

1 **Final agency action regarding decision below:**

2
3 **REQHRG Date hearing requested**

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 In the Matter of Summary Suspension of
8 the Real Estate Broker's License of

No. 05F-DI-294-002-REL

9 Kenneth Perkins, dba Virtual Realty

**ORDER GRANTING PARTIAL AWARD
OF ATTORNEY'S FEES**

10
11 Respondent.

12
13
14
15 Kenneth Perkins filed an application requesting an award of attorney fees and costs
16 under A.R.S. § 41-1007. The Arizona Department of Real Estate filed a response
17 opposing the request.

18 **BACKGROUND**

19 The Arizona Department of Real Estate issued a summary suspension of
20 Respondent Kenneth Perkins' Real Estate Broker's License. Mr. Perkins requested a
21 hearing. In an Amended Notice of Hearing issued on September 5, 2005, the
22 Department alleged that Mr. Perkins had violated 10 sub-sections of A.R.S. § 32-2153
23 and 2 provisions of the Arizona Administrative Code based on complaints by the owners
24 of 6 homes. The Department's basic factual allegations were that Mr. Perkins had
25 made misrepresentations and false promises and that he breached fiduciary duties
26 owed to the home owners (the "Misrepresentation Claims"), and that Mr. Perkins had
27 hired unlicensed salespersons (the "Salesperson Claims").

28 The hearing was conducted over 6 (non-consecutive) days beginning in October
29 2005 and ending in February 2006, and the parties then filed written closing arguments
30 with Proposed Findings of Fact and Conclusions of Law. On May 1, 2006, the

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

undersigned ALJ issued an Administrative Law Decision ("ALJ Decision") in which he found that the Department had not met its burden of proof to sustain any of the alleged

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

1 violations. On May 25, 2006 the Commissioner issued her Commissioner's Final Order
2 accepting all the ALJ Findings of Fact and the ALJ's conclusions that the Department
3 had not met the burden of proof with respect to the Misrepresentation Claims. The
4 Commissioner, however, concluded that the Department had shown that Mr. Perkins
5 committed the violations alleged in the Salespersons Claims.

6 On June 26, 2006 Mr. Perkins filed an Application for Award of Fees and Costs
7 ("Application"), which Application was supported by his attorney's Affidavit and billing
8 records and invoices. On July 11, 2006 the Department filed Department's Response to
9 Application for Award of Fees and Costs ("Response").

10 **Positions of the Parties**

11 Mr. Perkins' Application

12 Mr. Perkins argues that he prevailed on all significant issues and the
13 Department's position was not substantially justified because: (1) the Department
14 presented no witnesses for 3 of the 6 homes on which there were complaints; (2) the 3
15 witnesses that did appear were found to lack credibility; and (3) the Department had
16 previously investigated 4 of these complaints, found no statutory violations and closed
17 these 4 files, but presented no new evidence at hearing to demonstrate that it was
18 justified in reopening the complaints.

19 Mr. Perkins claims \$35,136.25 in attorneys' fees and \$5,271.92 in costs, which
20 are all charges that Mr. Perkins was obligated to pay. Mr. Perkins provided copies of his
21 attorney's time sheets and billing statements showing descriptions of work completed
22 and billing rates for the personnel completing the work. Attorney time was billed at
23 \$150.00 per hour, and paralegal time at \$50.00 per hour (when an attorney conducted
24 paralegal work the \$50.00 rate was used). Some billing entries show that 2 attorneys
25 conducted certain tasks, but in these instances Mr. Perkins was billed for only 1
26 attorney's time, and other entries show discounted rates. Mr. Perkins asserts that the
27 billing rates are justified given his attorney's experience in real estate law and that these
28 rates are in line with prevailing rates for this type of work.
29
30

The Department's Response

1 The Department argues that: (1) Mr. Perkins has not met the burden of proof to
2 show that he meets the statutory requirements; (2) the Department was substantially
3 justified in suspending Mr. Perkins license because the Commissioner has a duty to
4 protect the public and there were numerous complaints filed with the Department
5 alleging that Mr. Perkins had made misrepresentations; (3) if an award is made, Mr.
6 Perkins may not recover more than \$75.00 per hour as set forth in A.R.S. § 12-348(E);
7 and (4) if an award is made, Mr. Perkins may not recover fees for defending the
8 Salesperson Claims on which he did not prevail.
9

Applicable Law

10 To "ensure fair and open regulation by state agencies, a person. . . is eligible
11 for reimbursement of the person's costs and fees if the person prevails against any
12 agency in an administrative hearing as provided in section 41-1007." A.R.S. § 41-
13 1001.01(A)(2).
14

15 A.R.S. § 41-1007 provides, in part:

16 A. Except as provided in section 42-2064, subsection G, a hearing
17 officer or administrative law judge shall award fees and other costs
18 to any prevailing party in a contested case or an appealable agency
19 action brought pursuant to any state administrative hearing
20 authority. For purposes of this subsection, a person is considered
21 to be a prevailing party only if both:

- 22 1. The agency's position was not substantially justified.
- 23 2. The person prevails as to the most significant issue or
24 set of issues unless the reason that the person prevailed is
25 due to an intervening change in the law.

* * * *

26 C. A party that seeks an award of fees or other costs shall apply to
27 the hearing officer or administrative law judge, within thirty days
28 after the final decision or order, providing:

- 29 1. Evidence of the party's eligibility for the award.
- 30 2. The amount sought.
3. An itemized statement from the attorneys and experts
 stating:

- (a) The actual time spent representing the party.
- (b) The rate at which the fees were computed.

D. The award of reasonable attorney fees pursuant to subsection A of this section need not equal or relate to the attorney fees actually paid or contracted, but an award may not exceed the amount paid or agreed to be paid.

The “test for substantial justification is one of reasonableness, that is, the agency’s position must have a reasonable basis in both law and fact to be considered substantially justified.” Department’s Response at p. 3 (*citing Pierce v. Underwood*, 487 U.S. 552 (1988)).

ANALYSIS

Most Significant Set Of Issues

The Commissioner found that Mr. Perkins’ activities met the definition of “promotional practices” found in A.R.S. § 32-2101(45), and that Mr. Perkins had contracted with unlicensed parties that meet the definitions of “real estate salespersons” or “salespersons” found in A.R.S. §§ 32-2101(49) and 32-2101(51), respectively. Based on these findings the Commissioner determined that the Department met its burden of proof to show that Mr. Perkins had committed the violations alleged in the Salesperson Claims. Neither the Amended Notice of Hearing nor the Department’s written Proposed Findings of Fact and Conclusions of Law reference A.R.S. §§ 32-2101(45), 32-2101(49) or 32-2101(51), nor does either document specify which facts support a conclusion that Mr. Perkins’ conduct violated these provisions. The Department presented no witnesses to explain how or why the facts in evidence support a finding that Mr. Perkins’ conduct violated A.R.S. §§ 32-2101(45), 32-2101(49) or 32-2101(51). In short, the Department’s evidence was focused almost exclusively on the Misrepresentation Claims. Consequently, the ALJ concludes that the Misrepresentation Claims constitute the most significant set of issues in this matter.

Substantial Justification

1 The Department's basic factual allegation (with respect to the Misrepresentation
2 Claims) was that Mr. Perkins made misrepresentations and false promises to the
3 owners of 6 homes, which resulted in 6 complaints being filed.¹ The Department
4 presented no evidence in support of 2 of the 6 homeowner complaints (Connie and Roy
5 Sembach, and Luis and Julia Estrella). The Department presented no admissible
6 evidence in support of the third homeowner complaint (Carmen Garcia). In support of
7 the other 3 homeowner complaints (Dana Weber, Raymond and Marcella Salazar, and
8 Paul Ryan) the Department offered the testimony of Ms. Weber, Ms. Salazar² and Mr.
9 Ryan, but the Commissioner accepted the ALJ's Conclusions of Law finding that none
10 of these three witnesses was credible.

11 The Department had previously investigated both the Weber and Salazar
12 complaints and closed these matters. In the letter closing the Salazar complaint, the
13 Department specifically stated that it had found that there was not enough evidence to
14 show that there had been a violation of statute or rule. At the instant hearing none of the
15 Department's investigators or licensing personnel testified, and the Department
16 presented no evidence to show that it had discovered new information supporting a
17 conclusion that there had been a statutory violation in either matter (or that its
18 investigators had closed the cases in error). A logical inference is that the Department's
19 investigators and licensing personnel did not testify because their testimony would not
20 support a conclusion that Mr. Perkins committed any of the alleged violations.

21 The Department presented no witnesses to corroborate the testimony of Ms.
22 Weber, Ms. Salazar or Mr. Ryan. The Department did not subpoena any Mr. Perkins'
23 employees that were alleged have made some of the misrepresentations and false
24 promises. Even after Mr. Perkins presented witnesses whose testimony directly
25 contradicted Ms. Weber, Ms. Salazar and Mr. Ryan the Department did not call
26 witnesses who, if the facts alleged were true, could have corroborated their testimony.
27 In Ms. Salazar's case, her husband, who also signed the documents about which Ms.
28

29
30

¹ One complaint was filed directly with the Attorney General's Office and not the Department.

² Ms. Billie Nixon also testified about the Salazar complaint, but her testimony was not consequential.

1 Salazar alleged Mr. Perkins made false promises and misrepresentations, did not
2 testify.

3 In addition to the witnesses that corroborated Mr. Perkins' version of events,
4 documents entered into evidence also support Mr. Perkins' version of events. These
5 documents included deeds and standard-form real estate contracts that had been
6 notarized, and in some cases these documents were executed at private title
7 companies acting as escrow agents. Although each of the 3 testifying complainants
8 alleged that these documents had not been properly notarized, Mr. Perkins presented
9 credible evidence to the contrary.

10 Mr. Ryan testified that he was told by Mr. Perkins that he was not getting a loan,
11 and he testified that he did not read any documents and would have signed blank
12 pages. These statements are in direct contrast to factual allegations in the Notice of
13 Hearing.

14 The Department presented no evidence on 3 of the underlying complaints and
15 virtually no credible evidence on the other 3 underlying complaints. Mr. Perkins
16 presented substantial credible evidence in support of his position. In the Weber and
17 Salazar matters this rebuttal evidence should have been, and presumably was,
18 discovered by the Department during its investigation. In the Ryan matter, Mr. Ryan's
19 testimony was diametrically opposed to the facts alleged in the Notice of Hearing. The
20 Department's position was not substantially justified, because it was not reasonable in
21 fact or law.

22 Reimbursement Rate

23 Mr. Perkins is entitled to its fees and costs because he prevailed both as to the
24 most significant issue or set of issues and the Department's position was not substantially
25 justified. See A.R.S. § 41-1007. Mr. Perkins may only be awarded reasonable attorney
26 fees and costs that do not exceed the amount paid or agreed to be paid. See A.R.S. §
27 41-1007. The Department did not argue that Mr. Perkins' attorneys billed at an
28 unreasonable rate, or that the total billing was unreasonable. Despite the Department's
29 argument that Mr. Perkins must prove he is entitled to any award greater than \$75.00
30 per hour, there is no \$75.00 per hour cap in A.R.S. § 41-1007. This was a fairly complex

1 matter given that there were 6 complainants; the hearing took place over 6 non-
2 consecutive days; and each party had about 100 exhibits prepared. Mr. Perkins' lead
3 attorney has 30 years experience and expertise in real estate law. Consequently, the
4 ALJ concludes that the billing rates and time spent are reasonable. Mr. Perkins was
5 required to pay all fees and costs for which he is requesting reimbursement.

6 The Department asserts that Mr. Perkins may not recover fees for defending
7 the Salesperson Claims on which he did not prevail, relying on *Eastern Vanguard v.*
8 *Arizona Corporation Commission*. Although that case was considering an application for
9 fees under A.R.S. § 12-348 and not A.R.S. § 41-1007, its rationale is sound, and Mr.
10 Perkins' fee award should be limited those issues on which he prevailed. The Amended
11 Notice of Hearing alleges 12 statutory or administrative code violations based on 6
12 complaints. The Department did not specify how many violations of each statutory sub-
13 section it alleges Mr. Perkins committed, but each complaint, if fully proven, could have
14 resulted in 12 violations, which means that there were 72 possible violations of law or
15 rule. See Amended Notice of Hearing (Mr. Perkins subject to civil penalty of up to
16 \$1,000.00 for each alleged violation). The Commissioner found that Mr. Perkins had
17 violated A.R.S. § 32-2153(A)(1), (A)(21) and (A)(22) and assessed a \$6,000.00 penalty
18 indicating that there were 6 total violations proven. See Commissioner's Final Order. As
19 such, Mr. Perkins prevailed on 66 of 72 claims, and is therefore entitle to 91.67% of his
20 request, or \$32,208.23 in fees and \$4,832.59 in costs (\$37,040.82 total).

21 **ORDER**

22 **IT IS ORDERED** that the Department shall pay to Mr. Perkins \$32,208.23 in fees and
23 \$4,832.59 in costs (\$37,040.82 total).

24
25 Done this day, August 29, 2006.

26
27
28 _____
29 Thomas Shedden
30 Administrative Law Judge

1 Copy mailed this ____ day of
2 _____, 2006 to:

3 Elaine Richardson, Commissioner
4 Department of Real Estate
5 2910 North 44th Street, Suite 100
6 Phoenix, AZ 85018

7 Alan Tipton
8 Kelley Tipton & Whelan, PLC
9 2058 S. Dobson Rd Ste#9
Mesa, AZ 85202

10 Geoffrey P. Butzine
11 Randy Delgado II
12 Assistant Attorneys General
13 Office of the Attorney General
14 1275 W. Washington
Phoenix, AZ 85007

15
16
17 By _____
18
19
20
21
22
23
24
25
26
27
28
29
30