

**IN THE  
COMMONWEALTH OF VIRGINIA  
AUCTIONEERS BOARD**

**IN RE:**

Azam Mohammed Khan  
Sterling, Va

File Number 1999-01227  
License Number 2905000867

**FINAL OPINION AND ORDER NO. 2002-0199**

On May 18, 2001, the Auctioneers Board ("the Board") sent Azam Mohammed Khan ("Khan") a Notice of Informal Fact Finding Conference ("IFF") by certified mail and certificate of mailing, to the address of record, pursuant to the provisions of the Administrative Process Act §§ 2.2-4019 and 2.2-4021 (formerly § 9-6.14:11) of the 1950 Code of Virginia, as amended, to receive and act upon evidence that Khan violated certain regulations of the Board. On May 21, 2001, Khan received the certified mail.

On September 6, 2001, the Board convened the IFF in Richmond, Virginia. Azam Mohammed Khan ("Khan") appeared at the IFF with counsel, August Bequai ("Bequai"). Board Member Samuel Updike, Jr. presided at the IFF.

On October 2, 2001, by certified mail, the Board mailed to Khan at the address of record, a copy of the presiding Board Member's Summary of the IFF ("Summary") and notification of the Board's October 18, 2001 meeting. On October 18, 2001, the Board met and reviewed the record, which consisted of the investigative file, the transcript and exhibits from the IFF, and the presiding Board Member's Summary. Khan and Bequai appeared at the Board meeting and made presentations. The Board accepted the Summary and amended the recommendation to impose a six month suspension.

On November 26, 2001, by certified mail, the Board mailed to Khan, at the address of record, a copy of the Revised presiding Board Member's Summary of the IFF ("Revised Summary") and notification of the Board's January 10, 2002 meeting. On January 10, 2002, the Board met and voted to reconsider their case decision due to a mistake by staff. The Board reviewed the record, which consisted of the investigative file, the transcript and exhibits from the IFF, and the presiding Board Member's Revised Summary. Bequai and Howard Silberberg, Esquire, made presentations by telephone at the Board meeting on behalf of Khan, who did not attend. Patricia Brockbank, Complainant, was present at the Board meeting but did not participate in the discussion.

The Board adopts the facts in the Revised Summary and the findings of violations in the recommendation and incorporates it as a part of this Order.

The Board finds clear and convincing evidence that Khan violated the following sections of its 1995 Regulations:

- 18 VAC 25-21-100(A) (Count I)
- 18 VAC 25-21-160 (Count III)
- 18 VAC 25-21-180(A)(5) (Count IV)

The Board rejects the sanctions in the recommendation and imposes the following sanctions:

As to Count I: A \$1,000.00 monetary penalty and a twelve (12) month suspension of Khan's auctioneer license number 2905000867 based on the facts of the case, the severity of his actions, and the licensee's record with the Board, including Consent Orders 91-001-90-00691 and 99-0200.

As to Count III: A \$1,000.00 monetary penalty and a twelve (12) month suspension of Khan's auctioneer license number 2905000867 based on the facts of the case, the severity of his actions, and the licensee's record with the Board, including Consent Orders 91-001-90-00691 and 99-0200.

As to Count IV: A \$1,000.00 monetary penalty and a twelve (12) month suspension of Khan's auctioneer license number 2905000867 based on the facts of the case, the severity of his actions, and the licensee's record with the Board, including Consent Orders 91-001-90-00691 and 99-0200.

All suspensions are to run concurrently.

A total monetary penalty of \$3,000.00 is imposed for violations of Count I, Count III, and Count IV.

As to 1995 Regulation 18 VAC 25-21-180(A)(3) (Count II), the Board closes this aspect of the file with a finding of no violation.

THE TOTAL MONETARY PENALTY ASSESSED HEREIN SHALL BE PAID WITHIN SIXTY (60) DAYS FROM THE DATE OF ENTRY OF THIS FINAL ORDER. FAILURE TO PAY THE TOTAL MONETARY PENALTY ASSESSED WITHIN SIXTY (60) DAYS OF THE DATE OF ENTRY OF THIS FINAL ORDER WILL RESULT IN THE AUTOMATIC SUSPENSION OF YOUR LICENSE (LICENSE NO. 2905000867) UNTIL SUCH TIME AS SAID AMOUNT IS PAID IN FULL

AS PROVIDED BY RULE 2A:2 OF THE SUPREME COURT OF VIRGINIA, YOU HAVE THIRTY (30) DAYS FROM THE DATE OF SERVICE (I.E. THE DATE YOU ACTUALLY RECEIVED THIS DECISION OR THE DATE THE DECISION WAS MAILED TO YOU, WHICHEVER OCCURRED FIRST) WITHIN WHICH TO APPEAL THIS DECISION BY FILING A NOTICE OF APPEAL, SIGNED BY EITHER YOU OR YOUR COUNSEL, WITH JACK E. KOTVAS, SECRETARY OF THE AUCTIONEERS BOARD. IN THE EVENT THAT THE DECISION WAS SERVED ON YOU BY MAIL, THREE (3) DAYS SHALL BE ADDED TO THE THIRTY (30) DAY PERIOD.

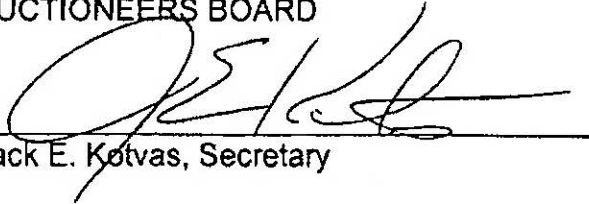
IF A PETITION FOR APPEAL IS FILED WITH THE CLERK OF THE CIRCUIT COURT, AS PROVIDED BY RULE 2A:4 OF THE SUPREME COURT OF VIRGINIA, THEN THE AUTOMATIC SUSPENSION OF YOUR LICENSE WILL BE STAYED PROVIDED THE FOLLOWING INFORMATION IS RECEIVED BY JACK E. KOTVAS, SECRETARY OF THE AUCTIONEERS BOARD:

1. A SIGNED COPY OF THE NOTICE OF APPEAL; AND
2. A COPY OF THE SURETY AGREEMENT OR A COPY OF THE RECEIPT FROM THE CLERK OF THE CIRCUIT COURT WHERE THE APPEAL HAS BEEN FILED INDICATING THAT A BOND HAS BEEN POSTED OR CASH PAID INTO THE COURT IN THE AMOUNT OF THE TOTAL MONETARY PENALTY ASSESSED IN THE FINAL ORDER

SO ORDERED:

Entered this 22 day of January, 2002.

AUCTIONEERS BOARD

A handwritten signature in black ink, appearing to read 'J. E. Kotvas', written over a horizontal line.

Jack E. Kotvas, Secretary

Copy Teste:

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Custodian of the Record



**DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION**

3600 West Broad Street, Richmond, Virginia 23230-4917  
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STEVEN L. ARTHUR  
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**SUMMARY OF INFORMAL FACT-FINDING CONFERENCE**

(REVISED)

**TO:** Virginia Auctioneers Board

**FROM:** Samuel Updike, Jr., Member *S.U., Jr. / S.U.*

**DATE:** IFF held on September 6, 2001

**RE:** Summary of Informal Fact-Finding Conference  
Held on September 6, 2001  
Azam Mohammed Khan  
File Number 1999-01227

**BACKGROUND**

The Notice of Informal Fact-Finding Conference (IFF) was sent by certified and first class mail to Mr. Azam Mohammed Khan on May 18, 2001. The following individuals participated at the conference: David Dorner, Investigator; August Bequai, Attorney for Respondent; Azam Mohammed Khan, Respondent.

**FACTS**

Azam Mohammed Khan was at all times material to these matters a licensed Auctioneer (License No. 2905 867, expiration date 09-30-02).

**Count 1**

On March 15 & 16, 1997, Mr. Azam Khan, on behalf of Park Royal Galleries Limited, held an auction on the grounds of Mr. Robert Gray's residence, located in Arlington, Va. An advertisement in the Washington Post stated it was an important estate auction and gave Mr. Gray's name and the fact that he was President Eisenhower's Cabinet Secretary. The advertisement contained a photograph of Mr. Gray's home along with a photograph of an oriental rug and a desk.

Ms. Patricia Brockbank attended the auction on March 16 and believed the articles for sale belonged to the Gray family. Ms. Brockbank was particularly interested in a carpet on display and was told by Mr. Khan that it was part of the and had a value of \$100,000. Mr. Khan further announced at the beginning of the auction that all the items on sale that day were part of the Gray estate. Ms. Brockbank made a bid on the carpet and purchased it for \$20,000 plus a ten-percent buyer's premium.

Ms. Brockbank questioned the authenticity of the carpet and its owner. She learned from Mr. Gray that he did not have any carpets for sale at the auction and in fact, only a few items to be sold were actually his. He entered into an agreement with Mr. Khan for the use of his estate grounds only. After not receiving the letter of authenticity for the carpet as promised, Ms. Brockbank had the carpet appraised, which was found to be valued at approximately \$10,800.

During the course of the investigation, the Board's Agent, Investigator David Dorner, made requests for records from Mr. Khan concerning the auction in question. Mr. Khan was not able to produce those records, citing they had been lost.

Khan's advertisement of the Gray Estate auction in the Washington Post on or about March 15 & 16, 1997, containing statements with respect to the ownership of the items to be sold were false, misleading, or deceptive in violation of the **Board's 1995 Regulation 18 VAC 25-21-100(A)**.

### Count II

On March 15 & 16, 1997, Mr. Azam Khan, on behalf of Park Royal Galleries Limited, held an auction on the grounds of Mr. Robert Gray's residence, located in Arlington, Va. An advertisement in the Washington Post stated it was an important estate auction and gave Mr. Gray's name and the fact that he was President Eisenhower's Cabinet Secretary. The advertisement contained a photograph of Mr. Gray's home along with a photograph of an Oriental rug and a desk.

Ms. Patricia Brockbank attended the auction on March 16 and believed the articles for sale belonged to the Gray family. Ms. Brockbank was particularly interested in a carpet on display and was told by Mr. Khan that it was part of the Gray estate and had a value of \$100,000. Mr. Khan further announced at the beginning of the auction that all the items on sale that day were part of the Gray estate. Ms. Brockbank made a bid on the carpet and purchased it for \$20,000 plus a ten-percent buyer's premium.

Ms. Brockbank questioned the authenticity of the carpet and its owner. She learned from Mr. Gray that he did not have any carpets for sale at the auction and in fact, only a few items to be sold were actually his. He entered into an agreement with Mr. Khan for the use of his estate grounds only. After not receiving the letter of authenticity for the carpet as promised, Ms. Brockbank had the carpet appraised, which was found to be valued at approximately \$10,800.

During the course of the investigation, the Board's Agent, Investigator David Dorner, made requests for records from Mr. Khan concerning the auction in question. Mr. Khan was not able to produce those records, citing they had been lost.

Khan's actions of making statements to Ms. Brockbank which represented the rug as being property of Mr. Gray and valued at \$100,000 were failing to demonstrate reasonable care, judgement or application of his knowledge and ability in the performance of his auctioneer duties in violation of the **Board's 1995 Regulation 18 VAC 25-21-180(A)(3)**.

### Count III

On March 15 & 16, 1997, Mr. Azam Khan, on behalf of Park Royal Galleries Limited, held an auction on the grounds of Mr. Robert Gray's residence, located in Arlington, Va. An advertisement in the Washington Post stated it was an important estate auction and gave Mr. Gray's name and the fact that he was President Eisenhower's Cabinet Secretary. The advertisement contained a photograph of Mr. Gray's home along with a photograph of an Oriental rug and a desk.

Ms. Patricia Brockbank attended the auction on March 16 and believed the articles for sale belonged to the Gray family. Ms. Brockbank was particularly interested in a carpet on display and was told by Mr. Khan that it was part of the Gray estate and had a value of \$100,000. Mr. Khan further announced at the beginning of the auction that all the items on sale that day were part of the Gray estate. Ms. Brockbank made a bid on the carpet and purchased it for \$20,000 plus a ten-percent buyer's premium.

Ms. Brockbank questioned the authenticity of the carpet and its owner. She learned from Mr. Gray that he did not have any carpets for sale at the auction and in fact, only a few items to be sold were actually his. He entered into an agreement with Mr. Khan for the use of his estate grounds only. After not receiving the letter of authenticity for the carpet as promised, Ms. Brockbank had the carpet appraised, which was found to be valued at approximately \$10,800.

During the course of the investigation, the Board's Agent, Investigator David Dorner, made requests for records from Mr. Khan concerning the auction in question. Mr. Khan was not able to produce those records, citing they had been lost.

Khan's failure to retain records of the auction conducted at the Gray Estate on or about March 15 & 16, 1997, for a period of four years is in violation of the **Board's 1995 Regulation 18 VAC 25-21-160**.

#### **Count IV**

On March 15 & 16, 1997, Mr. Azam Khan, on behalf of Park Royal Galleries Limited, held an auction on the grounds of Mr. Robert Gray's residence, located in Arlington, Va. An advertisement in the Washington Post stated it was an important estate auction and gave Mr. Gray's name and the fact that he was President Eisenhower's Cabinet Secretary. The advertisement contained a photograph of Mr. Gray's home along with a photograph of an Oriental rug and a desk.

Ms. Patricia Brockbank attended the auction on March 16 and believed the articles for sale belonged to the Gray family. Ms. Brockbank was particularly interested in a carpet on display and was told by Mr. Khan that it was part of the Gray estate and had a value of \$100,000. Mr. Khan further announced at the beginning of the auction that all the items on sale that day were part of the Gray estate. Ms. Brockbank made a bid on the carpet and purchased it for \$20,000 plus a ten-percent buyer's premium.

Ms. Brockbank questioned the authenticity of the carpet and its owner. She learned from Mr. Gray that he did not have any carpets for sale at the auction and in fact, only a few items to be sold were actually his. He entered into an agreement with Mr. Khan for the use of his estate grounds only. After not receiving the letter of authenticity for the carpet as promised, Ms. Brockbank had the carpet appraised, which was found to be valued at approximately \$10,800.

During the course of the investigation, the Board's Agent, Investigator David Dorner, made requests for records from Mr. Khan concerning the auction in question. Mr. Khan was not able to produce those records, citing they had been lost.

Khan's failure upon request or demand to produce to the Board's Agent records of the auction conducted at the Gray Estate on or about March 15 & 16, 1997, is in violation of the **Board's 1995 Regulation 18 VAC 25-21-180(A)(5)**.



## **RECOMMENDATION**

### **Count I**

Khan's advertisement of the Gray Estate auction in the Washington Post on or about March 15 & 16, 1997, containing statements with respect to the ownership of the items to be sold were false, misleading, or deceptive in violation of the **Board's 1995 Regulation 18 VAC 25-21-100(A)**.

I recommend a monetary penalty of \$1,000.00 be imposed for violation of the regulation.

### **Count II**

While I feel there may be some merit to this allegation, due to the absence of testimony and other supporting documentation, I feel there is insufficient evidence to support a regulatory violation.

### **Count III**

Khan's failure to retain records of the auction conducted at the Gray Estate on or about March 15 & 16, 1997, for a period of four years is in violation of the **Board's 1995 Regulation 18 VAC 25-21-160**.

I recommend a monetary penalty of \$1,000.00 be imposed for violation of the regulation.

### **Count IV**

Khan's failure upon request or demand to produce to the Board's Agent records of the auction conducted at the Grey Estate on or about March 15 & 16, 1997, is in violation of the **Board's 1995 Regulation 18 VAC 25-21-180(A)(5)**.

I recommend a monetary penalty of \$1,000.00 be imposed for violation of the regulation.

## **LICENSING INFORMATION**

Azam Mohammed Khan was at all times material to these matters a licensed Auctioneer (License No. 2905 867, expiration date 09-30-02).

**FINAL ORDER RECOMMENDATION**

THE TOTAL MONETARY PENALTY RECOMMENDED HEREIN SHALL BE PAID WITHIN SIXTY (60) DAYS FROM THE DATE OF ENTRY OF THE FINAL ORDER IN THIS MATTER. FAILURE TO PAY THE TOTAL MONETARY PENALTY ASSESSED WITHIN SIXTY (60) DAYS OF THE DATE OF ENTRY OF SAID FINAL ORDER WILL RESULT IN THE AUTOMATIC SUSPENSION OF YOUR LICENSE (LICENSE NO. 2905 867) UNTIL SUCH TIME AS SAID AMOUNT IS PAID IN FULL.

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Fitzpatrick, Judge Annunziata and Senior Judge Willis  
Argued at Alexandria, Virginia

AZAM MOHAMMED KHAN

v. Record No. 0497-03-4

COMMONWEALTH OF VIRGINIA,  
AUCTIONEERS BOARD

PARK ROYAL GALLERIES, LTD.

v. Record No. 0498-03-4

COMMONWEALTH OF VIRGINIA,  
AUCTIONEERS BOARD

OPINION BY  
JUDGE JERE M. H. WILLIS, JR.  
FEBRUARY 17, 2004

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY  
James H. Chamblin, Judge

Howard B. Silberberg (August Bequai, on briefs), for appellants.

William A. Diamond, Assistant Attorney General (Jerry W. Kilgore,  
Attorney General, on briefs), for appellee.

Azam Mohammed Khan, a licensed auctioneer, and Park Royal Galleries, Ltd., a licensed auction firm, (together appellants) appeal decisions by the trial court affirming orders of the Auctioneers Board (the Board) dated January 10, 2002, imposing monetary penalties upon appellants and suspending Khan's auctioneer's license. On appeal, appellants contend: (1) the Board was not authorized to take action in the cases because it lacked the statutorily required number of members; (2) the dismissal of two circuit court cases was binding on the Board; (3) the trial court erroneously disregarded legal precedent; (4) the trial court erroneously relied on law school notes as a basis for its decision; (5) the Board failed to follow its regulations; and (6)

the Board erroneously considered a prior consent order in determining whether to impose a sanction on Khan. We affirm the judgment of the trial court.

#### Background

On March 15 and 16, 1997, Khan, on behalf of Park Royal Galleries (Park Royal), conducted an auction on the grounds of the residence of Robert Gray, a cabinet secretary under President Dwight D. Eisenhower. Appellants placed in the Washington Post an advertisement which mentioned Gray's name and stated that the auction would be an "important" estate auction. Patricia Brockbank attended the auction, believing the items for sale belonged to the Gray family.

Brockbank was interested in an oriental carpet that Khan told her was part of the Gray estate and was worth \$100,000. She purchased the rug from Khan for \$20,000, plus a ten percent buyer's premium. She later learned that the carpet had not belonged to Gray. After she failed to receive a certificate of authenticity from Khan as promised, she had the carpet appraised and was told that the rug's value was \$10,800.

Brockbank filed in Arlington County Circuit Court a lawsuit against appellants, alleging they had misrepresented the rug to her and seeking a refund of her money. The case did not go to trial. By order entered October 9, 1998, the circuit court dismissed the case with prejudice. In 1999, Brockbank filed a similar suit in Fairfax County Circuit Court. The court dismissed that suit on grounds of res judicata and collateral estoppel.

In 1998, Brockbank filed a complaint with the Department of Professional and Occupational Regulation, which regulates the licensure of auctioneers through the Board. In her complaint, Brockbank alleged that Khan had represented to her that the rug had belonged to Gray and that it was valued at \$100,000. During an investigation of the incident by the Board's agent,

Khan failed to produce requested records concerning the Gray estate auction, stating that the records had been lost.

On September 6, 2001, Samuel Updike, a member of the Board, held an informal fact finding conference in which appellants participated. The charges against appellants were set forth in four counts.

Count I charged that the advertisement placed in the Washington Post by appellants concerning the Gray estate auction violated one of the Board's regulations. See 18 VAC 25-21-100(A).<sup>1</sup>

Count II charged that Khan made oral misrepresentations to Brockbank concerning the rug. The Board dismissed Count II, finding insufficient evidence to impose sanctions for this count.

Counts III and IV related to appellants' record keeping. Count III alleged that appellants failed to retain records of the Gray estate auction for four years as required by 18 VAC

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<sup>1</sup> 18 VAC 25-21-100(A) provides: "All advertising must be truthful. Advertising shall contain no false, misleading or deceptive statements, with respect to types or conditions of merchandise offered at auction, why merchandise is being sold, who has ownership, where the merchandise was obtained, or the terms and conditions of the auction and sale."

25-21-160.<sup>2</sup> Count IV alleged that appellants violated 18 VAC 25-21-180(A)(5)<sup>3</sup> by failing to produce records of the Gray estate auction when requested by the Board.

Mr. Updike recommended that the Board impose upon each appellant monetary penalties of \$1,000 for each violation of Counts I, III and IV. The parties failed to agree to a consent order and on October 18, 2001, the Board considered the cases. Three members of the Board were present at the meeting. The minutes of the meeting reported a fourth member was absent, but that a quorum was present.

Counsel representing both appellants argued to the Board their disagreements with the summary and recommendations from the fact finding conference. Khan also made a presentation to the Board. Mr. Updike was not present during these presentations and he did not participate in the Board's deliberations, pursuant to Code § 54.1-110(B). The two remaining members of the Board deliberated in closed meeting. The Board adopted Mr. Updike's summary, finding that

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<sup>2</sup> 18 VAC 25-21-160 provides:

The contract drawn with each owner; auction records, including but not limited to lists of buyers and their addresses; and clerk sheets showing the items sold including the buyers' numbers or names and the selling prices and the final settlement papers shall be retained for a period of four years from the date of settlement. These business records shall be available for inspection by the board or its designees as deemed appropriate and necessary.

<sup>3</sup> 18 VAC 25-21-180(A)(5) provides:

The board has the power to fine any individual or firm licensee, or to suspend or revoke any license issued under the provisions of Chapter 6 (§ 54.1-600 et seq.) of Title 54.1 of the Code of Virginia and the regulations of the board pursuant to the provisions of the Administrative Process Act . . . if it finds that:

The licensee, auction firm, or firm owner refuses or fails, upon request or demand, to produce to the board or any of its agents any document, book, or copy thereof in licensee's or owner's possession concerning the performance of auctioneering duties.

appellants had committed the acts alleged in Counts I, III and IV. The Board imposed monetary sanctions and suspended Khan's auctioneer's license for a period of six months.

Having determined that its summaries and recommendations contained errors, on January 10, 2002, the Board reconsidered appellants' cases with amended summaries and recommendations. Four members of the Board, including Mr. Updike, attended that meeting. The minutes state that "finding a quorum present," the meeting was called to order. Mr. Updike did not participate in appellants' cases.

Counsel for appellants presented arguments to the Board members via telephone. Counsel asserted that Code §§ 54.1-200 and 54.1-602(A) required that the Board have at least five members in order to act, noting that at that time, the Board consisted of only four members. Counsel presented further arguments concerning the four counts. The three board members then convened in closed session to consider the cases. Based on the facts of the case, the seriousness of appellants' actions, and Khan's record with the Board, the Board found violations as charged in Counts I, III and IV. The Board imposed \$3,000 in monetary penalties upon each appellant and suspended Khan's auctioneer's license for a period of one year.

On appeal, the trial court affirmed the Board's decisions.

#### Analysis

##### I.

Relying on Code §§ 54.1-200 and 54.1-602(A), appellants contend that because the Board consisted of fewer than five members, it could take no action and impose no sanctions. Code § 54.1-200 provides, in part: "A regulatory board established to administer a system of certification or licensure . . . unless otherwise specified by law, shall consist of at least five members." Appellants argue that because the Board consisted of fewer than five members,

rather than “at least” five members, it was not legally constituted and could not act on the charges against them.

Code § 54.1-200 is located in the “General Provisions” chapter of the statutes concerning the Department of Professional and Occupational Regulation. However, Code § 54.1-602(A) is located in the chapter that addresses auctioneers and the Auctioneers Board specifically. Code § 54.1-602(A) provides, in part: “The Auctioneers Board shall be composed of five members . . . .” When statutes conflict, we presume the legislature intended that the more specific provision control. See Tharpe v. Commonwealth, 18 Va. App. 37, 43-44, 441 S.E.2d 228, 232 (1994). Although the two statutes have similar wording, Code § 54.1-602(A) specifically addresses the Auctioneers Board. Therefore, Code § 54.1-602(A) applies here.

Appellants argue that “shall,” as employed in Code § 54.1-602(A), is mandatory, not permissive. Thus, they argue that the Board could not conduct business while comprised of fewer than five members serving under active appointments. This issue has not heretofore been addressed directly in Virginia. However, the Supreme Court has interpreted “shall” to be directory rather than mandatory in the context of actions taken by public officials.

“[T]he use of ‘shall,’ in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent.” As far back as 1888, when this Court addressed a statute that used the term “shall,” we stated that “[a] statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute.”

Butler v. Commonwealth, 264 Va. 614, 619, 570 S.E.2d 813, 816 (2002) (citations omitted).

Code § 54.1-602(A) contains no language prohibiting the Board from acting when fewer than five members are serving active appointments. In the absence of such language, the provision of the statute prescribing the number of board members is directory rather than mandatory.



Furthermore, Code § 54.1-105 sets forth and controls the authority of the Board to act. Code § 54.1-105 is entitled “Majority of board or panel required to suspend or revoke license, certificate or registration; imposition of sanctions.” It provides: “An affirmative vote of a majority of those serving on a board who are qualified to vote . . . shall be required for any action to suspend or revoke a license, certification or registration or to impose a sanction on a licensee.” At the January 10, 2002 board meeting, the results of which appellants appealed to the trial court, four board members had been appointed to the Board, and all four members were present. The minutes of the meeting state that a quorum of the Board was present. One board member did not participate in the decision of appellants’ cases. The decision was made by three members, a majority whether the Board consisted of four or five members.

This interpretation comports with decisions of other states.

“The almost universally accepted common-law rule is . . . [that] a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” . . . A board may act as long as there exists a quorum equal to a majority of all the actual members of the board.

Levinson v. Connecticut Board of Chiropractic Examiners, 560 A.2d 403, 418 (Conn. 1989)

(citations omitted).

[W]here appointments of lay persons by the governor of this State to the West Virginia Board of Optometry . . . had not been made, the West Virginia Board of Optometry, nevertheless, had jurisdiction to conduct license revocation proceedings against an optometrist practicing in this State, where the record indicated that, pursuant to W. Va. Code, 30-1-5 [1931]<sup>4</sup>, a quorum of board members existed during the transaction of business relating to such revocation proceedings.

Serian v. State, 297 S.E.2d 889, 893 (W. Va. 1982) (footnote added).

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<sup>4</sup> W. Va. Code § 30-1-5 provides in part: “A majority of the members of the board shall constitute a quorum for the transaction of its business.”

Appellants also contend that action by the Board when fewer than five members had been appointed deprived them of their due process rights.

The right of every person to engage in any lawful profession, trade or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when it is clearly found that such abridgment is necessary for the preservation of the health, safety and welfare of the public.

Code § 54.1-100. However, the Commonwealth is authorized to impose regulations upon professions or occupations in order to protect the public interest when, among other circumstances, “the unregulated practice of the profession or occupation can harm [the] welfare of the public.” Code § 54.1-100(1). The Board serves an administrative function, regulating the licensure of auctioneers, including suspending licenses and imposing sanctions for cause. This legislative purpose would be forestalled if transient vacancies were permitted to impair the Board’s ability to perform its duties. Code § 54.1-105 requires an affirmative vote of a majority of those serving on the Board to suspend a license or impose a sanction. A majority of the Board acted in appellants’ cases. Accordingly, we hold that those decisions were properly authorized and that no due process rights were impaired.

## II.

Appellants contend the dismissals of Brockbank’s circuit court cases were binding on the Board, precluding the Board from acting on her complaint. Res judicata “precludes relitigation of a claim or issue once a final determination on the merits has been reached by a court of competent jurisdiction.” Neff v. Commonwealth, 39 Va. App. 13, 18, 569 S.E.2d 72, 75 (2002). Brockbank alleged in her civil suits that Khan gave her false and misleading information concerning the history and value of the rug, thereby inducing her to purchase the rug. Similarly, Count II of the Board’s action alleged that Khan made statements to Brockbank which

misrepresented the ownership and value of the rug. However, Count I concerned the advertisement placed by appellants in the Washington Post, and Counts III and IV involved record keeping violations, none of which was addressed in Brockbank's complaints. Indeed, appellants admitted in their argument to the trial court that the res judicata argument did not apply to Counts III and IV. The lawsuits involved issues relevant only to Count II. The Board dismissed Count II. The resolution of Brockbank's circuit court cases had no bearing on Counts I, III and IV and, thus did not preclude the Board's actions with respect to those charges.

### III. and IV.

Appellants contend the trial court erred by disregarding precedent that it believed was wrongly decided and by relying on its law school notes in making its decision. However, appellants failed to present these arguments to the trial court. "The Court of Appeals will not consider an argument on appeal which was not presented to the trial court." Ohree v. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1998). See Rule 5A:18. Accordingly, Rule 5A:18 bars our consideration of these questions on appeal. The record reflects no reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.

### V.

Appellants contend that because the Board made no finding that they possessed records requested by the Board, it erred in finding that they violated 18 VAC 25-21-180(A)(5) by failing to produce the requested records. Appellants also assert that, because the Board charged them in Count III with failing to retain certain records, it was foreclosed from also charging in Count IV that they failed to produce those records.

Appellants represented to the Board and to the trial court that when they moved their business to a new location, they lost or misplaced the records requested by the Board concerning the Gray estate auction. However, an employee of Park Royal told a Board investigator that

records for the Gray auction were entered into the company's computer system and were "backed up" on tape. The employee stated that the history of the carpet was in the computer as item number E2782. This supported the charge in Count IV, failing to produce records. Even if appellants had misplaced hard copies of the Gray estate auction records during their move, they did not explain why they did not produce copies from their computerized records.

For the same reason, appellants' argument regarding the alleged inconsistency in charging that they violated both the record keeping regulation and the record production regulation is without merit. Appellants' own assertions that they lost records supported the violation of Count III, the failure to maintain records. Given the evidence that certain relevant records existed in Park Royal's computer system, the Board could have concluded that, although some hard copies of the requested records may have been lost or misplaced, other requested evidence existed on Park Royal's computer system, yet was not disclosed. Therefore, the evidence supported a violation of both regulations.

## VI.

Citing Code § 2.2-4019, Khan contends the Board, in rendering its decision, erred by considering a prior consent order in which Khan did not admit to a violation of the Board's regulations. Code § 2.2-4019 provides that "[a]gencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information."

The Board's January 22, 2002 final opinion and order regarding Khan's case states that the Board based its decision on the facts of the case, the seriousness of Khan's actions, and his record with the Board, including several prior consent orders. On October 18, 2001, three months before it issued its final opinion and order, the Board considered the same prior consent order in rendering its decision. On January 10, 2002, the Board reconsidered appellants' cases

and appellants' counsel participated in that proceeding via telephone. The minutes of that Board meeting disclose that, prior to the Board's deliberation of the cases, Khan's counsel argued to the Board that one of the prior consent orders did not contain an admission of a violation by Khan. Khan knew for three months that the Board had considered this consent order in its October 2001 meeting. Thus, he clearly had "advance notice" that the Board might consider that consent order in its reconsideration of the cases in January 2002. Under these circumstances, the Board's consideration of the document complied with the statute and did not prejudice Khan.

The judgment of the trial court is affirmed.

Affirmed.