 2."

² These cases involve separate licensees, and separate investigations. The Department unilaterally consolidated both cases for one hearing before the Division of Administrative Hearings. While this was done without a motion, in contravention of Rule 28-106.108, Florida Administrative Code, neither Rodriguez nor Wellman objected to the consolidation.

13. On April 22, 2004, the Division of Administrative Hearings assumed jurisdiction over these cases. The Administrative Law Judge initially scheduled the formal hearing for June 24 and 25, 2004, and later reset the formal hearing for August 5 and 6, 2004. A copy of the Administrative Law Judge's Notice of Hearing and Order Granting Continuance and Re-scheduling Hearing are attached as "Appendix 3."

14. On July 15, 2004, the Department filed a Motion to Relinquish Jurisdiction with the Administrative Law Judge. This Motion to Relinquish Jurisdiction is attached as "Appendix 4."

15. It is important to note that this was not a motion to amend the complaint, pursuant to the Florida Rules of Civil Procedure. Further, the Department did not seek a continuance, nor did it seek to place the case in abeyance. Rather, the Department filed a Motion requesting that the Division of Administrative Hearings relinquish jurisdiction over case number 2002002913 and case number 2002002911.

16. The Department's Motion requesting that the Division of Administrative Hearings relinquish jurisdiction of these cases was filed four (4) months after the Department filed the Administrative Complaint, and just

three weeks before the scheduled formal administrative hearing.

17. Both Rodriguez & Wellman objected and opposed the Department's request that the Division of Administrative Hearings relinquish jurisdiction over these cases. Rodriguez & Wellman were prepared for their formal hearing, had retained an expert to testify on their behalf, and had incurred substantial legal costs to defend their licenses and livelihoods. Rodriguez & Wellman's Objection and Motion in Opposition to Petitioner's Motion to Relinquish Jurisdiction is attached as "Appendix 5."³

18. On July 26, 2004, ten (10) days before the formal hearing, the Division of Administrative Hearings granted the Department's Motion to Relinquish Jurisdiction. A copy of the Administrative Law Judge's Order is attached as "Appendix 6."

19. In granting the Department's Motion to Relinquish Jurisdiction, the Administrative Law Judge specifically held that, "the file of the Division of Administrative Hearings is CLOSED." See, "Appendix 6."

³ The Department filed a memorandum in support of its Motion to Relinquish Jurisdiction, but this memorandum was filed one day after the Administrative Law Judge granted the Motion to Relinquish Jurisdiction.

20. Over three (3) months later, and without providing notice, On November 3, 2004, the Department filed a twenty (20) count "Amended Administrative Complaint" against both Rodriguez and Wellman.⁴ This Amended Administrative Complaint has the same case numbers, and involves the exact same appraisal which was the subject of the first Administrative Complaint which the Department requested the Division of Administrative Hearings relinquish jurisdiction. A copy of the Amended Administrative Complaint is attached as "Appendix 7."

LEGAL ARGUMENT

21. After having its Motion to Relinquish Jurisdiction granted, the Department is now without jurisdiction to prosecute Rodriguez & Wellman in the very same cases, involving the very same facts.

22. It is well settled that once an administrative agency refers a case for to the Division of Administrative Hearings for a formal administrative hearing, the agency is not permitted to take any action, except as a "party litigant." Nicolitz v. Board of Opticianry, 609 So.2d 92 (Fla 1st DCA 1992).

⁴ Neither Rodriguez nor Wellman were notified of a new investigation nor were they advised whether new information was presented to the Probable Cause Panel of the Florida Real Estate Appraisal Board.

23. In the case of Hoover v. Department of Professional Regulation, 620 So. 2d 805 (Fla. 5th DCA 1993), the Fifth District Court of Appeal granted a Petition for Writ of Prohibition preventing the Department of Professional Regulation from proceeding with the prosecution of a physician's medical license after the case had been dismissed by the Department of Professional Regulation, and the Division of Administrative Hearings relinquished jurisdiction. The court, citing the Nicoltz decision, stated:

The First District explained that once a disciplinary proceeding has been commenced by the filing of a complaint, and referred to DOAH, DPR has only two options: to proceed to formal hearing or to discontinue prosecution.

Hoover, 620 So. 2d at 807. (Emphasis added) (Citations omitted).

24. While the Department is entitled to request that the Division of Administrative Hearings relinquish jurisdiction; as a "party litigant," once jurisdiction has been relinquished, the Department should be deemed to have waived its right to prosecute the same complaint.

25. Similarly, if both Rodriguez & Wellman requested that the Division of Administrative Hearings relinquish jurisdiction, it would clearly have been considered a waiver

of their right to a formal administrative hearing. Under Nicoltz, the Department should not have more rights than Rodriguez & Wellman, and the Department's requested relinquishment of jurisdiction should constitute the Department's waiver of the prosecution of these cases.

26. Certainly, it would never be argued that a respondent in a license disciplinary prosecution could request that the Division of Administrative Hearings relinquish jurisdiction over their case; then wait several months, and request that they be afforded their formal hearing. Yet, this is exactly what the Department is attempting to do in this case.

27. As we have previously stated, Rodriguez & Wellman have spent considerable resources to prepare for their formal hearing, not only in terms of legal and expert costs, but also in time. Allowing the Department to halt the administrative proceeding, go back and redo their administrative complaint, starting the entire process all over again by filing a second Amended Administrative Complaint, would have significant due process implications, and a substantial impact on Rodriguez & Wellman's ability to defend their licenses and protect their livelihood.

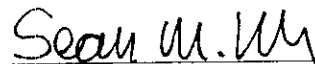
28. Should the Department be permitted to proceed in this second prosecution of the same two cases, there would be nothing to stop the Department from again waiting until just weeks before the next formal hearing, requesting the relinquishment of jurisdiction, and starting all over again. There would conceivably be no limit to how many times the Department could engage in this conduct.

RELIEF REQUESTED

WHEREFORE, Manuel Rodriguez and Clive Wellman respectfully request this Honorable Court to grant an order directing Respondent to show cause why the Writ of Prohibition should not be granted and after a hearing on the Petition to issue a Writ of Prohibition which prohibits the Respondent from prosecuting Manuel Rodriguez and Clive Wellman in case number 2002002911 and case number 2002002913.

Respectfully submitted,

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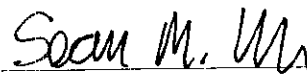
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Prohibition was furnished by via facsimile transmission and the Writ of Prohibition and Appendix were sent via Federal Express Overnight Delivery to:

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