



MAY 30, 2006

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May 23, 2006

Ben Henson, Executive Director  
Appraisal Subcommittee  
2000 K Street N. W.  
Suite 310  
Washington, D.C. 20006

RE: Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs v. Gina DiStefano/Zwanziger, File No.: 05-70-07317, Docket No.: 1939-70-05

Dear Mr. Henson:

Thank you for your responsive letter dated May 10, 2006 regarding the above-referenced matter. Ms. DiStefano/Zwanziger's legal counsel has also been provided a copy of your May 10, 2006 letter; consequently, Ms. DiStefano/Zwanziger has been made aware of the ASC's concerns in this matter. Please let this letter serve as an update to the issues explored both in the Commonwealth's letter of May 2, 2006 and your response of May 10, 2006.

As the particular legal environment under which the Bureau of Professional and Occupational Affairs is required to operate has some bearing on the resolution of the issues involved in this matter, please be advised that protections within the Constitution of the Commonwealth of Pennsylvania require the activities of the State Board of Certified Real Estate Appraisers and its Board Counsel (collectively referred to as the "Appraiser Board") to be separated by "walls of division" from the activities of the Office of Chief Counsel, Prosecution Division (referred to as "the Prosecution Division") See Lyness v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (Pa. 1992) (generally finding unconstitutional the commingling of prosecution and adjudication functions within the same individuals associated with administrative licensing bodies). The activities and limitations on the Prosecution Division are analogous to a local district attorney the Prosecution Division may investigate and bring formal charges against individuals, but cannot adjudicate the matter by making findings of guilt or innocence. The activities and limitations on the Appraiser Board are analogous to a judge/jury. They may receive evidence and determine whether a violation of the law occurred based on the evidence presented by the Prosecution Division, but they may not independently

investigate a matter or initiate charges. Just as it would be improper for a district attorney to discuss pending matters privately with the presiding judge, it is also improper for the Prosecution Division to discuss pending matters with the Appraiser Board outside of the context of the formal hearing structure. Consequently, a direct discussion between the Prosecution Division and the Appraiser Board about this pending disciplinary matter is prohibited.

In addition, the Pennsylvania appellate courts have issued somewhat conflicting rulings on whether a licensing board may refuse to issue, or later recall, a certificate to an individual who has not passed a required examination. Specifically, the Commonwealth Court in Dauer v. Department of Education, 874 A.2d 159 (Pa. Commw. 2005) held that where the decision to not issue a teaching certificate was based upon the ministerial application of objective criteria (the applicant did not contest that she did not pass the particular certification examination), rather than an exercise of discretion, the applicant could have no legitimate expectation that the agency would act in a manner other than by rejecting the application and no right, privilege or immunity was at stake. As no right, privilege or immunity was at stake, a full due process hearing was not required prior to refusing to issue the certificate.

However, several years prior, the same Commonwealth Court, in Holloman v. Bureau of Professional and Occupational Affairs, indicated that where an applicant must pass an examination to be licensed, where a license was subsequently issued to the applicant in error even though the applicant had allegedly not passed the examination, where the licensing board's regulations did not explicitly provide a mechanism for reviewing the grading of an examination, and where the examination was administered by the Board's selected examination provider, the Board was prohibited from arguing that its role was merely ministerial when it determined that the applicant actually failed the examination and attempted to recall the license. Instead, under the ruling in Holloman, the Commonwealth Court indicated that Commonwealth (through the Prosecution Division) must first prove at a due process hearing that the applicant did in fact fail the examination before the license may be rescinded.

The Appraiser Board did not *sua sponte* recall the appraiser's certificate and the matter was instead referred by the Appraiser Board's administrative staff to the Prosecution Division for investigation and initiation of formal disciplinary charges. Consequently, it appears likely that the Appraiser Board felt that the situation in this matter was factually more similar to Holloman than to Dauer and the Board was compelled to provide the appraiser with a due process hearing prior to removing the ability to practice real estate appraising. As indicated above, the Prosecution Division is prohibited from directly discussing this matter with the Appraiser Board outside of the formal hearing context; therefore, while based on the Prosecution Office's experience the above evaluation is very likely the one that the Appraiser Board undertook, the Appraiser Board may have undertaken a different evaluation.

With the above background, the Prosecution Division will respond seriatim to the various items addressed in your letter to the extent that the Prosecution Division is able to so respond. Specifically on page 3 of your letter, you required the Board to:

- **Notify the appraiser that the certified residential credential that she holds is not valid for federally related transactions.** Due to the non-adjudicative nature of the Prosecution Division, this office is unable to make binding declarations of that type. Further, as such a statement, by its nature, would purport to affect a right or privilege previously enjoyed by the appraiser, it is highly likely that appellate courts would deem such a notification by the Appraiser Board to be an

Adjudication requiring a due process hearing. For the above-indicated reasons, it is likely that the Appraiser Board would feel restrained from making such a statement prior to the completion of the formal hearing process. However, as indicated above, a copy of your letter of May 10, 2006 has been provided to the appraiser's legal counsel; consequently the appraiser has been put on notice regarding the ASC's opinion regarding that issue.

- Provide the appraiser a reasonable time period, not to exceed 60 days from the date of this letter, in which the appraiser may re-take the appropriate examination. The Prosecution Division had already offered the appraiser the opportunity to retake the examination or surrender her certificate prior to this office's letter of May 2, 2006. The appraiser refused both suggested resolutions and formal charges were subsequently filed against the appraiser. A formal disciplinary hearing was subsequently held on May 11, 2006 to determine whether the Respondent's certificate should be suspended because she was allegedly in violation of the Real Estate Appraisers Certification Act by not meeting the minimum qualifications for certification. See 63 P.S. § 457.11(a)(2). Due to delays in having the examination questions and responses released by the testing service, the evidentiary record has been held open for approximately 20 days to allow the Respondent's counsel an opportunity to consult with an expert to determine whether it is appropriate to challenge the raw score assigned by the testing service.
- Based on the examination results, validate or revoke the existing credential; and, See responses above. In the event that the Appraiser Board determines that the Prosecution Division met its burden of proving that the appraiser did not obtain a score of at least 75 on an examination with a "cut-score" of 75 and therefore did not meet the minimum qualifications for certification, the Appraiser Board will likely suspend the certificate of the appraiser.
- Not later than 60 days from the date of this letter, notify the ASC regarding whether the appraiser has re-taken the examination and whether she has successfully completed the examination (using the appropriate cut score) .. The Prosecution Division has offered its assistance to the appraiser in expediting the scheduling of a re-examination if the appraiser elects to retake the examination prior to the issuance of the Adjudication and Order in this matter. The Prosecution Division has also made separate arrangements with the testing provider to notify the Commonwealth when/if the Respondent has elected to schedule a new examination. The Commonwealth will advise the ASC as to whether the appraiser has retaken the examination and the results (if available at the time of writing).

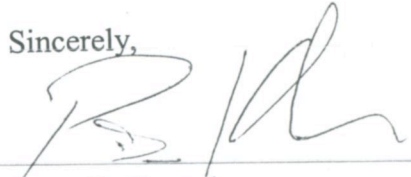
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<sup>1</sup> Under Pennsylvania law, unless ordered to do so by the Commonwealth Court or an appeal therefrom, the Appraiser Board is prohibited, for a minimum period of five (5) years, from reinstating the any individual whose certificate has been revoked. Consequently, to the extent that the Appraiser Board finds the appraiser in violation of the REACA, the Prosecution Division anticipates that the Appraiser Board will actively suspend the certificate of the appraiser until such time as she passes an appraiser certification examination.

Your letter of May 10, 2006 also requested additional information regarding other appraisers who may have been qualified utilizing the incorrect cut scores. Please be advised that the testing service identified a total of six (6) appraisers (the appraiser at issue and five others) who were incorrectly qualified due to the use of the incorrect cut score. The other five (5) appraisers all elected to retake the appraisal examination and subsequently passed the examination utilizing the correct cut score. To the Commonwealth's knowledge, the appraiser at issue is the only affected appraiser who has not yet retaken and passed the examination.

To the extent that you require additional information regarding this matter, and to the extent the Prosecution Division can provide a direct response, please feel free to contact me.

Sincerely,



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Peter D. Kovach  
Prosecuting Attorney  
Commonwealth of Pennsylvania  
Department of State

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