

SUPREME COURT OF VERMONT

Office of Professional Regulation v. McElroy, 2003 VT 31

824 A.2d 567 (2003) · No. No. 02-192 · Decided March 27, 2003

SUMMARY

The Vermont Supreme Court reviewed a reprimand issued to David M. McElroy for allegedly acting as an unlicensed real estate broker. The court held that involvement in a single transaction is not exempt from Vermont's licensing statutes, but concluded that the stipulated facts were insufficient to determine whether McElroy engaged in a continuing course of conduct within the state. The court rejected his First Amendment challenge and reversed and remanded for further findings.

CASE DETAILS

COURT	Supreme Court of Vermont
WRITING FOR THE COURT	Amestoy, C.J.; Dooley; Johnson; Skoglund; Frederic W. Allen, C.J. (Ret.), specially assigned
JURISDICTION	Vermont
DECIDED	March 27, 2003
DOCKET	No. 02-192
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	McElroy appealed a Washington Superior Court order reinstating a Real Estate Commission reprimand for engaging in real estate brokerage conduct without a Vermont license.
STANDARD OF REVIEW	Administrative agency statutory interpretations receive ordinary deference when they represent a permissible construction of the statute, but no additional deference is owed merely because the agency is composed of members of the regulated profession where the agency lacks special competence concerning the statutory issue.
PRECEDENTIAL VALUE	Published Vermont Supreme Court opinion; precedential.
PARTIES	David M. McElroy v. Office of Professional Regulation

TOPICS

- judicial review of agency action
- administrative law
- statutory interpretation
- first amendment
- appellate procedure

PRACTICE AREAS

administrative law

professional licensing

real estate regulation

constitutional law

appellate procedure

QUESTIONS PRESENTED

1. Whether conduct in furtherance of a single real estate transaction is exempt from Vermont's statutory definition of real estate broker.
2. Whether the stipulated facts established that McElroy engaged in a continuing course of conduct as a real estate broker within Vermont without a license.
3. Whether applying Vermont's real estate licensing statute to McElroy's advertising violated the First Amendment.

HOLDINGS

1. A person is not exempt from Vermont's real estate broker licensing requirements merely because the conduct involves only one transaction.
2. The stipulated facts were insufficient to determine as a matter of law whether McElroy engaged in a continuing course of conduct within Vermont; the matter therefore had to be remanded for further findings.
3. The licensing statute did not violate McElroy's First Amendment rights because it regulated misleading representations of his status as a Vermont broker, not advertising generally.

KEY QUOTATIONS

"The statutory language is broad in the scope of conduct it reaches, limited only by the requirement that there be a continuing course of conduct." (570)

"Our holding is only that McElroy is not relieved of regulatory requirements by virtue of the fact that only one transaction was involved." (571)

"He is not being restrained from publishing advertisements; he is being restrained from publishing misleading statements about his own status as a broker." (571)

FACTUAL BACKGROUND

McElroy, who was licensed as a broker in other states, advertised or allowed his name to be used in advertising the sale of a Vermont property between October 1999 and January 2000, contacted potential purchasers, and was present at the property when prospective buyers viewed it. He obtained a Vermont broker's license on February 1, 2000, before the closing, but the stipulated facts did not establish with sufficient specificity the nature, frequency, or extent of his prelicensure conduct in Vermont.

PROCEDURAL HISTORY

The Real Estate Commission reprimanded McElroy. An appellate officer reversed the reprimand, but the Washington Superior Court reinstated it. The Vermont Supreme Court reversed and remanded for further factual

findings concerning whether McElroy engaged in a continuing course of conduct, while affirming the determination that applying the licensing statute did not violate the First Amendment.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand for further proceedings and additional factual findings concerning whether McElroy's conduct constituted a continuing course of conduct within Vermont under the real estate broker licensing statutes.

CASES CITED

- Braun v. Board of Dental Examiners, 167 Vt. 110, 114, 702 A.2d 124, 126 (1997)
- Hughes v. Chapman, 272 F.2d 193, 196 (5th Cir. 1959)
- Tarrant v. Department of Taxes, 169 Vt. 189, 195, 733 A.2d 733, 738 (1999)
- In re Agency of Administration, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982)
- Becerra-Jimenez v. I.N.S., 829 F.2d 996, 1001-02 (10th Cir. 1987)
- Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981)
- Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 562-63 (1980)
- In re Deyo, 164 Vt. 613, 614-15, 670 A.2d 793, 794-95 (1995) (mem.)