

NO. A06-1146

State of Minnesota
In Court of Appeals

Ronald Staeheli*Appellant,*

v.

City of St. Paul*Respondents.*

REPLY BRIEF

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STANDARD OF REVIEW

This courts review on writ of certiorari is limited to an inspection of the record to determine the propriety of the Respondent city's jurisdiction and procedures and, with respect to the merits, to determine whether its decision was arbitrary, oppressive, unreasonable, fraudulent, or unsupported by evidence or applicable law. *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992). As a reviewing court, this court should not retry the facts or make credibility determinations. *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996).

INTRODUCTION

This brief is in reply to the Respondents Brief in the case of Ronald Staeheli v. City of St. Paul. The Respondent's brief is nothing more than equivocations, excuses, miss-directions and a manual for how the City might have accomplished the goal of canceling the Relator's TISH evaluator license if they would have bothered to do it right. They ask this court to retry the facts in light of alternative laws and guidelines not mentioned in the findings of the TISH Board or city council resolution in order to uphold the final decision the Respondent city has already reached.

At no point do they indicate evidence presented at the hearings that supports their allegations. They change the laws and guidelines that the Relator might have been

adjudged to have violated if they would have found him to be in violation of some law or guideline. They try to change the presumptive penalty for two violations to the presumptive penalty for four, they try to change "violation of the code of ethics" to violating some undefined "professional fitness" standard, try to change "visible at the time of the evaluation" to condition 16 months later, try to change, excuse and equivocate their own definition of what is reasonable notice prior to a hearing, try to explain away an arbitrary and oppressive time limit to the Relator's due process rights. They try to re-define a "telephone complaint reduced to writing" into a "valid" written complaint, try to explain away additional immaterial inflammatory evidence presented to the Board that served no purpose other than to smear the Relator, and they ignore or pay no heed to glaring serious errors of law.

The Respondent's claim that under Sabes v. City of Minneapolis, 120 N.W. 2d 871,875 (1963) the court can reverse if the City acted "capriciously, arbitrarily or oppressively," they go on to argue that under Senior v. City of Edina, 547 N. W. 2d 411, 416 (Minn Ct. App. 1996) that if the Respondent city "furnished any legal and substantial basis for the action taken." this court can not reverse. Then the Respondents' fail to establish anything the city actually did that "furnished any legal and substantial basis for the action taken." The actual TISH Board findings of fact (A-1,2,3) and city council resolution (A-4,5) affirming the TISH Board findings of fact are laden with error in the "substantial basis" of their findings and are incorrect as a matter of law in the "action taken". It is helpful to note that the Respondent city runs away from its own findings every chance they can. They say that because they could have reasonably applied

different standards and different laws in different ways that it was okay to have done it wrong in the first place.

The Respondent city claims that “the fact that a court reviewing the action of a municipal body may have arrived at a different conclusion, had it been a member of the body, does not invalidate the judgment of the city officials if they acted in good faith and with in the broad discretion accorded them by statutes and the relevant ordinances.” And then they ask this court to make the same conclusion as the City made, revocation, based on different standards than the city used, different conclusions than the city found, different ways of applying the presumptive penalties from their own ordinances, over reaching their own presumptive penalties without any guidance from the city as to the rational for “deviating from these standards” listed in the St. Paul Legislative code chapter 310.05 (m). All of this without any evidence to support their new theories, their new allegations or their new rational for the conclusion. And all of this when the Relator had almost no opportunity to present a meaningful defense in a meaningful way at a meaningful time.

This proceeding is not about what the Respondent city might have chosen to do to the Relator’s TISH License if they had decided to follow the law and guidelines. It is also not about whether on not what they did would have been reasonable applying a different standard. It is about what they did do and the errors they made along the way.

ARGUMENTS

1. The Respondent's Claim that Due Process was Provided by the Hearing Before the City Council is Disingenuous and Absurd.

Several times in the respondents brief to this court it is mentioned that despite the outrageous and obvious egregious errors of law and lack of any semblance of due process which arose during the TISH Board hearing process that because this is an appeal of the City Council's affirmation of the TISH Board decision that only the process before the city council is relevant. Nothing could be further from the truth.

The St. Paul Legislative code states that the Relator "may obtain a hearing before the city council to appeal any board order..." (A- 23) The city attorney Judy Hanson wrote a communication to the City Council stating that "Mr. Staeheli's appeal before you is based upon the existing record. There will be no introduction of new evidence" (RA-42) She went on to present a "standard of review" in her memorandum to the council. In that memorandum she instructed the council that "This appeal brought by Mr. Staeheli before the City Council is a review of the underlying record without presentation of new evidence."(RA-43) So when the respondents claim in their Brief that " The procedures afforded Relator during the hearing before the City Council satisfied constitutional due process requirements." they are being absurd.

Using the Respondent's definition of due process the council hearing could not meet the due process standard of "heard, ' in a meaningful manner in a meaningful time'" Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950); Armstrong v. Manzo, 380 U.

S. 545,552 (1965) If the hearing before the Council is simply a review of the decision of the TISH Board then the due process must be given during the TISH Board hearing. The council was instructed to ignore any additional evidence and base its decision strictly on the record as established before the TISH Board during its hearings. If the Relator was denied a full and fair hearing before the TISH Board no record review before the city council could satisfy due process.

Chapter 189.10 (a) (8) of the St. Paul Legislative code requires that the TISH Board "Take adverse action against a license or licensee as defined in section 189.01". Section 189.11 allows that the evaluator may appeal the TISH Board's decision. The Truth in Sale of Housing Board Bylaws adopted April 17, 2002 Section 2 says:

The board shall adopt by resolution a disciplinary action procedure based on Chapter 310 of the St. Paul Legislative Code, Uniform License procedures, section 310.05 Hearing procedures. The Procedure adopted *will follow the rules of due process*; to protect the interest of the Truth-in-Sale of Housing program in the City of St. Paul and the *rights of the Truth-in Sale of Housing evaluator*. (A-13) [emphasis added]

Clearly the Respondent city makes a ridiculous argument to assert that the hearing before the St. Paul City Council, which was only to review the finding of the TISH Board with instruction to not hear any additional evidence can serve as due process to the Relator. It is not envisioned by the Laws, rules or Bylaws and flies in the face of logic.

2. The Respondent's Claim that the Telephone Complaint is the Same as a Written Complaint is not Supported by the Evidence, Logic, Guidelines, Statute, or Rules.

A telephone call comes in to the TISH program administrator, the program administrator writes down what is said to her. She looks at the note she just wrote and

says to herself "look, a written complaint." And the Respondent argues that this meets the definition of a "written complaint." It is too ridiculous to debate. The Relator refers the court to the Appellants' Brief for his argument as it regards the validity of the telephone complaint.

The further violation of due process and error of law comes into play when the Respondent city claim to the TISH Board and city council that the complaint was from a homeowner. Assistant City attorney Judy Hanson told the city council that "The complaints were made by the owner." (A-94) If the complainant was the homeowner then the written complaint should have come from her according to the Board rules. (A-13). The city hopes to have it both ways, be able to tell the city council that the homeowner made the complaint while not having to take the chance that the homeowner might not go to the trouble of actually writing a complaint.

Assistant City Attorney Judy Hanson's memorandum to the City council did not say that Connie Sandberg can make a complaint against the Relator, Assistant City Attorney Judy Hanson said that the rules allow her to write down a telephone complaint and call it a written complaint. The rules do not say that, therefore the decision that was based on that memorandum was in error of law and is grounds for reversal by this court.

3. The Respondent's Claim That a One Day Notice Satisfies Due Process Is In Error.

The Relator did not and is not claiming that he was told that the January 10, 2006 hearing would be canceled. The Relator was told by the person in the position of Director of NHPI that he was postponing the hearing. (A-41) The Director of NHPI had

postponed and changed dates of hearings before, Andy Dawkins, Director of NHPI was the person that set the original date of January 10, 2006. (A-35) Not satisfied to presume the postponement called for by the NHPI Director the Relator sent a total of three separate communications to the Respondent city confirming and communicating the postponement to staff and the NHPI Director with copies to the city attorneys' office. (A-41,43,45) The Relator also stopped all communication with the hearing examiner about procedural concerns as to the hearing itself. Any claim that the Respondent makes that Bob Kessler, Director of NHPI ""indicat[ed] that he would discuss the possibility of a continuance with the City Attorney's office." is in direct conflict with the evidence. In direct response to the Relator's question "am I really going to have to go through with this" (A-42) the Director of NHPI Bob Kessler informed the Relator that he was postponing the hearing "until I can get a handle on the situation and decide the best way to proceed in a fair and equitable manner." (A-41)

The Respondent's claim that a one day notice meets any requirement is not supported by the evidence or the law. The Board itself defines reasonable notice as "generally considered to be at least ten (10) days prior to the date of the hearing." (A-19) The Board also gave the Relator the right to present witnesses, none of whom were available with less than 24 hours notice. Not having adequate notice to present a defense that was otherwise available to the Relator with proper notice as defined by the Board itself defeats the Respondent's argument that the Relator had "the opportunity to be heard at a meaningful time and in a meaningful manner." No meaningful defense could be offered with one day to prepare having no witnesses available and no time to find

alternatives. The Board failed its obligation to provide due process by ignoring its own guidelines and not providing proper notice as it was defined in the TISH Board's own guidelines.

If this court affirms this procedure as meeting the requirement of due process all a future city staff must do is create confusion about a hearing date and spring the hearing on a licensee the day before, depriving any person any reasonable preparation time to present a defense.

4. Respondent's Claims That Due Process Was Not Violated By The Lack Of Notice Of Some Of The Claims Against Relator Is Not Supported By The Evidence.

The respondent was never informed that he was accused of violating Minnesota Statute 609.475 until he arrived at the hearing on January 10, 2006. (A-61). The decisions during the hearing did not, as the Respondent alleges, "limit or reduce the allegation to be addressed during the hearing.." but expanded on the previously disclosed allegations. When asked about what the specific allegations were and what form would be used against him at the opening of the hearing the Hearing examiner stated "I think that we will find that out today" (A-83) Not only wasn't the Relator notified of what the allegations were before him, the Hearing Examiner was not even sure.

Nothing in any of the notices sent to the Relator listed as an allegation "video taped parts on the interior of her home" however it is listed as a violation of the code of ethics in the findings of fact of the TISH Board (A-2). This is in violation of the Board guidelines. If the video taping was an alleged infraction it would had to have been

included in the notice to the Relator prior to the hearing. It just shows up as a finding of wrongdoing and a violation of the code of ethics, which of course it is not.

5. The Time Limitations Followed During the TISH Board Hearing Denied the Relator's Due Process Rights.

The Relator did not and is not claiming that he was only given 30 min to defend himself, Relator claims that any unreasonable time limit denied the Relator of the rights given it by the cities own rules, guidelines and laws. The Respondent's brief claims that the Relator "was encouraged to submit written information as well as audio and video tape to the TISH Board for review prior to each hearing date." This is clearly in error and not supported by the evidence. The Relator was told that he may not contact any Board member in any way prior to the hearing (A-76) despite the Respondent cities ability to provide the Board with its entire complaint and evidence 4 month prior to the actual hearing date. Perhaps the Respondent is confused by the demand that all documentation be presented to the staff prior to the hearing date. That information was not to be distributed to the Board but gave the staff an additional advantage in limiting the Relator's defense to whatever they gave to the staff.

The Respondent's claim that the Relator had the opportunity to present "additional evidence" at the January 31, 2006 continuance of the hearing is not supported by the evidence. The Hearing examiner and the notice of disciplinary hearing were both clear that the January 31, 2006 hearing was for rebuttal evidence. (A-83 and A-76)

The Respondent's claim that the Relator was not disadvantaged by any of the instructions he received is in conflict with the evidence. The Relator was passionate in his assertions that an arbitrary time limit would prejudice his case. He wrote the Hearing examiner and City Attorney several times protesting the time limit and other restrictions arbitrarily added by staff to the hearing process. (A-38-40) He only stopped his protests after he was informed by the Director of NHPI Bob Kessler in a December 28, 2005 e-mail that the January 10, 2006 hearing was postponed. The uncontroverted fact in the matter is that no time limit was required by statute, rule or guideline and a time limit was applied to the Relator's defense over his strenuous objections depriving him of his rights to due process.

For the Respondent city to assert that the opportunity to present written statements to the Board is the same as having the evidence presented in open hearing is preposterous. No due process is served by having to present your defense in writing because the TISH Board could not be bothered to take the time to listen to the Relator as he "present[s] evidence, testimony and arguments in defense and rebuttal." (A-17 and A-77) It's the same as sending the jury home with depositions and having them come back and deliberate the case.

The Relator had no opportunity to present any direct evidence of any kind because the partial cross-examining of the cities witnesses took all of his allotted time.

The Respondent city contends that due process is met if the Relator had the opportunity to be *heard* "at a meaningful time and in a meaningful manner". Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950); Armstrong v. Manzo, 380 U. S. 545,552

(1965). [emphasis added] The Relator contends that limiting the defense to an arbitrary time limit makes the hearing lack meaning. Denying the Relator the full ability to defend himself and denying him a reasonable notice as defined by the Board itself robs the Relator of any meaning to his defense.

If this court affirms the Respondents' time limit as meeting the requirement of due process all a future City staff must do is arbitrarily create a time constraint to be sure that little exculpatory evidence can be presented on the record and create a voluminous complaint against a licensee so that they had no chance of defending all of the allegations put before them, depriving any person any reasonable defense. Or worse allowing a city to require no hearing, just written documentation that would be deliberated in closed sessions. This is not how due process is envisioned.

6. Respondent Cities Contention that there was Substantial Evidence to Support The Revocation Of The Relator's TISH Evaluator's License is without Merit or Evidence from the Record.

Nothing in the record or the Respondent cities brief contains any reference to any evidence to the condition of the home at 1638 Middleton on April 16, 2004. The only evidence that was presented showed the condition of the home 16 months later. No evidence was presented either to this court, the city council or the TISH Board that disputed the contention from the cities own expert witness Steve Shiller that he had no idea as to what was visible at the time of the original inspection or the condition of the property April 16, 2004. (A-78-93) The closest the city gets is that it had no record of any permits being pulled. While that is actually incorrect because several electrical

permits were pulled between the Relator's inspection and the cities inspection 16 months later the existence of a permit would indicate work being performed that was to code. This proceeding is about work being done below code. Also a complete permit record was not submitted as evidence to the City Council or TISH Board so that statement can not be considered by this court as it is not in the record.

What is on the record and was presented incorrectly by the Respondent city is that the Respondents Brief says that the Relator admitted that the electrical service drop was 9 feet from the deck and that code was 10 feet. The Relator never witnessed the service drop at the original July 2005 inspection by the city and by the time he was informed of the complaint the homeowner had had the service drop changed. What the Relator said was that the roof gutter was 8' 6" from the deck and if the wires were 6 inches above that they would have to be at least 9' from the deck, it was not during testimony but when asking questions which is not evidence. None of this matters of course because we are still not dealing with the condition when the Relator performed his inspection 16 month prior, we are dealing with the condition in July of 2005. The city inspector never measured the clearance to the deck from the wires and called for a correction before the Relator could confirm the condition of the electrical service. There is only evidence that the drop was near the roof and looked to be less that proper. A simple photo of the drop with measurement would have solved the issue of the service drop height in July of 2005 but none was presented as evidence.

The Respondent city also had the audacity to state to this court that "Relator submitted little else to dispute the allegations" when the city itself arbitrarily limited

Relator's time to present evidence "to dispute the allegations" and gave him 1 day to prepare a defense.

7. The City Council's Affirmation of the TISH Board's Findings of Fact Based on Violations of the Evaluator's Code of Ethics is in Error of Law.

The Relator claims that even if the evidence after a proper hearing with due process protections supported the allegations of violation of the evaluators code of ethics the actual code of ethics do not prohibit the alleged acts. The Relator made this argument in his Appellants' Brief, to the city council, city staff and to the TISH Board. The Respondent cities response is that they could have found the Relator to have violated a "professional fitness" standard. The TISH Board did not. The TISH Board and city council by affirmation found the Relator to have violated the evaluators code of ethics. If this court applies any reasonable standard to a reading of the code of ethics (A-54,55) the Relator can not be found to have violated them. The Respondent city is arguing this court should "retry the facts" and substitute a new standard of violation in place of the one it used against the Relator and it gave this court no evidence to support the allegation that the Relator violated a "professional fitness" standard. It is a bizarre argument. Even if it was allowed or proper for this court to "retry the facts" and apply a different standard than the Respondent city did the city offered no guidance for the court to apply a "professional fitness" standard.

8. The Respondent's Assertion that the Inclusion of Evidence of Trespass Against the Relator Brought Before the Board over the Relator's Objections did not Influence the TISH Board And City Council's Conclusions and Actions is not Supported by the Evidence.

The Respondent city claims that "The city did not rely on this information to impose additional discipline against Relator." The entire section of the Respondent cities answer to this allegation brought by the Relator contains no references to the record to show that this evidence had "no influence". The Respondent coming to the conclusion that it had no effect is unsubstantiated by the record.

The Respondent city stated that they "did not utilize this information to initiate additional complaints against [the] Relator." That would have been a much improved situation than the one that ended up happening. We could have had a response time, a hearing date and the Relator would have, in theory, the opportunity to present evidence as to whether or not it was a violation of anything to go and measure the exterior of an unfenced home in St. Paul during the day when no one was home after announcing his intention to do so and knocking on the door to get approval. This evidence in this situation had no probative value to the issues the Board was supposed to be deciding. The only value could be implication and innuendo that the Relator was accused of something else "bad". The Findings of the Board specifically go out of their way to list as a violation of probation the time the Relator "went without permission to Annette Peters' house with Brice, his son on January 12, 2006." (A-1) It is included in the Resolution of the city council affirming the findings of the TISH Board (A-4). If it did not figure in their decision they certainly went out of their way to mention it.

As earlier argued this entire subject line of evidence was objected to before the rebuttal hearing and during the rebuttal hearing. The city attorney actually said that the

reason that she allowed the Board to get a copy of the police report was that it was evidence about the "behavior" complaint. This is a member of the Minnesota bar that believed that accusations of trespassing 4 months after an incident is evidence of what happened during that incident 4 months earlier.

9. The City Councils Decision to Affirm the Revocation of Relator's License using the Rationale that it was the Relator's Fourth Violation and was the Proper Application of the Presumptive Penalty Provision was Incorrect and Therefore in Error of Law, Arbitrary and Capricious and Should be Reversed by this Court

The Respondent City said that even though the Findings of Fact are in error in that the first of four allegations listed was in fact not a disciplinary hearing (A-1, A-3, A-4 line 34-36), they go on to explain that they could have applied other guidelines or parts of ordinances in order to get to the same conclusion of revocation of the Relator's TISH license. Whether or not they could have used alternative rationale's is immaterial. They did what they did. They said twice that this was the fourth incidence of violation and the reason that they applied revocation of the Relator's License was that revocation was the presumptive penalty listed under Chapter 310. (A-1, A-3, A-4) The Relator is not only claiming that this was a due process violation. The Relator is claiming it was not his fourth disciplinary hearing, the findings and resolutions were incorrect and thus were in error of law. The first "disciplinary hearing" was not a hearing by any standard. The Board's own findings state "the Board declined to hold a disciplinary hearing."(A-1) Further St. Paul Legislative code chapter 310.05 (v) defines multiple violations as having

occurred within 12, 18 or 24 months of the date the matter comes before the city council or they are not counted. Because violation # 2 from Finding # 1 (B) (A-1) was three years old at the time of the hearing before the city council under Chapter 310.05 (m) the April 5, 2006 hearing could only have been the second violation applicable to presumptive penalties.

Chapter 310 states that if the City Council is to deviate from the presumptive penalties they are to include a written statement as to why they deviated from them. The Code requirement states “When deviating from these standards, the council *shall* provide a written reason that specify why the penalty selected was more appropriate” St. Paul Legislative Code Chapter 310.05 (m) [emphasis added] (RA 49) As no written statement is in the record explaining why the city council deviated from the presumptive penalty it is clear that they believed that they where applying the presumptive penalty for a fourth violation. The Respondent’s are asking this court to retry the facts and apply standards from other rules and guidelines to arrive at the same conclusion the city council did using a completely different rationale still without any substantial evidence to support it despite their refusal to allow any semblance of due process to the Relator’s defense.

The Respondent’s brief claims the “Relator was the subject of substantiated complaints involving high life/safety risks.” They quote no evidence or conclusion from the city council or TISH Board to arrive at that conclusion, the finding of fact of the TISH Board and the resolution of the city council never use the phrase “high life/safety risks” (A-1,2,3,4,5). Additionally the Board did consider the Relator’s prior complaint history before them and promptly miss counted while counting to four.

Any number of conclusions could be reached in any number of instances, tribunals, courts, Board's or hearing processes. This proceeding before this court is not to "retry the facts" to determine if another rationale would accomplish the result of revocation of the Relator's TISH License. See *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996). This proceeding is to determine if the rationale used was in error of law. Clearly it was.

10. The Respondent City was not Overwhelmed by the Requirements of Due Process and Proper Procedure.

It may be helpful to this court to consider that none of these objections and allegations made by the Relator should come as a surprise to the Respondent city. The Relator objected loudly and passionately upon learning of each and every attempt by the Respondent city to limit or eliminate the Relator's enumerated rights. The city and their attorney's uniformly ignored and dismissed their own due process requirements, guidelines, laws, proper procedures, requirements of complaints considered and general rules

This is not a small group of unsophisticated people trying their best to do a good job. This was a well planned and systematic attempt to subvert the constitutionally guaranteed rights of the Relator with the firm belief that access to the justice this court can provide would be beyond the Relator's resources to access. They were the city, they could do what ever they wanted, all with the supervision and blessing of the city attorney's office.

11. The Respondents Brief is Silent in its Defense for Some of the Most Serious Allegations Against the City and their Disciplinary Processes and Results in this Case.

The most telling part of the Respondent cities brief is what it does not say. They make no argument maintaining that there is any requirement for an evaluator with the St. Paul Truth in Housing Program to avoid having a “misunderstanding of the TISH Program and its mission to provide Buyers with information on the house they are purchasing”(A-3 and A-5). The Relator maintained in his earlier argument that it was the same as being convicted of heresy and the Respondent city does not dispute that. Both the Board and the City Council used this heresy conviction as rational for the punishment of cancellation of Relator’s TISH evaluators license and denial of the Relator’s ability to make a living.

Despite almost completely denying the Relator any of the rights to notice or due process and having unfettered access to the TISH Board and City Council before and after the hearings and the Respondent city is unable to point to a single shred of evidence as to what plumbing or electrical was visible, not built into walls, obstructed by storage or partitioned off in the basement and installed in the home at 1638 Middleton in St. Paul on April, 16, 2004 or what condition it was in at the time the Relator evaluated the home. The Respondent’s brief lists some evidence of the condition when the City inspected it 16 months later but no evidence was presented to this court or the city council or the TISH Board that indicated the condition on April 16, 2004 other than the Relator’s city sanctioned TISH report. April 16, 2004 is the only date important to these proceedings.

The city could not show that any evidence was presented to dispute their own experts testimony that they had no idea what that condition was in April of 2004.

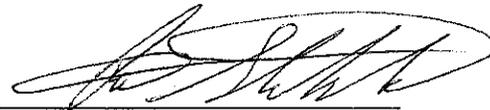
The Respondent city could also not point to a single provision of the code of ethics for evaluators of the St. Paul TISH program that the allegations violate. Apparently the Respondent city can not find a portion of the code of ethics the alleged behavior violated. They are still silent on which of the 12 ethical requirements listed in the code of ethics the alleged behavior violated.

CONCLUSION

For these and a myriad of other reasons argued before this court in this Brief and the Appellants' Brief this court must reverse and remand to the City Council of the City of St. Paul with instructions to enter a decree reinstating the Petitioners TISH License and clearing his name for all purposes.

Failing to do so would put in peril the well established concept of due process for quasi-judicial proceedings in and for the State of Minnesota.

Dated: August 24, 2006



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