IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CARL UNDERWOOD,

Plaintiff-Petitioner,

vs.

No. 30, 751
Santa Fe County
CV-2008-1736

NEW MEXICO COMMISSIONER OF PUBLIC LANDS, PATRICK LYONS,

Defendant-Respondent

CERTIORARI TO THE
FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

REPLY BRIEF

ORAL ARGUMENT REQUESTED

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NOTICE OF COMPLIANCE PURSUANT TO RULE 12-312(F) NMRA

The body of this *Brief-in-Chief* exceeds the 15-page limit set forth in Rule 12-213(F)(2) NMRA.

I certify that this *Brief-in-Chief* is proportionally spaced and the body of the Brief contains 4,022 words, less than the 4,400 maximum permitted by Rule 12-213.F(3) NMRA.

Lorraine Hollingsworth, Esq.

REQUEST FOR ORAL ARGUMENT

Petitioner Carl Underwood hereby requests Oral Argument in this matter pursuant to NMRA 12-214. This matter involves legal and factual issues regarding the interpretation and requirements of applicable statutes and also the scope of authority of the State Land Commissioner for which Oral Argument would add further clarification.

WHEREFORE, the Petitioner respectfully requests the Oral Argument be granted in this matter.

Lorraine Hollingsworth, Esq.

TABLE OF AUTHORITIES

NEW MEXICO CASELAW

STATUTES AND RULES

OTHER AUTHORITIES

COMES NOW Carl Underwood, Conservator and Guardian of Mrs. Earl Lee Anders, Petitioner, and hereby submits his Reply Brief in this matter.

I. The plain language of Section 19-7-14 required the Commissioner to base the valuation of the improvements on an appraisal, which, pursuant to New Mexico law, can only be conducted by a licensed real estate appraiser.

The first question to be answered in this matter is whether, based on Section 19-7-14 NMSA, the Commissioner was required to rely on an appraisal by a licensed real estate appraiser in determining the value of the improvements. This issue presents a question of statutory interpretation, which is a question of law that the Court reviews *de novo. United Rentals NW v. Yearout Mechanical*, 2010-NMSC-030, ¶7, 148 N.M. 426.

The parties agree that the determination of the value of the improvements to the property at issue in this matter is governed by Section 19-7-14 NMSA, which states:

> Whenever any state lands are sold or leased to a person other than the holder of an existing surface lease and upon which lands there are improvements belonging to such lessee or to another person, the purchaser or subsequent lessee, as the case may be, shall pay to the commissioner of public lands for the benefit of the owner of the improvements the value thereof as determined by an appraisal made by the commissioner of public lands." (Emphasis added).

However, the parties disagree about what is meant and required by the use of the word "appraisal." Mr. Underwood contends, as set forth in his Brief-in-Chief,

that Section 19-7-14 requires the valuation to be based on an appraisal conducted by a licensed appraiser. (Brief-in-Chief at 12-20).

In response, the Commissioner claims that he was not required to rely on an appraisal by a licensed appraiser or, apparently, any other type of expert in appraisals. He claims that he alone "appraises the value and determines the contest" because he "has substantial expertise regarding State trust lands and the unique issues that pertain to those lands." (Answer Brief at 26). The Commissioner claims that he "is uniquely well situated to make a determination of value based on specific factors arising in the State trust land context." *Id.* He further claims that "the Commissioner's valuation of lessee improvements arises from a consensual relationship where the lessee who places improvements upon State trust lands knows that the Commissioner will be valuing the improvements if the land is subsequently leased or sold to someone else." *Id.* at 25-26.

The Commissioner does not cite to any statutes, regulations or caselaw that support his broad claim of authority to both conduct an appraisal and determine the contested proceeding. His position cannot be sustained based on the plain language of Section 19-7-14 and the ordinary and usual understanding of what is meant by an "appraisal." His position is also not consistent with other statutes and regulations governing the Commissioner and State trust lands, with the admitted

practices of the State Land Office, or with the administrative proceedings in this matter.

A. The plain language of Section 19-7-14 requires an appraisal to be conducted based on the ordinary and usual understanding of the word "appraisal."

The first principle of statutory construction requires the Court to "look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language that is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *United Rentals NW, Inc.,* 2010-NMSC-030, ¶9 (internal quotations and citations omitted); *see also* the Uniform Statute and Rule Construction Act, §12-2A-19 NMSA ("[t]he text of a statute or rule is the primary, essential source of its meaning"). In construing a statute, "[s]tatutory words are presumed to be used in their ordinary and usual sense." *Bettini v. City of Las Cruces*, 82 N.M. 633, 634, 485 P.2d 967, 968 (S.Ct. 1971).

The common understanding of an "appraisal" is an analysis or evaluation of property value by a disinterested expert in the area of real estate. The New Mexico Legislature has defined "appraisal" as meaning "an analysis, opinion or conclusion prepared by a real estate appraiser relating to the nature, quality, value or utility of specified interests in or aspects of identified real estate or real property, for or in expectation of compensation..." §61-30-3.A, NMSA. The Commissioner, in

§19.2.10 NMAC, which applies to easements and rights of way on public lands, adopted the definition of appraisal in §61-30-3A. §19.2.10.7.A. NMAC. Black's Law Dictionary defines an appraisal as "[a] valuation or estimation of value of property by disinterested persons of suitable qualifications. The process of ascertaining a value of an asset or liability that involves expert opinion..." (5th ed., West Publishing Co., 1983).

The use of the word "appraisal" in Section 19-7-14, based on the ordinary and usual sense of the word, requires an analysis by a person qualified to offer an expert opinion on property valuations. In New Mexico, only licensed real estate appraisers are authorized, by law, to appraise real estate and offer expert testimony on property valuations based on an appraisal. §61.30.10A NMSA ("It is unlawful for any person in this state to engage or attempt to engage in the business of developing or communicating real estate appraisals or appraisal reports without first registering as an apprentice or obtaining a license or certificate from the board under the provisions of the Real Estate Appraisers Act [61-30-1 NMSA 1978]"). New Mexico Real Estate Appraisers Board website, www.rld.state.nm/realestateappraisers ("[i]t is illegal in New Mexico to appraise real estate without a license issued by the Board").

There is no reason to conclude that the Legislature intended the word "appraisal" to have any other meaning than that which is commonly accepted.

Based on the plain language of the statute, the Commissioner's valuation determination had to be based on an appraisal conducted by a person with expertise in real estate valuations, which, in the State of New Mexico, is a licensed real estate appraiser. In fact, an appraisal of the valuation of the improvements by anyone other than a licensed real estate appraisers would be illegal.

The plain language interpretation is supported by Section 19-7-16 NMSA, which requires that the costs and expenses related to the appraisal of the improvements on state lands are to be paid by the purchaser or subsequent lessee. Clearly, the Legislature recognized that the State Land Office would incur costs related to obtaining an appraisal and made provisions for those costs to be reimbursed.

Even if the Court were to accept the Commissioner's argument that the phrase "an appraisal made by the commissioner of public lands" means that the Commissioner himself is to conduct the appraisal (which, unless he is a licensed real estate appraiser, would be illegal), his decision in this matter does not in any way meet the requirement that the valuation of the improvements must be based on an appraisal. Although the Commissioner tries to hedge the issue by claiming that he had the authority to review the evidence presented at the hearing *de novo* (which Mr. Underwood vigorously disputes) and then implying that his review of the evidence somehow met the requirements for an appraisal, it is clear that the

Commissioner did not rely on an appraisal of any kind in making his determination.

Instead, the Commissioner rejected both the Hearing Officer's report and recommendation, which was based on the appraisal testimony of the licensed appraiser retained by the State Land Office, and the testimony of all four licensed appraisers who testified at the hearing, whose appraisals were based on accepted industry standards and practices, and who employed the valuation method set forth in the Lease. (*See* Brief-in-Chief at 3-4; 8-11). Not only did the Commissioner not rely on any type of an appraisal, he stated that he would not rely on an appraisal because he believed that appraisals are "based on the subjective opinion of its author and not on exact science." (RP 839-840; RP 849 ¶¶1, 2). Rather than relying on the testimony of expert licensed appraisers, the Commissioner relied on the testimony of lay witnesses with no experience in property valuation, who did not claim to have conducted an appraisal of any type, and who were not disinterested witnesses. (*See* Brief-in-Chief at 9-11). Nothing in his *de novo* review of the record or in his subsequent decision based on that review comes close to resembling an appraisal as defined in Section §61-30-3A, NMSA or to the common understanding of what constitutes an appraisal.

The Commissioner's argument that he is to conduct the appraisal under Section 19-7-14 should also be rejected because it would lead to an absurd or

unreasonable application of the statute. *Phelps Dodge Tyrone v. New Mexico Water Quality Control Comm'n,* 2006-NMCA-115, ¶15, 140 N.M. 464. First and foremost, there is no evidence in the record that the Commissioner is a licensed real estate appraiser and therefore it is illegal for him to appraise real estate, including the value of improvements to real estate. The Commissioner is also not a disinterested party. As admitted by the Commissioner, he has a fiduciary duty as the trustee of the public lands to ensure the best outcome for the State trust lands. (Answer Brief at 27-28). The Commissioner is not required to consider the interests of the lessee or of subsequent lessees or purchasers. In fact, such a consideration would potentially be a breach of his trust obligations. Therefore, if the Commissioner were to be allowed to conduct an appraisal, it would not be fair and unbiased. Additionally, if the Land Commissioner were to actually conduct an appraisal, he would be developing the factual basis for the valuation, which would make him a witness in the case subject to cross-examination at the administrative hearing. This would result in the untenable situation of the Commissioner being both a fact witness and the final decision maker.

Apparently, the only situation in which the Commissioner claims to have the authority to conduct an appraisal is for improvements to state lands in a lease situation. The Commissioner has not adequately explained why the appraisal of improvements on leased lands is any different than the appraisal of other State trust

lands. The Commissioner admits that "[h]istorically, and as a matter of certain aspects of current practice," the Commissioner relies on appraisals "by any 'disinterested party,' not necessarily a certified real estate appraiser." (Answer Brief at 23, ftnt 6).[1] In support of this statement, the Commissioner cites to a number of statutory and regulatory provisions requiring appraisals. *Id.* These are not merely historical or current practices but statutes and regulations setting forth mandatory requirements. Clearly, the Legislative intent is that the valuation of property interests on state trust lands, for both sales and leases, be based on appraisals, which, by State law, can only be conducted by licensed appraisers.

The Land Commissioner does not offer any examples where the "disinterested party" was someone other than a licensed real estate appraiser. Nor has the Commissioner identified any other transactions dealing with State trust lands where a valuation determination was made solely by the Land Commissioner without reliance on an appraisal by a licensed real estate appraiser. In point of fact, the State Land Office, in this case, hired not one but two licensed real estate appraisers to determine the value of the improvements and to offer testimony at the hearing. The Commissioner is the only person in the entire administrative proceeding, including the State Land Office, Mr. Underwood, and Hearing Officer

[1] Based on the Real Estate Appraisers Board's unequivocal statement that real estate appraisals can only be conducted by licensed appraisers and the clear language of §61.30.10A NMSA that it is unlawful to appraise real estate without a license, it is not clear with such "disinterested parties" would be.

Judge Donnelly, who did not rely on an appraisal conducted by a licensed real estate appraiser. (Brief-in-Chief at 17-18).

B. Other statutes and regulations regarding appraisals, the Commissioner and public lands support the conclusion that "appraisal" means an analysis conducted by an expert qualified in real estate appraisals, which in New Mexico means a licensed real estate appraiser.

If the Court determines that the plain language of the statute is not clear, the Court can look to other statutes relating to the same subject matter for further clarification. *United Rentals,* 2010-NMSC-030, ¶22. The New Mexico Supreme Court has "repeatedly viewed related statutes in light of their common legislative policies." *Id.* at ¶27. When determining legislative intent, "a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter." *State v. Rivera,* 2004-NMSC-001, ¶13, 134 N.M. 768.

As already discussed above, the only people who can appraiser real estate are licensed real estate appraisers. The definition of appraisal set forth in Real Estate Appraisers Act, 61-30-3A, was adopted by the Land Commissioner in §19.2.10.7A, which deals with requirements for easements and rights of way.

As discussed in the Brief-in-Chief, the New Mexico Enabling Act requires appraisals for all transactions involving state trust lands, including leases. (Brief-

in-Chief at 14);[2] *State ex rel. King v. Lyons,* 2011-NMSC-004, ¶36. The Enabling Act requirement is very broad and there is no basis for the distinction that the Commissioner attempts to draw in regard to the valuation of improvements on leased trust land made pursuant to Section 19-7-14. (Answer Brief at 23). In the *Lyons* case, the Commissioner did not argue that he could conduct the appraisal required by the Enabling Act. Instead, he conceded that an appraisal is required before any transaction involving state trust land. *Lyons,* 2011-NMSC-004, ¶36.

Consistent with the Enabling Act, appraisals are required for numerous transactions in regard to trust lands. Pursuant to §19-7-9 NMSA, the Commissioner is authorized to lease lands for commercial development or public use purposes as long as all of the requirements of the Enabling Act are met, including the requirement for an "appraisal at true value." Applicants for lease or purchase of public lands are required to provide appraisals by disinterested third persons. §§19-7-1 and 19-10-14 NMSA. Based on the New Mexico Real Estate Appraisers Act, the disinterested person must be a licensed real estate appraiser. 61.30.10A NMSA. Section 19.2.9.18.C(2) NMAC , addressing improvement value credits, specifically requires an appraisal by a certified real estate appraiser. Section §19.2.21.8.C NMAC, which governs land exchanges, is similar to Section 19-7-14 and states that "the commissioner shall appraise the trust lands and the

[2] In reviewing the Brief-in-Chief, it came to counsel's attention that the first citation on page 14, Section i., is not complete. Instead of *Id.* at ¶36, it should be *State ex. rel King v. Lyons,* 2011-NMSC-004, ¶36.

non-trust lands proposed to be exchanged at their true value." The section then explains that the appraisal is to be conducted by a person qualified to conduct appraisals, not by the Commissioner himself. *Id.* The clear intent of the statutes and the regulations is that valuations of various aspects of state trust lands are to be based on appraisals and that the appraisals are to be conducted by a disinterested third party, that is a licensed real estate appraiser, not the Commissioner.

Given the requirement that appraisals of real property may only be conducted by licensed real estate appraisers, the clear intent throughout the statutes and regulations governing the Commissioner and state trust lands that property valuations are to be based on appraisals, and the Commissioner's admitted practice of relying on third party appraisals, there is absolutely no basis for interpreting Section 19-7-14 as meaning that the Commissioner, rather than a licensed real estate appraiser, is to do the required appraisal. Nor is there any basis for interpreting Section 19-7-14 to mean that the Commissioner may base the valuation on something other than an appraisal conducted by a licensed real estate appraiser, including his own alleged expertise or the testimony of lay witnesses at a contest hearing.

The record is clear that the Commissioner's final decision was not based on an appraisal by a licensed real estate appraiser, as required by Section 19-7-14. Therefore, the Commissioner's final decision must be overturned.

II. In reaching his final decision, the Commissioner erred in conducting a *de novo* review of the record and reaching his own factual determinations. Based on this error, his decision must be overturned.

The Commissioner has not identified any statutory or regulatory provisions or relevant case law that allow give him the authority to conduct a *de novo* review of the hearing record in order to reach his own factual conclusions independent of those of the hearing officer.

The Commissioner erroneously claims that he, not the hearing officer, is the fact finder. On its face, this argument is simply not credible. A fact finder is the person or entity responsible for taking evidence, whether in court or at an administrative hearing. *In the Matter of Robert Matthew Bristol*, 2006-NMSC-041, ¶16, 140 N.M. 317. The Commissioner has established regulations for administrative proceedings that require the appointment of a hearing officer, who has the authority to address pre-hearing matters, conduct the hearing, and take the testimony of witnesses. §§19.2.15.11 to 19.2.15.14 NMAC. Section 19.2.15.11 NMAC states that "the commissioner shall, by order, appoint a hearing officer to preside over the administrative hearing." After the conclusion of the hearing, the hearing officer may request post-hearing pleadings and submissions and issues a final report to the Commissioner and the parties. §19.2.15.17. In the matter now before the Court, Judge Donnelly was appointed as the hearing officer and, by

holding the hearing and taking evidence, acted as the fact finder for the contest proceeding.

The Commissioner's administrative hearing procedures are not unique but reflect common administrative practices in New Mexico, where administrative hearings are typically conducted by hearing officers or hearing panels. *See, e.g.*, 20.1.4.100.E NMAC (New Mexico Environment Department permit procedures regarding the appointment of hearing officer to conduct hearings); *In re Bristol*, 2006-NMSC-041, ¶2 (when a formal disciplinary proceeding is initiated, the chairman of the Disciplinary Board is required to appoint either a hearing officer or a hearing committee to hear the matter). It is the duty of the hearing officer to preside over the administrative hearing and to take evidence at the hearing.

The hearing officer, after conducting the hearing, is typically required to provide a report to the final decision maker or to the person or persons responsible for the next level of review. §19.2.15.17 NMAC (the Commissioner's administrative procedure requires the hearing officer to provide a final report to the Commissioner and the parties); §20.1.4.500 NMAC (NMED permit procedures require the hearing officer to submit a report); *In re Bristol*, 2006-NMSC-041, ¶2 (the hearing committee is required to submit a report to the Disciplinary Board). Hearing officer reports contain summaries of the evidence presented at the hearing, usually in the form of findings of fact, conclusions of law, and also include

recommended decisions based on the evidence. *Id.* The hearing officer or hearing committee appointed to conduct the administrative hearing is the fact finder. *See In re Bristol*, 2006-NMSC-041, ¶15; *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, 125 N.M. 786, ¶22.

The Commissioner claims that he is the fact finder because he is required to "issue an order adopting, modifying, or rejecting [the hearing officer's] report," and the order has to "contain a grant or denial of the relief requested and a statement of the legal and factual basis for the order." 19.2.15.17.E NMAC. Again, this requirement and language is not unique to the Commissioner's administrative procedures. The NMED permit hearing procedures and the Disciplinary Board procedures are very similar. §20.1.4.500.D(2)(the Secretary may adopt, modify, or set aside the Hearing Officer's recommended decision, and shall set forth in the final order the reasons for the action taken); Rule 17-315 NMRA (the hearing panel "may accept, reject or modify or increase the sanctions contained in the recommendation of the hearing committee"). These provisions have never been construed to mean that the final decision maker, rather than the hearing officer, is the fact finder. *See In re Bristol*, 2006-NMSC-041, ¶15; *Atlixco Coalition,* 1998-NMCA-134, ¶22.

In construing the Disciplinary Board administrative procedures, which are very similar to the Commissioner's procedures, the Supreme Court held that the

hearing committee, which fulfills the same role as the hearing officer in a contested matter before the Commissioner, "is the only entity designated to take evidence during the course" of the administrative hearing and is therefore the fact finder. *In re Bristol*, 2006-NMSC-041, ¶15. Similarly, Judge Donnelly was designated to take evidence and was the fact finder. There is no basis for the Commissioner's claim that he was the fact finder.

The Supreme Court held that the hearing committee, like other fact finders, "should be given deference on questions of fact." *Id.* at ¶16. In the Disciplinary Board proceedings, the next level of review is the hearing panel and then the Supreme Court. The Commissioner is in the same position as the hearing panel and the Supreme Court. The Court held that both the hearing panel and the Supreme Court itself were required "defer to the hearing committee on matters of weight and credibility, viewing the evidence in the light most favorable to the hearing committee's decision and resolving all conflicts and reasonable inferences in favor of the decision reached by the hearing committee." *Id.* at ¶¶16, 26. The Court also stated that the ability to adopt, modify or reject the hearing panel's recommendation was necessarily limited by the deferential standard of review. *Id.* at ¶17. Given the similarity in administrative procedures, the Commissioner should have applied the same deferential standard to Judge Donnelly as the fact

finder and the Commissioner's authority to adopt, modify or reject the Hearing Officer's report is necessarily limited by the deferential standard of review.

Like the Commissioner in this matter, instead of giving deference to the factual findings of the hearing committee, the hearing panel in *Bristol* reweighed the evidence and substituted its judgment for that of the hearing committee on questions of fact, which the Supreme Court held was an error on the part of the panel. *Id.* at ¶¶19-25. Because the hearing panel's improper review was the basis for its legal conclusions and recommended decision, the Court found that its conclusion and recommendation must also be rejected. *Id.* at ¶25. The Commissioner committed the same error by conducting a *de novo* review and reweighing the evidence and substituting his judgment for the of Judge Donnelly on questions of fact. Because his final decision was based on his erroneous standard of review, his final decision must be overturned.

III. CONCLUSION

Because of the errors committed by the Commissioner in reaching his final decision, including his failure to base his decision on an appraisal by a licensed appraiser and his application of the incorrect standard in reviewing the Hearing Officer's Report and recommendation, as well as other reasons set forth in the Brief-in-Chief, the Commissioner's final decision must be overturned.

Based on a review of the evidence in the case in the light most favorable to the Hearing Officer's findings of fact, which demonstrate that there is substantial evidence to support the Hearing Officer's decision, the Petitioner respectfully requests that the Court adopt the Hearing Officer's Recommended Decision and find that the fair market value of the improvements located on the Southeast Parcel or Back Parcel of former Business Lease, No. BL-882, is $285,000 and uphold the award of costs to the Petitioner by the Hearing Officer.

In the alternative, the Petitioner respectfully requests that the matter be remanded to the District Court with instructions that the District Court shall overturn the Commissioner's final decision and adopt the Hearing Officer's final report and recommended decision and find that the value of the improvements was $285,000.

Respectfully submitted,

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I certify that a copy of the foregoing was sent to counsel of record on this 13th day of January, 2012.

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