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ATTORNEY GENERAL

October 24, 2019

The Honorable Richard J. Cash, Member
South Carolina Senate
P.O. Box 142
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Dear Senator Cash:

You seek our opinion regarding “the jurisdiction of professional licensing boards granted by Chapter 1 of Title 40 of the Code of Laws.” Specifically, your questions are as follows:

Question 1:

Do sections 40-1-40 through 40-1-90 give a professional licensing board jurisdiction over all matters related to the licensee acting in his professionally licensed capacity; including actions taken while serving an associated trade organization related to that licensure?

Question 2:

Can a professional licensing board take action under 40-1-110 (f and g) if there is not a separate violation under the licensing boards' profession specific practices act? For example, if a real estate licensee commits a dishonorable act while representing a professional trade association but the act does not occur in connection with a specific real estate transaction, can the real estate board take action?

Our short answer to both of these questions is “yes.” We will elaborate more fully below.

Law/Analysis

In Dantzer v. Callison, 230 S.C. 75, 95, 94 S.E.2d 177, 188 (1956), our Supreme Court discussed the role of the General Assembly in the exercise of the police power by placing restrictions upon professional licensees. The Court explained that

[t]he granting of a license to practice certain professions is the method taken by the State, in the exercise of its police power, to regulate and restrict the activity of the

licensee. He takes the same subject to the right of the State, at any time for the public good to make further restrictions and regulations.

The Dantzler Court cited in support Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955), noting that “[t]he Supreme Court of the nation [held] . . . that in matters of public health [and safety] the power of the legislature is exceedingly broad and it was not for the courts but for the legislature to determine the need for such regulation as a protection of the public.” 230 S.C. at 94, 94 S.E.2d at 187. Such an analysis strongly supports our conclusions herein.

The General Assembly has chosen to regulate the real estate industry in South Carolina extensively. In Op. S.C. Att’y Gen., 2014 WL 6569896 (November 10, 2014), we stated the following in pertinent part with respect to the regulation of realtors:

[t]he South Carolina Real Estate Commission (“the Commission”) was created by the Legislature pursuant to the current S.C. Code Ann. § 40-57-10 (2011): [t]here is created the South Carolina Real Estate Commission under the administration of the Department of Labor, Licensing and Regulation.” Furthermore, the Legislature makes clear that “[t]he purpose of this commission is to regulate the real estate industry so as to protect the public’s interest when involved in real estate transactions.” S.C. Code 40-57-10(2011). To effectuate this purpose, the Commission is given the authority to set the standards for qualifications and eligibility for licensure, conduct and decide on disciplinary actions for violations, recommend changes to legislation and regulations affecting the real estate industry and to set a fee schedule through regulation. S.C. Code Ann. § 40-57-60 (2011). . . .

Section 40-57-710 sets forth the grounds upon which the Board may discipline a licensee. However, § 40-57-710 also makes it clear that the grounds for discipline enumerated therein are not exclusive. Subsection (A) of § 40-57-710 begins by stating “[i]n addition to Section 40-1-110, the Commission may deny issuance of a license or may take disciplinary action . . . “ based upon the enumerated grounds set forth in § 40-57-710 (emphasis added).

In interpreting any statute, it is the cardinal rule that the primary purpose is to ascertain the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

Applying these basic rules of construction, when the Legislature expressly incorporated another Chapter of the Code, as it did in this instance, (“in addition to Section 40-1-110”), the Court will thus give the Legislature’s words and intent full effect. Compare Clemson Univ. v. Speth, 344 S.C. 310, 543 S.E.2d 572 (2001) [no indication the Legislature intended the definition of “park” to apply]. Thus, the grounds contained in § 40-1-110 for denial or revocation of a

realtor's license are clearly added to those grounds found at § 40-57-710. As we stated in Op. S.C. Att'y Gen., 1969 WL 15443 (February 11, 1969),

[i]t goes without saying that a provision for disciplinary grounds whereby the license of a licensee may be revoked or suspended does constitute the heart of the real estate licensing act. That profession, as with all other professions and callings, should be policed effectively so as to force out and eliminate the unfit and unworthy.

It is evident that the General Assembly's intent in adding § 40-1-110 to the grounds for discipline contained in § 40-57-710 was indeed to "force out and eliminate the unfit and unworthy" from licensure if determined to violate Section 40-1-110. Section 40-1-110 provides that

[i]n addition to other grounds contained in this article and the respective board's chapter:

(1) A board may cancel, fire, suspend, revoke, or restrict the authorization to practice of an individual who:

- (a) used a false, fraudulent, or forged statement or document or committed a fraudulent, deceitful, or dishonest act or omitted a material fact in obtaining licensure under this article;
- (b) has had a license to practice a regulated profession or occupation in another state or jurisdiction canceled, revoked, or suspended or who has otherwise been disciplined;
- (c) has intentionally or knowingly, directly or indirectly, violated or has aided or abetted in the violation or conspiracy to violate this article or a regulation promulgated under this article;
- (d) has intentionally used a fraudulent statement in a document connected with the practice of the individual's profession or occupation;
- (e) has obtained fees or assisted in obtaining fees under fraudulent circumstances;
- (f) has committed a dishonorable, unethical, or unprofessional act that is likely to deceive, defraud, or harm the public;
- (g) lacks the professional or ethical competence to practice the profession or occupation;
- (h) has been convicted of or has pled guilty to or nolo contendere to a felony or a crime involving drugs or moral turpitude;

- (i) has practiced the profession or occupation while under the influence of alcohol or drugs or uses alcohol or drugs to such a degree as to render him unfit to practice his profession or occupation;
- (j) has sustained a physical or mental disability which renders further practice dangerous to the public;
- (k) violates a provision of this article or of a regulation promulgated under this article;
- (l) violates the code of professional ethics adopted by the applicable licensing board for the regulated profession or occupation or adopted by the department with the advice of the advisory panel for the professions and occupations it directly regulates.

Each incident is considered a separate violation.

Section 40-1-110 was enacted in 1996 as part of Act 453. The legislative purpose of the Act, as expressed in its Title was, in part, “To Provide, Among Other Things For The Powers and Duties Common To All Occupational and Professional Licensing Boards Under the Administration of The Department of Labor, Licensing and Regulation. . . .” The Act enacted §§ 40-1-10 through 40-1-220, as now codified, thereby setting forth powers and duties “common to all occupational and professional licensing boards under the administration of the Department of Labor, Licensing and Regulation.” Section 40-1-40 enumerates those occupational and professional licensing boards under the jurisdiction of LLR, including the Real Estate Commission. The purpose of LLR “is to protect the public through the regulation of professional and occupational licensees and the administration of boards charged with the regulation of professional and occupational practitioners.” § 40-1-40(A).

Your questions focus particularly upon subsections (f) and (g) of § 40-1-110. These subsections have been referenced in previous decisions by our courts. For example, in 16 Jade Street, LLC v. R. Design Construction Co., LLC, 405 S.C. 384, 390, 747 S.E.2d 770, 773 (2013), our Supreme Court rejected the conclusion of the lower court finding personal liability based upon a residential contractor’s license. The circuit court had concluded that “as a resident licensee, Aten assumed professional responsibility for the project and, furthermore, that the use of the term professional responsibility ‘is broad enough to include civil liability.’” 405 S.C. at 389, 747 S.E.2d at 773. However, the Supreme Court, in disagreeing with this analysis, explained as follows:

. . . we disagree with the court’s conclusion that professional responsibility is tantamount to civil liability. The only consequences imposed by virtue of an individual’s license are to be meted out specifically by the appropriate licensing board, not a civil court. See S.C. Code Ann. § 40-1-100(l) (2005) (listing the acts for which the licensing board can sanction a licensee, including when he “lacks the professional or ethical competence to practice the profession.”); § 40-59-110 (2005)

(stating additional grounds for which a residential contractor, or home inspector can be sanctioned). Thus, we decline to construe these statutes so broadly as to create a duty in tort.

Id. (emphasis added). Thus, the Court made clear that the licensing board for the profession possessed primary jurisdiction over the licensee, not the civil courts. Moreover, the grounds enumerated in § 40-1-110 (including subsection g) were available to the licensing board to sanction and discipline a licensee.

In addition, Subsections (f) and (g) were recited by the Court of Appeals as grounds for discipline of a dentist in an unpublished decision, Lagroon v. S.C. Dept. of Labor, Licensing and Regulation, 2010 WL 10080281 (Sept. 24, 2010). And in a decision of the Administrative Law Court, Ulmer v. S.C. Dept. of Labor, Licensing and Regulation, 2018 WL 3098067, Docket No. 17-ALI-11-0445-LP (June 19, 2018), the Court concluded, with respect to the Real Estate Commission, that § 40-57-710(A) “incorporates additional grounds for disciplinary action found in Section 40-1-110.” Id. at * 5.

Specifically, in Ulmer, the Administrative Law Court remanded the case to the Real Estate Commission, which had applied § 40-1-110(1)(h) [criminal conviction for crime involving drugs or moral turpitude] because “it is unclear whether Appellant was ever convicted of the drug-related felony charges on the SR&I report and the Commission’s decision to deny Appellant’s application is premised on that finding.” Id. at * 7. Moreover, the ALC noted that “Appellant admitted to violating Section 40-1-110(1)(f) of the South Carolina Code . . . in the Consent Agreement, which might have been applicable to this situation, the Commission similarly made no reference to it.” Id. (emphasis added). The ALC quoted Section 40-1-110(1)(f) in a footnote as a possible ground for discipline: “A board may cancel, fine, suspend, revoke, or restrict the authorization to practice of an individual who . . . (f) has committed a dishonorable, unethical or unprofessional act that is likely to deceive, defraud, or harm the public.” Thus, there can be little doubt that § 40-1-110(1)(f) has been deemed applicable in the specific context of the Real Estate Commission.

The decision in Golde v. Fox, 98 Cal.App.3d 167, 159 Cal. Repr. 864 (1979) is highly instructive in this regard and sets forth the Legislature’s rationale for inclusion within § 40-1-110, the subsections (f) and (g) relating to the discipline of a realtor licensee. In Golde, the Commissioner of the Department of Real Estate revoked a realtor’s license for a drug offense. The Court explained the reasoning for such revocation as follows:

[h]onesty and truthfulness are two qualities deemed by the Legislature to bear on one’s fitness and qualifications to be a real estate licensee. If appellant’s offense reflects unfavorably on his honesty, it may be said to be substantially related to his qualifications. . . . [citations omitted]. Illegal possession and transportation by airplane with the attendant sophisticated planning of a quarter of a million dollars worth of marijuana, admittedly for the purpose of personal gain, is clearly an illicit act of deceit and dishonesty in a fundamental sense.

The crime here, of course, does not relate to the technical or mechanical qualifications of a real estate licensee, but there is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are deeply and daily involved in various aspects of the practice [of a realtor].

98 Cal.App.3d at 176-77, 159 Cal. Repr at 868-69. Such rationale is equally applicable here. Thus, the answers to your questions are in the affirmative.

Conclusion

As one court has noted, “[a] real estate licensee is held to a higher standard than members of the general public, and a real estate license imposes a duty on a licensee to conform to the statutory standards set forth” by the Legislature. Boggs v. Ohio Real Estate Comm., 926 N.E.2d 663, 672 (Ohio 2009). And as our own Supreme Court has recognized, “. . . there can be no reasonable doubt that the rights of those who have been duly licensed to practice [a profession] under the laws of this State are property rights of value which they are entitled to have protected, and it is likewise free from doubt that to permit others to engage in this practice without complying with the law of the State tends to encroach upon the rights of licensed practitioners....” Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419, 423 (1938).

Our Supreme Court, in 16 Jade Street, supra has made clear that the relevant licensing board, not the civil courts, has primary jurisdiction over a licensee for breach of his or her professional responsibility. With these fundamental principles in mind, and addressing your specific questions, the answer to both of your questions is “yes.” If a real estate licensee takes action while serving an associated trade organization, the Real Estate Commission possesses jurisdiction over that licensee for conduct encompassed by § 40-1-110 (as well as § 40-57-710). Section 40-1-40(B) expressly states that the Real Estate Commission is one of the “boards and the professions and occupations” under the jurisdiction of the Division of Professional and Occupational Licensing, South Carolina Department of Labor, Licensing and Regulation.” Such Division’s purpose “is to protect the public through the regulation of professional and occupational licensees and the administration of boards charged with the regulation of professional and occupational practitioners.” Section 40-1-70(8) authorizes boards and commissions under this jurisdiction to “discipline[e] persons licensed under this article in a manner provided for in this article.”

Clearly, therefore, the General Assembly has provided that a professional licensing board, such as the Real Estate Commission, possesses the jurisdiction to discipline licensees for conduct which may be merely tangential to or even unrelated to the practice of the profession, so long as within the grounds set forth in §§ 40-1-110 and 40-57-710. Indeed, subsection (g) of § 40-1-110 authorizes a licensing board to discipline a licensee who “has been convicted or pled guilty or nolo contendere to a felony or a crime involving drugs or moral turpitude.” Such conduct may well not relate to the realtor’s professional practice. See, e.g. Gale v. State Bd. of Med. Examiners of S.C., 282 S.C. 474, 320 S.E.2d 25 (Ct. App. 1984) [Court of Appeals

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upholds revocation of medical license for various acts unrelated to the practice of medicine, including numerous housebreakings and obtaining fraudulent driver's licenses]. The bestowal of such broad jurisdiction upon a licensing board is consistent with the Legislature's purpose "to protect the public through the regulation of professional and occupational licensees. . . ." § 40-1-40(A).

Likewise, the answer to your second question is "yes." Clearly, as the ALC stated in Ulmer, supra, § 40-57-710 "incorporates additional grounds for disciplinary action found in Section 40-1-110." See also Jade Street, supra [citing § 40-1-110 as authority for discipline by licensing board]. Included within § 40-1-110(1) are subsections (f) and (g); subsection (f) authorizes the Real Estate Commission to discipline a licensee who "has committed a dishonorable, unethical, or unprofessional act that is likely to deceive, defraud or harm the public." Certainly, subsection (f), on its face, does not relate only to acts involving the practice of real estate licensees, but is far more general in scope. As one court has stated, while conduct subject to discipline may "not relate to the technical or mechanical qualifications of a real estate licensee, ... there is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are deeply and daily involved in various aspects of the practice [of a licensed realtor]." Golde, supra.

In our opinion, subsections (f) and (g), as well as the remainder of § 40-1-110(1), would be part of the jurisdiction of the Real Estate Commission, thereby enabling the Commission to sanction licensees for violations thereof. If a real estate licensee commits a dishonorable act (or unethical or unprofessional act), while representing a professional trade association, but the act does not occur in connection with a specific real estate transaction, it is our opinion that the Real Estate Commission is nevertheless authorized to take action, including disciplinary action pursuant to § 40-1-110(f) and (g). Of course, our opinion does not comment upon any specific facts, which cannot be determined in an opinion of this Office.

Sincerely,



Robert D. Cook
Solicitor General