

NO. A06-1146

State of Minnesota
In Court of Appeals

Ronald Staeheli

Appellant,

v.

City of St. Paul

Respondents.

APPELLANTS' BRIEF

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STATEMENT OF ISSUES

- 1) WHETHER THE CITY OF ST. PAUL COMMITTED AN ERROR OF LAW BY IGNORING ITS OWN ORDINANCES AND THE TISH BOARD'S GUIDELINES FOR DISCIPLINARY PROCEDURES, GUARANTEES OF DUE PROCESS, NAMELY GUARANTEES OF RIGHT TO PRESENT EVIDENCE AND GUARANTEES OF RIGHT OF PROPER NOTICE AND BASING ITS DECISION ON AN INVALID COMPLAINT.

The City Council of the City of St. Paul canceled the petitioners St. Paul TISH evaluators license. The City of St. Paul based its decision on a finding and determination of the TISH Board.

- 2) WHETHER THE FINDINGS OF FACT AND DETERMINATION THAT TOGETHER WITH THE MEMORANDUM FROM THE CITY ATTORNEY THAT FORMED THE BASIS FOR THE RESPONDENT CITY COUNCIL'S DECISION TO CANCEL THE PETITIONER'S LICENSE IS IN ERROR OF FACT AND LAW, NOT SUPPORTED BY THE EVIDENCE AS PRESENTED, BEYOND THE STATUTORY AUTHORITY OF THE TISH BOARD AND ARBITRARY AND CAPRICIOUS.

The City Council of the City of St. Paul canceled the petitioners St. Paul TISH evaluators license. The City of St. Paul based its decision on a finding and determination of the TISH Board.

STATEMENT OF FACTS

The Petitioner is a resident of Eagan, MN who was until April of 2006 a licensed TISH evaluator for the City of St. Paul. He was licensed from the early 1990's and had no problems or disciplinary hearings or issues with the program or board until the hiring of the current program administrator Connie Sandberg. (App. 1)

On November 15, 2002 the St. Paul TISH Board closed a complaint against the Petitioner with no adverse action by declining to hold a disciplinary hearing, with a letter to the Petitioner that no board action would be taken. (App. 1)

On November 20th 2002 the St. Paul TISH Board held a hearing to consider a complaint by a competitor evaluator, that hearing resulted in a 30 day suspension of the evaluators license to perform TISH evaluations and a 1 year probation (App. 1) the terms of which were not disclosed to the Petitioner or decided by the Board.

On January 26, 2005 the St. Paul TISH Board held a hearing to consider a complaint by a competitor evaluator, that hearing resulted in a 30 day suspension of the evaluators license to perform TISH evaluations and a 1 year probation the terms of which were not disclosed to the Petitioner or decided by the Board. That determination was overturned by the City Council who's resolution overturning the determination was vetoed by the sitting mayor. (App. 1) The stated reason the Council gave for overturning the determination of the Board was that they did not have a homeowner complaining. On July 27, 2005 a Board member Jim Reiter called the program administrator and asked "can Mayor overturn?" On that same date the owner of 1638 Middleton Ave called in a complaint. (App. 7)

On April 16, 2004 the Petitioner prepared a Truth in Sale of Housing report for the property at 1638 Middleton (App. 49-52). On July 27, 2005 the owner of the house who purchased the home in September of 2004 (App. 92) called the program administrator Connie Sandberg to say that she was opening up her walls and noticed that the plumbing did not seem right.

On August 1, 2005 the Petitioner meet with city inspector Steve Shiller and inspected the home at 1638 Middleton Ave in St. Paul.

Over the next weeks the Program Administrator Connie Sandberg sent the Petitioner several different complaints and the Petitioner replied to them.

On September 9, 2005 the Program Administrator sent the Petitioner a complaint form that was submitted to the Board for their review (App. 28-33)

In October the TISH Board reviewed in detail the complaint against the Petitioner and determined that the process that they had used in the prior hearings were flawed and laughable. (App. 69-71) They voted to have a disciplinary hearing on the latest complaint and to revamp their process including investigating the possibility of engaging a third party to have their hearings. (App. 72-75)

The Program Administrator of the TISH Program wrote the Petitioner about an upcoming disciplinary hearing as it regarded the complaint enumerated in the notice on November 4, 2005 (App. 76-77). Notice contained additional restrictions to time and added discovery requirements to the Petitioner's defense not included in earlier hearings and not added by the Board at their October 12, 2005 hearing. (App. 64-75) Director of NHPI Andy Dawkins sent two letters to the Petitioner including the letter changing the hearing date to January 10, 2006 and another confirming the change and dismissing the petitioners procedural concerns (App. 34-35)

The Petitioner wrote many letters and emails to the incoming Director of NHPI Robert Kessler and St. Paul Legislative Hearing Officer Marcia Moermond and the Assistant City Attorney Judy Hanson (App. 36-48) including a request to the Director Kessler asking that the Hearing be canceled or delayed (App. 36). Mr. Kessler agreed to delay the hearing by email on December 28, 2005.(App. 41-42) This was confirmed by

two letters to Mr. Kessler by fax and email. (App. 41) In response to a courtesy email Petitioner sent to the Program Administrator on January 9, 2006 the Director of NHPI Bob Kessler sent the Petitioner a notice that a disciplinary hearing would be taking place on January 10, 2006, the next day. (App. 43)

At the hearing the Petitioner and Board were presented with additional complaint material prepared by the Hearing Examiner Marcia Moermond, this material was not sent to the Petitioner prior to the meeting and contained material additional complaints against the Petitioner.

The Petitioner was limited to 45 minutes to present his defense. (App. 83) This was an improvement over earlier communication that indicated the time limit would be 30 Minutes. (App. 76) This change was made without Board approval. (App. 64-75) The Petitioner was not able to offer any testimony or evidence, he was denied the ability to fully cross-examine the witnesses called against him because of the time limit added by the Hearing Examiner. The hearing was continued to January 31, 2006 for rebuttal evidence. At that hearing additional complaint material was presented including evidence that the Petitioner trespassed on the property at 1638 Middleton. At the close of the hearing the St. Paul TISH Board issued their findings and determinations with the determination to permanently cancel the TISH evaluators license of the Petitioner . (App. 1-3)

The Petitioner appealed the decision of the TISH board to the St. Paul City Council which held a hearing on April 5, 2006. The Council considered testimony from the Petitioner, a homeowner Annette Peters and a staff report from the Assistant City

Attorney Judy Hanson who also submitted a memorandum that explained and expanded on the TISH Findings of fact and determination including a section on objections that the Petitioner had made about the procedure and included her opinion that the TISH Board had acted wholly within the law and proper procedure. (App. 96)

Based on the evidence before it the City Council affirmed the decision of the TISH board and permanently canceled the petitioners license. The City Council then memorialized its decision. Petitioners correspondence to the Director of NHPI went unanswered (App. 99-100) and the Mayor signed the resolution on April 17, 2006. (App. 5) The written notice was sent to the petitioners sons house at 358 Arbor Street, St. Paul, MN by the St. Paul City Clerk's office and received by the Petitioner upon his return from international travel on April 27, 2006.

ARGUMENT

1. THE VARIOUS STANDARDS OF REVIEW

Review by certiorari is limited to inspection of the record of the administrative tribunal, here the City of St. Paul, and is confined to question affecting whether the determination was arbitrary, oppressive, unreasonable, fraudulent, or made under an erroneous theory of law or without evidence to support it. Zahavy v. University of Minnesota, 544 N.W.2d 32 (Minn. App.1996) See, also, Minn. Stat. 14.69, scope of

judicial review. In the instant case, the decision of the City of St. Paul was arbitrary, capricious, based in error of law, unsupported by the evidence, based on a hearing process that deprived the Petitioner's due process rights, based on a memorandum that deviates from and expands on the finding of fact and determination passed by the TISH Board established by the SPLC chapter 189, and based on conclusions that have no basis in the law or the facts.

In reviewing the procedures used by respondent in making its decision we contend the review is governed by the Minnesota Administrative Procedure Act (MAPA).

MAPA defines a contested case as:

a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

Minn. Stat. § 14.02, subd. 3 (2000). An "agency" is defined as

any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the tax court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases.

Id., subd. 2 (2000). Under section 14.02, subdivision 2, the St. Paul City Council is not considered an agency because it does not have statewide jurisdiction. *See City of*

Mankato v. Mahoney, 542 N.W.2d 689, 693 (Minn. App. 1996). But appellate cases often cite MAPA as the standard for reviewing city council decisions. *In re License of West Side Pawn*, 587 N.W.2d 521, 523 (Minn. App. 1998), *review denied* (Minn. Mar. 30, 1999); *Mahoney*, 542 N.W.2d at 691-92

Under MAPA,

The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Made upon unlawful procedure; or
- (d) Affected by other error of law; or
- (e) Unsupported by the substantial evidence in view of the entire record as submitted; or
- (f) Arbitrary or capricious.

Minn. Stat. § 14.69 (2000); *see West Side Pawn*, 587 N.W.2d at 523. Review is limited to “the record before the city council at the time it made its decision.” *West Side Pawn*, 587 N.W.2d at 523 (citing Minn. Stat. § 14.68).

This appeal is centered on issues of law relating to the subject decision of the City of St. Paul. The action taken by the City in connection with the Petitioner’s Truth in Sale of Housing (TISH) Evaluators License is affected by the application of the law to the

facts and particularly to statutory interpretation. A decision may be deemed arbitrary and capricious only if: (1) it relied on factors not intended by the ordinance; (2) entirely failed to consider an important aspect of the issue; (3) offered an explanation that conflicts with the evidence; or (4) it is so implausible that it could not be explained as a difference in view or the result of the city's expertise. *Minnegasco v. Minn. Pub. Utils. Comm'n*, 529 N.W.2d 413, 418 (Minn. App. 1995), *rev'd on other grounds*, 549 N.W.2d 904 (1996).

A) THE CITY OF ST. PAUL COMMITTED AN ERROR OF LAW BY IGNORING ITS OWN ORDINANCES AND THE TISH BOARD'S GUIDELINES FOR DISCIPLINARY PROCEDURES, GUARANTEES OF DUE PROCESS, NAMELY GUARANTEES OF RIGHT TO PRESENT EVIDENCE AND GUARANTEES OF RIGHT OF PROPER NOTICE AND BASING ITS DECISION ON AN INVALID COMPLAINT.

The St. Paul TISH Board passed by Resolution number 02-02 disciplinary guideline procedures (App. 16-19) and Bylaws and Rules of Procedure by Resolution number 02-01 latter amended by resolution 03-01 and 03-04 (App. 8-15). It was under these rules and guidelines the TISH Board held a hearing against the Petitioner on January 10, 2006 for the purposes of disciplinary procedure.

At all time relevant to these proceedings, however, the City has ignored the substance and intent of the guidelines and rules. Namely the rules designed to protect the evaluator's rights to a fair hearing. The City did not provide proper notice and did not allow the Petitioner to present evidence or witnesses because partially cross-examining witnesses took all of the time allotted to the Petitioner.

The City denied the Petitioner his rights under the ordinance and guidelines in a myriad of ways.

- 1) **The Relevant St. Paul Ordinance And Underlying Bylaws And Disciplinary Procedures Provide For Specific Rights To Proper Notice Of Disciplinary Hearing That Could Result In Adverse Action, These Ordinances And Rules Were Ignored By The Respondent City By Postponing A Hearing, Then Holding A Hearing Without Proper Notice. A Hearing That Contained Surprise Complaints Not Noticed To The Petitioner**

SPLC chapter 189.10 (a) 1 provides that the TISH Board “Adopt rules and bylaws governing its procedure”. On April 17, 2002 the TISH Board passed by resolution 02-02 the Truth-in-Sale of Housing Board Disciplinary Procedure for Truth-in-Sale of Housing Evaluators. (App. 16-19) It notes in the preamble that it is adopted from Chapter 310 of the St. Paul Legislative Code, uniform License Procedures, section 310.05, Hearing Procedures. Sec. 310.05. Hearing procedures reads, in relevant part:

(a) Adverse action; notice and hearing requirements. In any case where the council may or intends to consider any adverse action, including the revocation or suspension of a license, the imposition of conditions upon a license, or the denial of an application for the grant, issuance or renewal of a license, or the disapproval of a license issued by the State of Minnesota, the applicant or licensee shall be given notice and an opportunity to be heard as provided herein. The council may consider such adverse actions when recommended by the inspector, by the director, by the director of any executive department established pursuant to Chapter 9 of the Charter, by the city attorney or on its own initiative.

(b) Notice. In each such case where adverse action is or will be considered by the council, the applicant or licensee shall have been notified in writing that adverse action may be taken against the license or application, and that he or she is entitled to a hearing before action is taken by the council. The notice shall be served or mailed a reasonable

time before the hearing date, and shall state the place, date and time of the hearing. The notice shall state the issues involved or grounds upon which the adverse action may be sought or based. The council may request that such written notice be prepared and served or mailed by the inspector or by the city attorney.

The Guidelines of the TISH Board go on to expand on the definition of the Notice provisions by listing what must be in the Notice and defining the “reasonable time” provision as “generally considered to be at least ten (10) days prior to the date of the hearing.” (App. 17).

In the instant case notice was sent to the Petitioner on November 4, 2005 (App. 76-77) and later notice was sent to Petitioner from former Director of Neighborhood Housing and Property Improvement Andy Dawkins who is a member of the TISH Board See SPLC 189.07 (b) postponing the hearing to January 10, 2006. (App. 35) Upon the election of a new Mayoral administration with the City of St. Paul the Petitioner entered into talks with the appointed director of Neighborhood Housing and Property Improvement (NHPI) Robert Kessler discussing issues of validity of the complaints against the Petitioner. (App. 36-37) (App. 42-41) Included in his communications the Petitioner asked for a delay of the hearing. (App. 36) By e-mail the appointed Director of NHPI Bob Kessler on 12/28/2005 6:29:16 PM Central standard time had communications with the Petitioner (App. 41). In that communication the Director stated “...the action on the 10th be delayed until I can get a handle on the situation and decide the best way to proceed.”

The Petitioner then replied to the Director of NHPI Robert Kessler on the same date "...it is my understanding that the hearing will not be taking place on the 10th of January, 2006." (App. 41) The Petitioner then wrote and sent the Director of NHPI a letter Dated December 29, 2005 confirming the hearing was delayed and made an argument as to not having the hearing at all. (App. 45-48) The Petitioner wrote in that letter that:

"You have been kind enough to spend time with me reviewing the evidence I have supporting my claim that I have been unfairly targeted by Connie Sandberg with the TISH program. While I think those are powerful reasons to suspend all disciplinary hearings until an overhaul of the process can be achieved I have several issues as it regards the specific question of the complaints surrounding my inspections of 1638 Middleton. That was the only subject of the hearing that you delayed, originally scheduled for January 10, 2006." (App. 45)

No one from the City contacted the Petitioner to address his stated belief that the hearing was delayed.

The Petitioner contacted by e-mail on January 9, 2006 the Program Administrator Connie Sandberg (App. 43) as a courtesy to be sure that she was informed of the delay of the hearing date. It was in Robert Kessler's reply (AFF 43) that the Petitioner was informed that there would be a hearing on January 10, 2006 which had the practical effect of giving the Petitioner somewhat short of 30 hours to prepare a defense. It eliminated the petitioners ability to present witnesses or any witnesses at all in that they all were unable to attend on such short notice. It had the effect of giving the Petitioner one days notice to

prepare and deliver a defense to charges that he could reasonable have believed he may never have to defend.

At the hearing the Petitioner was presented with surprise additional complaints that were prepared by the Hearing Examiner Marcia Moermond. (App. 56-63) This material added allegations that the Petitioner violated Minnesota Chapter 609.475, until that moment the Petitioner had never been informed that he was accused of violation of a State Statute. (App. 61) It also added allegations that the Petitioner violated protocol in contacting the homeowner directly in an effort to disassociate himself with the City of St. Paul. (App. 56) When the Petitioner attempted to clarify exactly which complaint form the City would be using and the Board would be considering and what the specific allegations might be the Hearing Examiner stated "I think that we will find out today" (App. 83) so until he arrived at the hearing and actually heard the evidence against him the Petitioner was not given notice of the full extent of the allegations against him in violation of the TISH Boards Guidelines for Disciplinary Hearings (App. 16-19) In short, Petitioner was denied the most basic right to defend himself.

These accusations were not made in any of the earlier disciplinary notices and had the effect of depriving the Petitioner of his due process rights to prepare a defense. The time limit discussed later deprived him of these right against these and the earlier noticed complaints. The lack of notice of these additional surprise complaints further diminished the petitioners ability to form and present an effective defense.

While the hearing was continued to January 31, 2006 the Petitioner was informed that the continued hearing on January 31, 2006 would only include rebuttal evidence

(App. 83) further depriving the Petitioner of the right to present direct evidence in his defense.

As the notice given the Petitioner does not meet the City's own definition of reasonable notice (10 days) so the decision based on the hearing that was not reasonably noticed it is therefore unreasonable and should be reversed by the appellant court. See Zahavy v. University of Minnesota, 544 N.W.2d 32 (Minn. App.1996) See, also, Minn. Stat. 14.69, scope of judicial review.

2) The Relevant St. Paul Ordinance And Underlying Bylaws And Disciplinary Procedures Provide For Specific Rights To Present Evidence and Witnesses At A Disciplinary Hearing That Could Result In Adverse Action, These Ordinances And Rules Were Ignored By The Respondent City.

In the original letter Notice of Intent of the Board to Consider Adverse Action the respondent City informed the Petitioner that "You have the right to be represented, and you have the right to present evidence, testimony, and arguments in defense or rebuttal." The letter also says that "this report and all of the attachments referenced in the report will be copied and sent to the board in advance of the hearing." The notice letter also contained an admonition against any contact with the Board by saying "From this point forward, until the board has heard the evidence and made a decision, you may not discuss any aspect of the complaints against you unless and until you are speaking with the entire board, on the record and in a public forum such as the scheduled hearing" The letter also contained a severe limitation to the amount of time the Petitioner would have to present a defense. The Petitioner was informed that "Verbal and oral presentations at the meeting would be limited to one-half hour for each party." (App. 76)

The Petitioner then wrote the Director of NHPI Andy Dawkins a letter protesting many aspects of the process to that point including that the staff was not given the authority to change the disciplinary guidelines. The letter read in relevant part:

- **STAFF CAN NOT UNILATERALLY CHANGE THE DISCIPLINARY GUIDELINES TO SUIT ITS GOALS, THAT POWER IS THE BOARDS ONLY AND ONLY BY RESOLUTION.**
 - No changes to the disciplinary process have been approved by the Board as would be required under chapter 189 assigning all responsibility to the Board to discipline evaluators under its program.

After receiving the letter from the Director of NHPI Andy Dawkins of November 28, 2005 (App. 34) the Petitioner then entered into communications with the St. Paul Legislative Hearing Officer Marcia Moermond and Judy Hanson, Assistant City Attorney protesting the very limited time given to the Petitioner. He made those protests in several e-mails and letters. (App. 38-40) His protests were ignored or dismissed and he was not given the full opportunity defend himself by being afforded the rights conferred upon him by the Disciplinary Guidelines (App. 17) and the notice letter (App. 77).

The Ordinances that establish the TISH Board SPLC Chapter 189, the Uniform License Procedure SPLC Chapter 310, the underlying Guidelines and Bylaws (App. 8-19) are all silent on the issue of time limits to present a defense. The evidence against the Petitioner was voluminous and sent to the board ahead of the meeting. The Petitioner was admonished that the only way he could present evidence in his defense was “on the record and in a public forum such as the scheduled hearing ”. The effect of the arbitrary time limit was to deny the Petitioner of his enumerated rights to “present evidence, testimony, and arguments in defense or rebuttal” (App. 77) in effect saying you have all

the due process rights you can fit into 30 minutes. The Petitioner wrote by e-mail to the Legislative Hearing Officer Marcia Moermond that:

“The letter from staff adds several restrictions to my defense that the Board never added to its disciplinary guidelines. The most difficult restriction that was added by staff was a 30 min time limit on my defense. These restrictions deny me the ability to defend myself. Staffs report against me that the Board has had since October 12, 2005 is 6 pages and 46 paragraphs long with 16 addendums and many photographs totaling over 50 pages. This packet of information that the Board Chair specifically asked the Board to "read and digest" would take 45 minutes just to read much less to read with commentary about how I dispute the claims made in each and every paragraph. To say that all things are equal when "both sides" have the same amount of time is an insult to anyone with intelligence. I will have about 36 seconds to defend myself against each of these 50 pages of accusations not counting the pictures.”

(App. 39)

The Legislative Hearing Officer wrote back that the Petitioner should provide information to the board which would have been in violation of the ex-parte rules explained in the notice letter sent to the Petitioner by Program Administrator Connie Sandberg (App. 76) when she said “I believe the tape should be provided as background prior to the meeting of the TISH Board, as requested in the notification from Mr. Dawkins. I also think that written statements from you rebutting aspects of the staff report are welcome and expected” (App. 38)

Not only was the Petitioner denied his basic right to present a defense through testimony and evidence by a time limit arbitrarily added to the hearing process he was given conflicting instructions about what he would and would not be allowed to do prior to the hearing.

It is also helpful to note that once the Petitioner was informed that the hearing would be delayed (App. 41) he stopped all communication or requests for clarification about the rules that would govern how he would have to present his defense.

The net effect of the time limit and subsequent deliberations and confusions was to create a hearing process that was oppressive and unreasonable and beyond anyone's ability to reasonably decipher. As there was no clear person in charge of the hearing process and it was in flux right up until its beginning including whether or not it was even going to take place. It lacks even the semblance of a reasonable and fair hearing process. It was fraudulent and made under an erroneous theory of law. Therefore the appellant court can and should reverse. Zahavy v. University of Minnesota, 544 N.W.2d 32 (Minn. App.1996) See, also, Minn. Stat. 14.69

3) The Relevant St. Paul Ordinance And Underlying Bylaws And Disciplinary Procedures Provide For Specific Rights For a Complaint That Could Result In Adverse Action Must Be In Writing, These Ordinances And Rules Were Ignored By The Respondent City.

The complaint that resulted in the Findings of Fact and Determination item 4 was received by phone and reduced to writing by the Program Administrator. The Petitioner was sent an email from the Program Administrator Connie Sandberg in which she stated that "The plumbing complaint was made orally to me over the telephone" (App. 101) She did not indicate that she reduced it to writing at that time. The memorandum presented to the City Council on appeal of the St. Paul TISH Boards Finding of Fact and Determination by Assistant City Attorney Judy Hanson said that "Mr. Staeheli challenged the complaint indicating it was not in writing by the

complainant. The July 27, 2006[5] (sic) complaint was made by telephone and reduced to writing. The August 2, 2006[5], (sic) complaint was made by the complainant in writing. Proper procedure was followed under TISH Bylaws, resolution number 02-02 adopted April 17, 2002, which allows telephone complaint to later be reduced to writing by the supervisor who receives the complaint” (App. 97)

The resolution that the memorandum mentioned is silent on any definition of a written complaint beyond the simple straight forward statement that “All valid complaints must be in writing, however the complainant may be anonymous.” (App. 16) The memorandum also fails to mention to the City Council that the TISH Board also passed a “Definition of a Valid Complaint” as ARTICLE IX, section 3 in January, 2003 amending its Bylaws and Rules. The article defines Complaint filing Criteria as meeting both criteria. The criteria says that “The complaint must be in writing, and must be specific to the Truth-in-Sale of Housing Disclosure Report prepared for the dwelling, or it must be specific to the performance of the evaluator...” The Bylaws are silent of an expanded definition of “complaint must be in writing” which is the same language used in both Bylaws and Disciplinary Guidelines as defining a “valid” complaint. (App. 13) It is fraudulent and an error of law to say that any part of the Bylaws “allows telephone complaints to later be reduced to writing”. The simple fact is the Bylaws do not allow for such procedures.

The Petitioner addressed his concerns with the Assistant City Attorney Judy Hanson by communications on April 5, 2006 asking for the specific part of the guidelines or Bylaws that allowed for a “written complaint” requirement being met by a telephone

complaint later reduced to writing. (App. 103) She wrote back that “it is my interpretation that the complaints may come in over the phone and later be reduced to writing.” (App. 103) adding no further documentation or authority. The City Council acted on her interpretation of the Bylaws which is clearly incorrect. In cases where the interpretation of an ordinance, or in this case a Bylaw, is at issue, the Court of Appeals looks to the ordinance itself. The manner of applying the ordinance to the facts is for the Court Yeh v County of Cass, 696 N.W.2d 115 (Ct. App. 2005)

The Bylaws use the language that they are attempting to define a “valid” complaint. It is clear that if a complaint is not valid it can not be used to adversely effect an evaluator’s license as it was in this case. A complaint that is not valid can only be invalid.

Therefore it follows that the decision of the City Council was in error of law, fraudulent, based on an invalid complaint and should and could be reversed by the appellant court.

B) THE FINDINGS OF FACT AND DETERMINATION THAT TOGETHER WITH THE MEMORANDUM FROM THE CITY ATTORNEY THAT FORMED THE BASIS FOR THE RESPONDENT CITY COUNCIL’S DECISION TO CANCEL THE PETITIONER’S LICENSE IS IN ERROR OF FACT AND LAW, NOT SUPPORTED BY THE EVIDENCE AS PRESENTED, BEYOND THE STATUTORY AUTHORITY OF THE TISH BOARD AND ARBITRARY AND CAPRICIOUS.

Case law is clear that if the Petitioner can show that the procedure or result was in error of law, not supported by the facts as presented that the appellant court should reverse.

As a result of the hearing process the St. Paul TISH Board wrote and passed a findings of facts and determination. Ignoring for the moment the fact that the Petitioner alleges that he did not receive proper notice, was denied a fair hearing and much of the complaint against him was invalid by virtue of the fact it did not meet the TISH Boards definition of a valid complaint the Finding of Fact and Determinations were made under an erroneous theory of law and were without evidence to support it.

Every single item listed including the rationale for the adverse action taken were either in error of law and or were without evidence to support it.

- 1) **The Findings Of Fact & Determination Finding # 1 And #7 Are In Factual Error And Are In Error Of The Law Because They Define A Closed Complaint As An Adverse Action.**

The Truth in Sale of Housing Board issued a Finding of fact and determination as it regards the discipline that they assigned. The legal authority that they quote to establish the assigned discipline is listed under Finding #7 and states;

“...based on Saint Paul Legislative Code Chapter 310, Uniform License Procedures. It provides for a **Fourth Violation resulting in adverse action** the Board may impose any of the following penalties: Revocation or suspension of the TISH license for a fixed period of time, refusal to renew the TISH license, or cancellation of the TISH license permanently. These guidelines are consistent with St. Paul legislative code Chapter 310.05 (m) (2) Violation of the Legislative Code relating to the Licensed activity, which provided that the presumptive penalty is revocation.” [emphasis added]

The entire Finding rests its hypothesis and conclusions on the supposition that the proceeding was the **“fourth violation resulting in adverse action.”** (App. 3)

The disciplinary guidelines passed by the Board in April of 2002 as resolution 02-02 makes the following determinations as it regards adverse action.

Under the heading GENERAL the Guidelines state that

“Prior to scheduling any Board meeting agenda item, or hearing that has the potential for imposing an adverse action upon any Licensed evaluator, the supervisor will conduct an investigation and prepare a report to the board. After notice of a proposed disciplinary action has been sent to the chairperson of the board and to the evaluator, the supervisor will present formal findings and recommendations to the board at any regular or special meeting. **The board may or may not take any adverse action.** In the case of adverse action the evaluator has the right to appeal the boards decision to the city council.” [emphasis added] (App. 16)

The board guidelines go on to describe a disciplinary hearing that could result in adverse action.

Under the heading NOTICE the guidelines state

“In any case where the board may or intends to consider any adverse action, including the revocation or suspension of a license, the imposition of conditions upon a license, or the denial of an application for the grant, issuance or renewal of a license, **the licensee shall be given notice and an opportunity to be heard.**”
[emphasis added] (App. 17)

The heading goes on to guarantee the subject evaluator of several rights including to be noticed with a ten day notice, the specifics of the issues involved and the evaluators right to defend himself.

The board guidelines go on to define the hearing that is required to take place before any adverse action can be sought or based.

Under the heading HEARING the guidelines state:

- 1 The supervisor shall present the issues involved or grounds upon which the adverse action may be sought or based.
- 2 The board shall act as a hearing examiner and make determinations of fact upon which it shall base its findings and determination

(App. 18)

A glaring error in the Boards Findings of fact and determination is that what they list as the first violation of adverse action meets none of the definitions of adverse actions in the guidelines under which it operates.

Finding # 1 states that;

“This disciplinary hearing is the fourth occasion the TISH board has considered adverse action on the TISH license held by Ron Staeheli.”

A. The first occasion was on November 15, 2002 about a report of inconsistency with Evaluator Guidelines. In this matter, *the Board declined to hold a disciplinary hearing*, with a letter to the evaluator that *no board action would be taken*. [emphasis added] (App. 1)

The Board stated that it had taken no adverse action yet it still reported in Finding #7 that this hearing (January 10, 2006) resulted in the fourth adverse action against the evaluator when clearly it was only the third such finding of adverse action by the Board against the evaluator. The Finding #1 (A) states the Board *took no action*, as a result no adverse action could have been taken. (App. 1)

The guidelines require that any adverse action be as the result of a disciplinary hearing, the finding states unequivocally that “*the Board declined to hold a disciplinary hearing*” therefore no adverse action could have resulted.

Clearly the board was in factual error when it determined to cancel the petitioners license applying SPLC Chapter 310 (m) (2). (App. 27) Chapter 310 (m) (2) of the St. Paul City Code has a presumptive penalty for the third adverse action against a licensee. That penalty is a \$2,000.00 fine and a 10 day suspension. Further the Memorandum (App. 96) presented to the City Council was in factual and legal error when it made the statement that “the TISH Board followed proper procedures and accurately followed the law in making their findings and determination to cancel Mr. Staeheli’s Evaluators license” The Cities action of relying on the findings of fact and determination to establish the proper discipline is in error of law and they are in conflict with themselves and must be reversed. It is obvious that they can not count to four or they determined the adverse action and then re-defined a closed complaint to adverse action to justify the adverse action they wanted.

The Petitioner sent a letter to the Director of NHPI Robert Kessler listing his concerns about this factual error and the Director ignored his letter. (App. 99) The City council based its decision on the findings and determination (App. 4-5) which was fatally flawed and therefore the decision of the City Council must and should be reversed.

- 2) Finding # 2 Is Based On Surprise Evidence From An Allegation That Dealt With Issues That Had No Value To Prove Or Disprove The Allegations Before The Board, Was Presented In A Rebuttal Forum, And Based On Allegations Not Noticed To The Petitioner.**

Even though the theory was that the board was meeting to deal with a specific set of complaints and that set of complaints was in flux and changing before and during the hearings the City committed an error in law when it allowed and presented allegations of wrongdoing by the Petitioner that had no value to prove or disprove any of the allegations put before the board.

The City put into evidence a police report that alleged that the Petitioner trespassed upon the property of at 1638 Middleton (App. 104) and also put into evidence two letters between David Mortensen and the petitioner (App. 110-114) Neither of those documents were noticed to the petitioner required by the Board guidelines (App. 16-19). Further the Hearing Examiner ordered that the January 31, 2006 hearing was for rebuttal evidence (App. 83) and the evidence presented could not have been in rebuttal because it dealt with allegation of wrongdoing that occurred after the January 10, 2006 hearing.

The alleged violation occurred on January 12, 2006 (App. 1). This was six months and 12 days after the last conduct of the petitioner that was supposedly the subject of the hearing although truth be told the Petitioner is still not quite sure what allegations he was supposed to be defending himself against as they changed so frequently and he had no notice and no time to defend himself with. There could be no value whatsoever to the board than a prejudicial and obvious attempt at smearing the character of the petitioner. The petitioner was denied all due process rights under the Board disciplinary guidelines. Upon objection to the inclusion of the allegation of trespassing the hearing examiner did not rule on the objection but simply said "duly noted". (APP. 105)

The board found that the petitioner was on probation at the time he “went without permission to Annette Peters’ house” which clearly indicates that the board weighed and included these allegations into its findings and determinations. It also calls into question the parameters of “probation” in the minds of the board. Clearly the Petitioner was not acting in his capacity as an evaluator. He could not have gone to Annette Peters’ house to perform an evaluation. What were the parameters of the probation? There is no record of exactly what the board meant by probation so for the purpose of this finding the word has no meaning, however it is obvious that the board found it had weight in that it is included as a separate finding that was voted on separately.

These findings and determinations were in error of law as the inclusion in this hearing process about these complaints denied the Petitioner even the shadow of due process rights and has no meaning under the law and should be reversed by this court.

3) Finding # 3 of the Findings of the TISH Board are not supported by the evidence, are based on an invalid complaint and an expired TISH report.

The findings states that the report the Petitioner prepared for the property at 1638 Middleton on April 16, 2004 did not indicate the electrical service drop was too low. However original complaint that came in from the homeowner by telephone did not complain about the electrical service drop. According to the notes prepared by the TISH Program Administrator Connie Sandberg the telephone message read “8:10 Annette Peters question re TISH, 651-699-7837 drain not up to code, no vents ACI 1638 Middleton Ave, report = M.” (App. 7) further the Program Administrator wrote to the

Petitioner that the "plumbing complaint came in over the telephone" making no mention of a complaint about the electrical service. (App. 101)

The complaint did not discuss the electrical service at all and was added by the city inspectors after the fact. Presenting the City Council with the impression that the homeowner complained against the Petitioner about the electrical service drop was in error, not supported by the evidence and should be reversed.

While there was no time allotted to the Petitioner to call his own witnesses or present a defense the City still did not meet its burden in that there was no testimony or evidence presented as to the condition of the service drop on the date the Petitioner inspected the house.

The report in question was prepared by the Petitioner on April 17, 2004. The complaint was not investigated until July 27, 2004. At the time the report was investigated it was 3 months invalid. There was no evidence presented that the report was inaccurate at the time it was prepared. As a matter of fact the Cities only expert witness stated several times he had no knowledge or opinion as to what the condition of the service drop was in April of 2004. (App. 89) (App. 78) The net effect of the conclusion that the Board came to that "The problems did not likely arise after the report was prepared" is not based on any evidence presented at all and assumes that it was the petitioners obligation to prove that his report was factual at the time it was prepared, not the Cities obligation to show by evidence that the report was in error. The only evidence in the record shows the condition of the property in late July 2005, there was no evidence presented other than the original report to show the condition in April, 2004.

Evidence presented included the bill from the electrician that replaced the service which noted that the service mast was bent. (App. 53) There was no evidence or testimony that dealt with when the service mast was damaged.

SPLC Chapter 189.02 (a) states that a report is only valid for 365 days (App. 21) so the finding lists as a violation of Chapter 189.14 and 189.15 and Evaluator's Code of Ethics an invalid complaint about an expired report with no evidence to support it other than its condition 16 months later. The finding is in error of law and lacks evidence to support it and should be reversed by this court.

The City council based its decision on the findings and determination (App. 1-5), which were gravely flawed and therefore the decision of the City Council must and should be reversed.

- 4) Finding # 4 of the Findings of the TISH Board are not supported by the evidence, are arbitrary and capricious, are based on an invalid complaint and an expired TISH report.**

The telephone complaint that initiated this item from the home owner Annette Peters was not a valid complaint, to comply with the Rules of Appellant procedure we will resist repetition except to say that finding #4 flowed from a invalid complaint and an expired TISH report.

The report prepared by the Petitioner and approved by the board as required by SPLC 189.05 has several disclaimers including that it is limited in scope to what was visible at the time of evaluation. (App. 49)

The Cities only expert witness said several times over two hearing dates that he "had no idea when the plumbing was done for that house." (App. 85-86) The home owner

testified that she first saw the house 5-6 months after the report was prepared by the Petitioner. (App. 92) While there was no time allotted to the Petitioner to call his own witnesses or present a defense the City still did not meet its burden in that there was no testimony or evidence presented as to the condition or visibility of the offending plumbing in April of 2004. Over and over the Cities expert Steve Shiller testified that he could make no statement about the plumbing issues prior to the time he did the inspection. (App. 89) The report the Petitioner prepared was 3 months expired before anyone who testified inspected the plumbing to determine what was visible or proper at the time of the original report. The TISH Board was forced to acknowledge that “at least some of the venting problems were not visible at the time of the April 2004 inspection” (App. 2) there was no testimony or evidence presented that dealt with what was visible and when it was visible or when the plumbing that was improper was installed. While the TISH Board concluded that “Problem associated with much of the waste piping were readily visible...” they made that conclusion ignoring the April 16th 2004 report note that reported that much of the basement at the time of the original inspection was not visible (App. 50) and with no testimony or evidence that the offending plumbing was visible or about what was visible in April, 2004. They could only have been referring to what was visible at the time the City inspected in July of 2005, 3 months after the report issued had expired. This decision is arbitrary and capricious because it entirely failed to consider an important aspect of the issue, offers an explanation that conflicts with the evidence and it is so implausible that it could not be explained as a difference in view or the result of the city’s expertise. See *Minnegasco v. Minn. Pub. Utils. Comm’n*, 529 N.W.2d 413, 418

(Minn. App. 1995), *rev'd on other grounds*, 549 N.W.2d 904 (1996). The finding was arbitrary, capricious, not supported by the evidence despite the petitioners inability to defend himself properly and based on an invalid report and invalid complaint and should therefore be reversed.

The City council based its decision on the findings and determination (App. 4-5), which were seriously flawed and therefore the decision of the City Council must and should be reversed.

5) Finding # 5 Of The Findings Of The TISH Board Is Not Supported By The Evidence, The Behavior Alleged Does Not Rise To The Level Of Violation Of The Code Of Ethics, Is Not Prohibited Behavior For Evaluators Under Any Written Guideline Or Code Of Ethics, Does Not List With Specificity The Item Under The Code Of Ethics That The Alleged Behavior Violated.

Again because of the arbitrary time limit placed on the Petitioner he was denied his rights to defend himself of these accusations.

Finding #5 alleges that the Petitioner somehow violated the Evaluators code of ethics by “treated Annette Peters, the owner of 1638 Middleton Ave, in a disrespectful way through his comments toward her and the situation. Further, he videotaped parts on the interior of her home, including documents on her kitchen table, against her expressly stated wished and without her knowledge. Finally, in these actions, Ron Staeheli was acting in the capacity of a Truth in Sale TISH inspector and was therefore, subject to the standards and restrictions of such.”

The issue here is were the findings of the board in regards to these issues noticed to the Petitioner in the complaint or were they added later, is the behavior alleged prohibited by the Evaluators code of ethics and does the evidence presented support the conclusion that the Petitioner was acting in “the capacity of a Truth in Sale (TISH) inspector.”

The complaint form sent to the Petitioner in November of 2005 did not list as a violation video taping the interior parts of the property at 1638 Middleton, therefore its inclusion in the findings as a violation of the Code of Ethics for St. Paul TISH evaluators is in error of law in that the Bylaws and guidelines require notice of the complaints that could result in adverse action. As it is omitted from the notice and included in the findings as justification of the adverse action recommended it is in error of law and should be reversed.

The board concluded that “With these actions, Ron Staeheli acted in violation of the City of St. Paul Code of Ethics for Truth in Sale of Housing Evaluators.” That Code of Ethics is 12 items long and in no place does it list or intimate that there are behavioral restrictions, especially being required to act in such a way that a complaining homeowner does not feel “disrespected”.(App. 54-55) There is no mention or indication of level of respect that an evaluator must show to anyone, much less member of the public who has never engaged the evaluator for services. The homeowner was an adverse party to the Petitioner at the time of their interactions and the Petitioner had no duty or obligation to make her feel in any particular way respected or reassured at all. The finding that the

actions violated the Code of Ethics is in error of law, not supported by the evidence in the record and is arbitrary and capricious and therefore the finding and the conclusion of cancellation of Petitioner's TISH evaluators license should be reversed.

The homeowner Annette Peters was asked a series of questions to establish the relationship that the Petitioner had with her. She denied ever engaging the Petitioner as a TISH evaluator, ever allowing an evaluation of her home by the Petitioner, ever ordering or in anyway contacting the Petitioner to engage in the activity of performing as a TISH evaluator on any home she ever owned. She answered each question in the negative. (App. 91-92)

The duties of the evaluator are well defined in the Code of ethics, evaluator guidelines and in SPLC chapter 189.15 Duties of evaluators. (App. 25) None of those duties portend to require the evaluator to do anything as it regards the complaint process. The notice letter even relieves the evaluator from having to attend any disciplinary hearings against him. (App. 77) The finding that the Petitioner was acting in his capacity of TISH evaluator is not supported by the evidence, is in error of law and is arbitrary and capricious and should therefore be reversed.

- 6) Finding # 6 Of The Findings Of The TISH Board Is Not Supported By The Evidence, The Behavior Alleged Does Not Rise To The Level Of Violation Of The Code Of Ethics, Is Not Prohibited Behavior For Evaluators Under Any Written Guideline Or Code Of Ethics, Does Not List With Specificity The Item Under The Code Of Ethics That The Alleged Behavior Violated.**

The Petitioner makes all of the above arguments as it regards finding #6 in the findings of fact and determination of the St. Paul TISH Board including the lack of time

for the evaluator to defend himself from the accusations, the behavior is not prohibited by the evaluators code of ethics, the finding is improperly vague in that it does not list the provision of the code of ethics that is allegedly violated by the actions alleged.

This item is particularly erroneous in that it attempts to find the Petitioner responsible for actions that everyone agrees he did not do. When Annette Peters was asked if the Petitioner was the one who called her and represented themselves to be from the City Attorneys office, Annette Peters answered simply "no". (App. 93) It does not attempt to quantify the petitioners participation on the alleged violation but it is sure that he did not perform the act that was, in the conclusion of the board, in violation of the Code of Ethics of the St. Paul TISH evaluators, a code of ethics that does not attempt to control behavior evaluators while not performing evaluations. This finding could only find that the Petitioner was "...more likely than not" involved, a standard of proof that is so low as to be immaterial.

The City council based its decision on the findings and determination (App. 1-5), which were critically flawed, in error of law and therefore the decision of the City Council must and should be reversed

- 7) The Determinations Of The Findings Of The TISH Board Is Not Supported By The Evidence, The Behavior Alleged Does Not Rise To The Level Of Violation Of The Code Of Ethics, Is Not Prohibited Behavior For Evaluators Under Any Written Guideline Or Code Of Ethics, Does Not List With Specificity The Item Under The Code Of Ethics That The Alleged Behavior Violated.**

The determination of the Board states four reasons for the recommendation of "cancels permanently the Truth in Sale License held by Ron Staeheli. 1) the serious

nature of the infractions of Ron Staeheli both in this case and the previous cases heard by the Board. 2) the long-term repetitive nature of the violations of Ron Staeheli; 3) Ron Staeheli's apparent ongoing misunderstanding of the TISH program and its mission to provide buyers with information on the house they are purchasing, rather than help sellers meet a regulatory requirement; and 3) (sic) the fact that Ron Staeheli was on probation at the time of the inspection in question." (App. 3)

We will not repeat the above arguments about the deeply flawed nature of the process that lead to the conclusions of the board for reason #1 and #2 however there was no testimony or evidence presented that dealt with any of the violations listed as violations ever being found by the board in prior disciplinary hearings. There is no evidence presented that the board has ever found the Petitioner to have missed an electrical service drop, major plumbing issues behind walls, acting disrespectfully to members of the public that complain against him or aiding and abetting improper phone calls ever in the past. As a result the determination that there is a long term repetitive nature of the violations is not supported by the evidence.

It bears repeating that the board justified its determination for cancellation of the petitioners license by re-classifying a closed complaint as an adverse action in order to justify to the City Council its decision.

Determination #3 is the equivalent to being accused and convicted being a heretic. The Petitioner was not accused of "misunderstanding the TISH program" in the notice sent to him (App. 28-33) and the determination that he did shows the far-fetched subjectivity of the boards opinions on the matter. Nowhere does the TISH program have

a mission statement or other documentation of the proper understanding that an evaluator must have in order to maintain his license. The board basing its determination on a requirement that an evaluator have the proper understanding of the program is in error of law, subjective and vague to the point that it is unenforceable, is not required of the position of evaluator by any requirement of law or guideline, there was no evidence presented that the Petitioner had any particular attitude or understanding of the mission of the program.

Further the role of evaluator is well documented to be, in fact, to “help sellers meet a regulatory requirement.” Who else is going to help sellers meet what is clearly a regulatory requirement of the City of St. Paul? A TISH evaluation is required by all sellers and their agent with penalties under the law that can include imprisonment. SPLC Chapter 189.19 (App. 25) It is required that evaluators not discriminate against anyone and that they in fact file the reports with the city to confirm that a seller is meeting his obligation under the code. The role of the evaluator is clearly to help sellers meet this regulatory requirement but because the Petitioner was not noticed of this complaint and was severely limited in time to present a defense he could not address these issues. The determination was in error of law and should be reversed.

While it is true that the Petitioner was on probation there were no clear terms to what probation meant and how it may effect his actions while on probation. The term “probation” by itself is unenforceable because it is vague and the board made no effort to define the terms or additional responsibilities the Petitioner may have as a result of being on probation. It under these circumstances is a meaningless term and therefore

unenforceable. It is meaningless under the SPLC chapter 310, Uniform License Procedures or SPLC chapter 189 as there is no provision for "probation" in either ordinance, the word does not appear in the code.

The City council based its decision on the findings and determination (App. 4-5), which were acutely flawed and therefore the decision of the City Council must and should be reversed.

CONCLUSION

For the forgoing reasons the decision of the City of St. Paul should be reversed. This proceeding should be remanded to the City of St. Paul for entry of a decision decreeing that the Petitioner TISH evaluator license be reinstated and Petitioner's personal record cleared of the cancellation for all purposes.

Dated: July 15, 2006



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).