

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 IN THE MATTER OF:

No. 14F-001-AAG

4 TOM HORNE, individually; Tom Horne for
5 Attorney General Committee (SOS Filer
6 2010 00003);
7 KATHLEEN WINN, individually;
8 Business Leaders for Arizona (SOS Filer
9 2010 00375).

CASE MANAGEMENT ORDER NO. 15
ORDER ON MOTION TO
STRIKE TESTIMONY

10 Pending before this Tribunal is Appellants' Motion to Strike Testimony.

11 Appellants argue Special Agent Brian Grehoski committed perjury while testifying in
12 this matter and that the appropriate remedy is striking the entirety of his testimony.

13 The specific part of Agent Grehoski's testimony being questioned revolves
14 around the telephone conversations between Special Agent Mervin Mason, Agent
15 Grehoski, and Greg Tatham, a commercial real estate broker, on May 31, 2012.

16 Agents Grehoski and Mason wanted to speak to Mr. Tatham about a real estate
17 transaction in which Tom Horne was selling a strip mall at 1515 North 7th Avenue and
18 rolling the proceeds of that sale over into the purchase of a new property in Sun City
19 West in a "1031 exchange" to avoid or reduce tax consequences.

20 On the afternoon of May 30, 2012, Agent Mason left a message for Mr. Tatham
21 and asked that Mr. Tatham return the call.

22 Later that afternoon, Mr. Tatham returned Agent Mason's call. Mr. Tatham made
23 a recording of that telephone call. In the call, Agent Mason indicated he was driving at
24 the time and was unable to talk. The two agreed that Mr. Tatham would call Agent
25 Mason the following day around 1:00 p.m.

26 On May 31, 2012, Mr. Tatham called Agent Mason on his cell phone. Mr.
27 Tatham made a recording of the telephone call that reflected the call lasted
28 approximately 15 minutes. Agent Mason indicated that he was in a vehicle and Agent
29 Grehoski was driving. Agent Mason put the call on speakerphone and Agent Grehoski
30 introduced himself. Agent Grehoski went on to explain that he and Agent Mason were
the two agents who showed up at Mr. Tatham's home one evening to speak to Mr.

1 Tatham's wife. After the introductory comments, Agent Mason began asking questions
2 regarding Mr. Horne's real estate transaction that Mr. Tatham assisted with in the fall of
3 2010.

4 Mr. Tatham explained that he was not a broker on the sale of the property, but
5 was hired by Mr. Horne to remove an underground storage tank on the property and to
6 help find a new property for Mr. Horne to purchase in a "1031 exchange." Mr. Tatham
7 stated he did not remember who the agent for Mr. Horne was in the sale of the
8 property.

9 The following exchange occurred during the conversation:

10 Agent Mason: Are you aware of him consulting with anybody else [on the
11 sale of the property]? I guess he had a broker that helped him sell it.

12 Mr. Tatham: It was a retail guy from one of the commercial brokerage
13 houses and I don't know who it was offhand. I mean I have his name
14 somewhere back in a file.

15 Agent Mason: Okay. Okay, but other than that guy you're unaware of
16 him consulting with anybody else?

17 Mr. Tatham: No.

18 Agent Mason: Okay. Well –

19 Agent Grehoski: Was anybody giving him advice on the side that was not
20 officially involved in the sale?

21 Mr. Tatham: I have no idea. You would have to ask Tom Horne that. He
22 probably seeks advice from a lot of people, so I mean I –

23

24 Mr. Tatham: And, I mean honestly, that building was sold for a million
25 three when, you know, we had deals at over three million dollars and then
26 the, you know, and the real estate market went away. So Tom [Horne] is
27 talking to a lot of people to try to – to try to, you know, figure out the best
28 way to move an asset and roll into something else. So, to answer your
29 question directly, I'm not sure that he was discussing this with any other
30 brokers. All's I know is that he typically runs by all of his deals, you know,
he runs me, you know, he refers to me to review whatever deals he is, he
is considering, even if I'm not involved in any commission or
representation.

Horne-Winn Exhibit 14.

On July 16, 2012, Agent Mason drafted a "302 report" summarizing his
conversation with Mr. Tatham. In the report, Agent Mason stated, "Tatham was not
aware of HORNE ever consulting with KATHLEEN WINN for real estate advise [sic] on

1 the sale of the property. WINN was not involved in the transaction of the sale of 1515
2 N. 7th Ave., Phoenix, AZ.” YCAO Exhibit 34.

3 According to Agent Mason’s cell phone records, he made a two minute phone
4 call to Mr. Tatham at 1:03 p.m. on May 30, 2012. Then, Agent Mason received a two
5 minute phone call from Mr. Tatham at 3:47 p.m. on May 30, 2012. Mr. Tatham then
6 called Agent Mason at 1:03 p.m. on May 31, 2012, and the conversation lasted 15
7 minutes. No other calls to or from Mr. Tatham are reflected in Agent Mason’s cell
8 phone records. Similarly, Mr. Tatham’s cell phone records do not reflect any calls to or
9 from Agent Mason’s cell phone during the relevant time period.

10 At hearing, Agent Grehoski testified that he specifically recalled having a
11 substantive telephone conversation with Mr. Tatham while driving down I-17 in
12 Phoenix. Agent Grehoski testified that Agent Mason initiated the telephone call and
13 that it was a shorter conversation because Mr. Tatham was not in his office and/or did
14 not have the documents he needed to refer to at hand. According to Agent Grehoski,
15 he and Agent Mason did ask some questions including whether Mr. Horne consulted
16 with Ms. Winn regarding the sale of the property, of which Mr. Tatham denied any
17 knowledge.

18 Agent Grehoski asserted that after the telephone call ended, he and Agent
19 Mason discussed the conversation and agreed that the next time they spoke to Mr.
20 Tatham, they would ask the broader question of whether Mr. Horne had consulted with
21 *anyone* regarding the sale of the property instead of focusing only on Ms. Winn.

22 Agent Grehoski testified that he and Agent Mason had a second substantive
23 telephone conversation with Mr. Tatham and that conversation is the one reflected in
24 Mr. Tatham’s recording. During that conversation, Agent Grehoski and Agent Mason
25 asked the general question as to whether Mr. Tatham knew of Mr. Horne conferring
26 with anyone regarding the sale of the property.

27 The telephone records support a finding that the first substantive telephone
28 conversation to which Agent Grehoski testified did not occur. Rather, the only
29 substantive conversation supported by the telephone records is the one in which Agent
30

1 Mason and Agent Grehoski asked the general question as to whether Mr. Tatham had
2 any knowledge of Mr. Horne consulting with anyone regarding the sale of the property.

3 Appellants argue that Agent Grehoski's "complete fabrication" as to the first
4 substantive telephone call is a basis for this Tribunal to strike all of Agent Grehoski's
5 testimony. Defendant's Motion to Strike Testimony at p. 2. Appellants acknowledged
6 that such a determination is permissive and not mandatory, but urged that this Tribunal
7 exercise that discretion as the appropriate remedy. Both Appellants and the Yavapai
8 County Attorney's Office cited *Stockwell v. Stockwell*, 790 N.W.2d 52 (S.D. 2010) for
9 the proposition that "[w]hile a finder of fact may reject a witness's testimony when that
10 witness has testified falsely, it is not required to do so." *Id.* at 61.

11 While the evidence calls into question Agent Grehoski's testimony regarding the
12 existence of a first substantive telephone call, Agent Grehoski's testimony was not
13 contradictory of Mr. Tatham's statements during the telephone call that was recorded.
14 When asked if he had any knowledge that Mr. Horne had consulted with anyone other
15 than the broker involved in the sale of the property, Mr. Tatham stated he did not. It
16 appears Mr. Tatham was not specifically asked about Ms. Winn's possible involvement,
17 but one can assume that if Mr. Tatham knew Mr. Horne was consulting with Ms. Winn,
18 he would not have answered the question in the negative. Therefore, Agent Grehoski's
19 testimony that Mr. Tatham denied Ms. Winn's involvement in the sale of the property
20 was consistent with Mr. Tatham's statements during the telephone call.

21 Any inconsistencies in Agent Grehoski's testimony at hearing will be considered
22 by the Administrative Law Judge and will go to the weight to be given the remainder of
23 his testimony. Accordingly, striking the testimony of Agent Grehoski is not appropriate.

24 **IT IS ORDERED** denying Appellants' Motion to Strike Testimony.

25 Done this day: April 14, 2014.

26 /s/ Tammy L. Eigenheer
27 Tammy L. Eigenheer
28 Administrative Law Judge

29 Copy e-mailed this 14th day of April, 2014 to all parties and interested persons,
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