

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION, BOARD	)	
OF AUCTIONEERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 95-3710
	)	
IRWIN SHERWIN,	)	
	)	
Respondent.	)	
<hr/>	)	
DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION, BOARD	)	
OF AUCTIONEERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 95-5044
	)	
BEACH AUCTION HOUSE,	)	
	)	
Respondent.	)	
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DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION, BOARD	)	
OF AUCTIONEERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 95-5045
	)	95-5046
IRWIN SHERWIN, d/b/a	)	95-5047
BEACH AUCTION HOUSE, INC.,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 28 1997; July 16, 1997;<sup>1</sup> and August 14, 1997, at West

Palm Beach, Florida, before Errol H. Powell, a duly designated

Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Theodore R. Gay, Esquire  
Department of Business and  
Professional Regulation  
401 Northwest 2nd Avenue, Suite N-607  
Miami, Florida 33128

For Respondent: Louis Sherwin, Qualified Representative  
237 Alexander Palm Road  
Boca Raton, Florida 33128

STATEMENT OF THE ISSUE

Whether Respondents committed the offenses set forth in the administrative complaints and the amended administrative complaint and, if so, what action should be taken.

PRELIMINARY STATEMENT

In 1995, the Department of Professional Regulation, Board of Auctioneers (Petitioner) filed several administrative complaints against Irwin Sherwin, Beach Auction House, and Irwin Sherwin, d/b/a Beach Auction House, Inc. (Respondents), alleging various violations of Chapter 468, Florida Statutes (1993), the statute governing the practice of auctioneering. The Respondents disputed the allegations of fact in the administrative complaints and requested a formal hearing. The matters were referred to the Division of Administrative Hearings (Division) and assigned the following case numbers: Case Nos. 95-2855, 95-3710, 95-5044, 95-5045, 95-5046, and 95-5047. The cases were consolidated for hearing. Subsequently, the Division's file in Case No. 95-2855

was closed. By Order dated May 21, 1996, Petitioner was

permitted to amend its administrative complaint in Case No. 95-5045.

In 1996, Petitioner filed another administrative complaint against Respondent Sherwin, charging him with violations of Chapter 468, Florida Statutes (1993). Respondent Sherwin disputed the allegations of fact in the administrative complaint and requested a formal hearing. The matter was referred to the Division and assigned Case No. 96-3916. Case Nos. 95-3710, 95-5044, 95-5045, 95-5046, 95-5047, and 96-3916 were consolidated for hearing. Subsequently, the Division's file in Case No. 96-3916 was closed.

Regarding Case No. 95-3710, Petitioner filed a two-count administrative complaint against Respondent Sherwin. Petitioner charged Respondent Sherwin with: Count I--violating Subsection 468.389(1)(l), Florida Statutes (1993), by having pled to four counts of embezzlement in the State of North Carolina; and Count II--thereby, violating Subsection 468.389(1)(k), Florida Statutes (1993).

As to Case No. 95-5044, Petitioner filed an administrative complaint against Respondent Beach Auction House. Petitioner charged Respondent Beach Auction House with violating Subsection 468.389(1)(e), Florida Statutes (1993), by engaging in conduct in connection with a sales transaction, which demonstrates bad faith or dishonesty.

Regarding Case No. 95-5045, Petitioner filed a two-count

amended administrative complaint against Respondent Sherwin, d/b/a Beach Auction House. Petitioner charged Respondent Sherwin, d/b/a Beach Auction House with: Count I--violating Subsection 468.389(1)(j), Florida Statutes (1993), through violating Subsection 468.385(9), Florida Statutes, by failing to post a surety bond for an auctioneer in the amount of \$10,000 with the Petitioner in order to do business in the State of Florida; and Count II--violating Subsection 468.389(1)(j), Florida Statutes (1993), through violating Subsection 468.385(10), Florida Statutes, by failing to post a surety bond for an auction business in the amount of \$25,000 with the Petitioner in order to do business in the State of Florida.

As to Case No. 95-5046, Petitioner filed an administrative complaint against Respondent Sherwin, d/b/a Beach Auction House. Petitioner charged Respondent Sherwin, d/b/a Beach Auction House with violating Subsection 468.389(1)(e), Florida Statutes (1993), by engaging in conduct in connection with a sales transaction, which demonstrates bad faith or dishonesty.

Regarding Case No. 95-5047, Petitioner filed a five-count administrative complaint against Respondent Sherwin, d/b/a Beach Auction House. Petitioner charged Respondent Sherwin, d/b/a Beach Auction House with: Count I--violating Subsection 468.388(1), Florida Statutes (1993), by an auctioneer or auction business failing to execute a written agreement with the owner or the agent of the owner of any property offered for sale, prior to

conducting an auction in the State of Florida; Count II--violating Subsection 468.389(1)(e), Florida Statutes (1993), by engaging in conduct in connection with a sales transaction which, demonstrates bad faith or dishonesty; Count III--violating Subsection 468.389(1)(h), Florida Statutes (1993), by an auctioneer commingling money or property of another person with his own; Count IV--violating Subsection 468.389(1)(e), Florida Statutes (1993), by engaging in conduct in connection with a sales transaction, which demonstrates bad faith or dishonesty; and Count V--violating Subsection 468.389(1)(c), Florida Statutes (1993), by failing to account for or to pay, within a reasonable time not to exceed 30 days, money belonging to another which came into the control of this Respondent through an auction.

At hearing, Petitioner presented the testimony of 2 witnesses and entered 15 exhibits into evidence.<sup>2</sup> Respondents presented the testimony of 1 witness (Respondent Sherwin) and entered 22 exhibits into evidence.

No transcript of the hearing was ordered. At the request of the parties the time for filing post-hearing submissions was set for more than ten days following the conclusion of the hearing. An extension of time was granted for the submission of the post-hearing submissions. The parties filed post-hearing submissions which have been duly considered.

#### FINDINGS OF FACT

1. On May 26, 1989, the Department of Professional

Regulation (now, the Department of Business and Professional Regulation), Board of Auctioneers (Petitioner) licensed Irwin Sherwin (Respondent Sherwin) as an auctioneer. He was issued license number AU 0000720.

2. However, Respondent Sherwin was initially denied licensure. On December 29, 1986, Respondent Sherwin submitted an application for licensure, without examination, as an auctioneer to the Petitioner. By order dated October 22, 1987, the Petitioner denied Respondent Sherwin's application on the basis that Respondent Sherwin had been charged with grand theft.

3. Respondent Sherwin requested an informal hearing on his denial. By final order dated September 14, 1988, and filed September 19, 1988, the Petitioner granted Respondent Sherwin's application, subject to certain special conditions, including payment of a \$10,000 fine, posting of a \$300,000 auctioneer bond,<sup>3</sup> and imposition of a period of probation after licensure, with Respondent Sherwin, during the probation, practicing under the supervision of an approved auctioneer. Subsequently, through agreement made by Respondent Sherwin at Petitioner's meeting held on February 16, 1989, the Petitioner modified the bond requirement by order dated March 4, 1989, and filed March 9, 1989, to include the following: (a) a \$10,000 auctioneer bond and a \$25,000 auction business bond, within 30 days of February 16, 1989, to permit licensure; and (b) a \$25,000 auctioneer bond and a \$50,000 auction business bond, within 30



days of the date of the order, in order for Respondent Sherwin to maintain licensure.

4. On or about October 20, 1989, after Respondent Sherwin was licensed by the Petitioner, Respondent Sherwin obtained a \$25,000 auctioneer bond from American Bankers Insurance Company of Florida. On November 6, 1989, Respondent Sherwin posted the bond with the Petitioner.

5. On February 19, 1990, Respondent Beach Auction House, Inc. (Respondent Auction House) was licensed by the Petitioner as an auction business. Respondent Auction House was issued license number 0000531. As a condition of licensure, Respondent Auction House was required to obtain a bond for an auction business. On or about December 1, 1989, Respondent Auction House obtained a \$25,000 bond as a auction business from American Bankers Insurance Company of Florida, the same surety for Respondent Sherwin.

6. The president of Respondent Auction House was Respondent Sherwin's son, Louis Sherwin. The address for Respondent Auction House was 2009 Northeast 2nd Street, Deerfield Beach, Florida.

7. On December 1, 1993, Respondent Auction House's license became delinquent for failure to renew its license. Respondent Auction House's license has remained delinquent since December 1, 1993.

Case No. 95-3710

8. In August 1974, the North Carolina Auctioneer Licensing Board (North Carolina Auctioneer Board) licensed Respondent Sherwin as an auctioneer and licensed Blowing Rock Auction Galleries, Inc., his business, as an auction firm.

9. On March 14, 1994, in the General Court of Justice, Superior Court Division, Wake County, North Carolina, Case Nos. 94-CRS-2435, 2441, 2443, 2448, pursuant to a plea agreement, Respondent Sherwin pled guilty to two felony counts of

embezzlement of state property and two felony counts of embezzlement of county property. The embezzlement related to unpaid sales tax due the State of North Carolina and one of its counties by Respondent Sherwin's business, Blowing Rock Galleries, Inc., for which Respondent Sherwin was responsible under the law of the State of North Carolina. As part of the plea agreement, among other things, Respondent Sherwin was sentenced to 6 years in North Carolina's state prison, but his sentence was suspended, and he was placed on unsupervised probation for 5 years under certain specific conditions.

10. On advice of counsel, Respondent Sherwin entered into the plea agreement.<sup>4</sup>

11. The felony convictions against Respondent Sherwin have not been set-aside or voided by a court of competent jurisdiction.

12. By Consent Order dated December 21, 1994, the North Carolina Auctioneer Board took action against Respondent Sherwin and Blowing Rock Auction Galleries, Inc., related to several improprieties, including the embezzlement felonies, under the laws and rules governing auctioneers in the State of North Carolina. As to the improprieties, Respondent Sherwin, his son, Louis Sherwin and Blowing Rock Auction Galleries, Inc., entered into a settlement agreement in which they agreed, among other things, that their licenses, issued by the North Carolina Auctioneer Board, would be surrendered and that their licenses

would be considered permanently revoked. By the Consent Order, the North Carolina Auctioneer Board approved the settlement agreement and pursuant to the settlement agreement, ordered, among other things, the surrender of the licenses of Respondent Sherwin, his son, and Blowing Rock Auction Galleries, Inc., subject to the conditions and limitations of the settlement agreement.

Case Nos. 95-5044 and 95-5046

13. On March 17, 1994, Tanya Braunshteyn and her husband, Michael Braunshteyn, while on vacation, attended an auction at Respondent Auction House. Respondent Sherwin was present at the auction but did not conduct the auction. The Braunshteyns were successful bidders on a picture or framed sculpture, a ring, and a china set at a total cost of \$3,483.30. The Braunshteyns did not purchase the merchandise at that time but left a deposit.

14. The following day the Braunshteyns returned to Respondent Auction House to retrieve and pay for their merchandise. They paid \$3,250 in cash as partial payment for the merchandise and received the picture or framed sculpture and the ring, together with a receipt, written descriptions of the merchandise received, and certificates of valuation. Respondent Sherwin agreed that the Braunshteyns could pay the balance, \$233.30, for the china by check at a later time and that the china would be shipped to them after receipt of the check.

15. On March 26, 1994, Mrs. Braunshteyn mailed a check to

Respondent Sherwin in the amount of \$233.30 for the balance on the china. On April 11, 1994, the check cleared her bank. However, the Braunshteyns did not receive the china. They made several telephone calls to Respondent Auction House and spoke with Respondent Sherwin several times inquiring about the china.

The Braunshteyns received several different and unsatisfactory reasons as to why the china was not sent to them.

16. On March 18, 1995, approximately 11 months after the balance was paid on the china, the Braunshteyns were again vacationing in Florida. They visited the Respondent Auction House with the specific intent of receiving a refund of the money they paid for the china that they never received. At that time, Respondent Sherwin refunded their money in full for the china.

Case No. 95-5045

17. After inquiry from the Petitioner, by letter dated May 19, 1995, American Bankers Insurance Company notified the Petitioner that Respondent Sherwin's surety bond had been cancelled. The Bond Notice of Cancellation, accompanying the letter, indicates that the auctioneer's bond was cancelled effective November 18, 1990, due to an underwriting decision by the surety.

18. Respondent Sherwin does not dispute that a surety bond was not maintained and in force for either him, as an auctioneer, or for Respondent Auction House, as an auction business.<sup>5</sup>

Case No. 95-5047

19. In 1989 Louis Carusillo consigned to Jack Beggs approximately 1000 items of merchandise, including furniture, jade, and sculptures, worth between \$600,000 and \$800,000. Mr. Beggs owned an auction business located in Sarasota, Florida.

20. Sometime in 1990, without Mr. Carusillo's knowledge or

consent, Mr. Beggs re-consigned and delivered a substantial portion of Mr. Carusillo's merchandise to Respondent Sherwin in Blowing Rock, North Carolina. Respondent Sherwin received the merchandise in two or three truckloads at his auction gallery, Blowing Rock Auction Galleries, Inc., in Blowing Rock.

21. At the time of delivery, Respondent Sherwin failed to inventory Mr. Carusillo's merchandise. As a result of the failure to inventory, Mr. Carusillo's merchandise was commingled with merchandise belonging to Respondent Sherwin at Blowing Rock Auction Galleries.

22. All of Mr. Carusillo's merchandise were tagged with his initials on them. At some point in time, Respondent Sherwin noticed Mr. Carusillo's initials on the merchandise. Respondent Sherwin recognized Mr. Carusillo's initials, due to a prior business dealing in years past in which Mr. Carusillo had consigned some merchandise to Respondent Sherwin.

23. In the summer of 1990, Respondent Sherwin telephoned Mr. Carusillo regarding Mr. Carusillo's merchandise at Blowing Rock Auction Galleries received from Mr. Beggs. The telephone conversation with Respondent Sherwin was the first time that Mr. Carusillo had knowledge of the merchandise that he had consigned to Mr. Beggs being delivered to Respondent Sherwin.

24. Mr. Carusillo viewed his past transaction with Respondent Sherwin as unsatisfactory and had no intentions of allowing Respondent Sherwin to possess and sell his merchandise.

Mr. Carusillo conveyed his position to Respondent Sherwin. Mr. Carusillo refused to consign any of his merchandise to Respondent Sherwin and refused to sign any written agreement authorizing Respondent Sherwin to sell any of the merchandise.

25. Despite knowing of Mr. Carusillo's position and despite having no written agreement authorizing the sale of any of Mr. Carusillo's merchandise, Respondent Sherwin retained Mr. Carusillo's merchandise and sold some of the merchandise at both Blowing Rock Auction Galleries and at Respondent Auction House. (In the winter of 1990, Respondent Sherwin had Mr. Carusillo's merchandise delivered to Respondent Auction House.)

26. In 1991, Mr. Carusillo filed a civil action against, among others, Respondent Sherwin and his son, Louis Sherwin, in the Circuit Court of Broward County, Florida, Seventeenth Judicial Circuit, Case No. 91-03351. Through the law suit, Mr. Carusillo sought, among other things, the return of his merchandise in the possession of Respondent Sherwin, an injunction to stop further sales of his merchandise by Respondent Sherwin, and an accounting of his merchandise from Respondent Sherwin. An Agreed Temporary Injunction was entered by the Court on February 14, 1991, forbidding, among other things, the sale or removal of Mr. Carusillo's merchandise and ordering an accounting of his merchandise. An Agreed Order as to Replevin was entered by the Court on May 9, 1991, allowing, among other things,



Mr. Carusillo to remove his merchandise from Respondent Sherwin's possession.

27. Even though Respondent Sherwin rendered an accounting of Mr. Carusillo's merchandise, the accounting was not satisfactory. Furthermore, even after Mr. Carusillo removed what

he thought was all of his merchandise, Respondents sold other merchandise belonging to Mr. Carusillo.

28. After protracted litigation, by an Amended Final Judgment dated April 26, 1995, entered nunc pro tunc August 18, 1994, the Court entered judgment against Respondent Sherwin, his son (Louis Sherwin), and Mr. Beggs. As to Respondent Sherwin and his son, the Court found that they were jointly and severally liable and awarded Mr. Carusillo, among other things, the sum of \$468,959.74, which included the following: a total pecuniary loss of \$113,639.30 (including interest of \$12,167.80), pre-judgment interest of \$44,347.28, treble damages for civil theft, which brought the total to \$473,959.74, and a credit to Respondent Sherwin and his son, which reduced the total to \$468,959.74.

29. The Amended Final Judgment was appealed but was upheld by the appellate court.

30. At the hearing in the instant case, Respondents attempted to show that the monetary loss to Mr. Carusillo, as evidenced by the Amended Final Judgment, was incorrect and improper. However, the evidence presented by Petitioner at hearing was clear and convincing that the monetary judgment entered by the Court should not be disturbed. Respondents failed to present evidence to overcome Petitioner's showing.

31. By Order dated September 27, 1996, the Circuit Court of Broward County directed payment to Mr. Carusillo for the judgment

from the Auctioneer Recovery Fund in the amount of Mr. Carusillo's "actual and direct losses occurring subsequent to October 1, 1991." Subsequently, Mr. Carusillo made a claim for payment of the judgment from the Auctioneer Recovery Fund.

32. On December 6, 1996, Petitioner considered Mr. Carusillo's claim. On December 31, 1996, Petitioner entered an order on the claim ordering, among other things, that Mr. Carusillo be paid \$94,575 from the Auctioneer Recovery Fund and that \$47,287.50 of the \$94,575 was attributable to Respondent Sherwin.

33. On or about January 15, 1997, a warrant from the State of Florida was issued for \$94,575, representing payment to Mr. Carusillo from the Auctioneer Recovery Fund.

#### CONCLUSIONS OF LAW

34. Pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes, the Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto.

35. License revocation proceedings are penal in nature. The burden of proof is on the Petitioner to establish the truthfulness of the allegations by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

36. Section 468.388, Florida Statutes (1993), provides for

the conduct of an auction and provides in pertinent part:

(1) Prior to conducting an auction in this state, an auctioneer or auction business shall execute a written agreement with the owner, or the agent of the owner, of any property to be offered for sale, stating:

(a) The name and address of the owner of the property;

(b) The name and address of the person employing the auctioneer or auction business, if different from the owner; and

(c) The terms or conditions upon which the auctioneer or auction business will receive the property for sale and remit the sales proceeds to the owner.

37. Section 468.389, Florida Statutes (1993), provides in pertinent part:

(1) The following acts shall be grounds for the disciplinary activities provided in subsections (2) and (3):

\* \* \*

(c) Failure to account for or to pay, within a reasonable time not to exceed 30 days, money belonging to another which has come into the control of an auctioneer or auction business through an auction.

\* \* \*

(e) Any conduct in connection with a sales transaction which demonstrates bad faith or dishonesty.

\* \* \*

(h) Commingling money or property of another person with his own. Every auctioneer and auction business shall maintain a separate trust or escrow account in an insured bank or savings and loan association located in this state in which shall be deposited all

proceeds received for another person through  
an auction sale.

\* \* \*

(j) Violating a statute or administrative  
rule regulating practice under this part or a  
lawful disciplinary order of the board or the  
department.

(k) Having a license to practice a comparable profession revoked, suspended, or otherwise acted against by another state, territory, or country.

(1) Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice or the ability to practice the profession of auctioneering.

(2) When the board finds any person guilty of any of the prohibited acts set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

(a) Refusal to certify to the department an application for licensure.

(b) Revocation or suspension of a license.

(c) Imposition of an administrative fine not to exceed \$1,000 for each count or separate offense.

(d) Requirement of bonding in amounts not to exceed \$100,000 for auctioneers and \$300,000 for auction businesses.

(e) Issuance of a reprimand.

(f) Placement of the auctioneer on probation for a period of time and subject to conditions as the board may specify, including requiring the auctioneer to successfully complete the licensure examination.

38. Section 468.385, Florida Statutes (1993), provides in pertinent part:

(9) Each auctioneer shall post with the department a \$10,000 surety bond issued by an insurance company authorized to do business in this state. . . . The bond shall . . . be in effect at all times that the auctioneer has a current active license and conducts business in this or any other state.

(10) Each auction business shall post with the department a \$25,000 surety bond issued by an insurance company authorized to do business in this state. . . . The bond shall be in effect at all times that the auction business has a current active license and conducts business in this or any other state.

39. Regarding Counts II and IV in Case No. 95-5047, the two alleged violations of Subsection 468.389(1)(e), Petitioner has revised its position to consider the acts or omissions relating to Mr. Carusillo to constitute only one, instead of two, violations of Subsection 468.389(1)(e). Consequently, Counts II and IV are combined to comprise one count of an alleged violation of Subsection 468.389(1)(e) in Case No. 95-5047.

40. Also, regarding Count I in Case No. 95-5047, the alleged violation of Subsection 468.388(1), Petitioner points out that Subsection 468.389(1)(j) was not alleged but argues that a violation of Subsection 468.388(1) should be deemed to constitute grounds for disciplinary action pursuant to Subsection 468.389(1)(j). Petitioner's omission of alleging a violation of Subsection 468.389(1)(j) is not fatal. In the instant case, in order to have a violation of Subsection 468.389(1)(j), a violation of Chapter 468, Florida Statutes, must be demonstrated; therefore, if Petitioner demonstrates a violation of Subsection 468.388(1), a violation of Subsection 468.389(1)(j) has occurred. Consequently, if Petitioner demonstrates a violation of Subsection 468.388(1), a violation of Subsection 468.389(1)(j) will be deemed to have been demonstrated.

41. Additionally, Petitioner points out that the alleged violations in Case No. 95-5047 occurred prior to the 1993 Florida Statutes cited. The Florida Statutes in effect at the time of the alleged violations were the 1989 Florida Statutes. However, Petitioner points out further that the language and numbering of the Florida Statutes in effect at the time of the alleged violations are identical to the 1993 Florida Statutes cited. Petitioner's error in citing the correct Florida Statutes is not fatal. The alleged wrongful conduct is the same and requires the same proof. Moreover, Respondents were on notice of the alleged wrongful conduct. Consequently, the determination as to whether the violations alleged in Case No. 95-5047 occurred will be made in accordance with the 1989 Florida Statutes.

42. Petitioner has demonstrated by clear and convincing evidence that Respondents committed the violations as alleged and revised.

43. The penalty provision of Subsection 468.389(2), Florida Statutes (1989), differs from the statutory provisions set forth in the 1993 Florida Statutes cited. Subsection 468.389(2), Florida Statutes (1989), provides in pertinent part:

(d) Requirement of bonding in amounts not to exceed \$25,000 for auctioneers and \$50,000 for auction business.

44. Further, as to penalty, Rule 61G2-7.030, Florida Administrative Code, formerly Rule 21BB-7.030, Florida Administrative Code, provides in pertinent part:



(1) When the Board finds that an applicant or licensee whom it regulates under Chapter 468, Part VI, F.S., has committed any of the acts set forth in Section 468.389, F.S., it shall issue a final order imposing appropriate penalties within the ranges recommended in the following disciplinary guidelines:

\* \* \*

(c) Failure to account for money belonging to another which has come into the control of an auctioneer or auction business through an auction, within a reasonable time not to exceed 30 days. The usual penalty shall be: 1st offense -- an administrative fine of \$100 to \$500 and a reprimand; 2nd offense -- an administrative fine of \$500 to \$1,000, an increase in the amount of bond required, probation and successful completion of the licensure examination; 3rd offense -- an administrative fine of \$1,000 and license revocation.

(d) Failure to pay money belonging to another which has come into the control of an auctioneer or auction business through an auction, within a reasonable time not to exceed 30 days. The usual penalty shall be: 1st offense -- an administrative fine of \$500 to \$1,000, probation and/or license suspension; 2nd offense -- an administrative fine of \$1,000, suspension and an increase in the amount of bond required; 3rd offense -- an administrative fine of \$1,000 and license revocation.

\* \* \*

(f) Conduct in connection with a sales transaction which demonstrates bad faith or dishonesty. The usual penalty shall be: 1st offense -- an administrative fine of \$1,000 and license suspension followed by probation; 2nd offense -- an administrative fine of \$1,000, license suspension followed by probation and an increase in the amount of bond required; 3rd offense -- an administrative fine of \$1,000 and license revocation.

\* \* \*

(i) Commingling money or property of another person with his own. The usual penalty shall be: 1st offense -- an administrative fine of \$100 to \$500 and a reprimand; 2nd offense -- an administrative fine of \$500 to \$1,000, an increase in the amount of bond required, probation and successful completion of the

licensure examination; 3rd offense -- an administrative fine of \$1,000 and license revocation.

\* \* \*

(k) Violating any provision of Chapter 468, Part VI, F.S., Chapter 455, F.S., any rule of the Board or Department. The usual penalty shall be selected from the full range of penalties available to the Board and will be based upon the severity of the underlying offense.

\* \* \*

(m) Having a license to practice a comparable profession revoked, suspended, or otherwise acted against by another state, territory, or county. The usual penalty shall be commensurate with the penalty invoked by the other jurisdiction or a penalty consistent with these guidelines for the underlying offense committed in the other jurisdiction.

(n) Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice or the ability to practice the profession of auctioneering. The usual penalty shall be an administrative fine of \$1,000 and license suspension or revocation.

(2) Based upon consideration of aggravating or mitigating factors, present in an individual case, the Board may deviate from the penalties recommended in Subsection (1) above. The Board shall consider as aggravating or mitigating factors the following:

- (a) The severity of the offense;
- (b) The danger to the public;
- (c) The number of repetitions of offenses;
- (d) The length of time since the violation;
- (e) The number of times the licensee has been previously disciplined by the Board;
- (f) The length of time licensee has practiced;
- (g) The actual damage, physical or

otherwise, caused by the violation;  
(h) The deterrent effect of the penalty imposed;  
(i) The effect of the penalty upon the licensee's livelihood;  
(j) Any effort of rehabilitation by the licensee;

- (k) The actual knowledge of the licensee pertaining to the violation;
- (l) Attempts by the licensee to correct or stop the violation or refusal by the licensee to correct or stop the violation;
- (m) Related violations against the licensee in another state including findings of guilt or innocence, penalties imposed and penalties served;
- (n) Actual negligence of the licensee pertaining to any violation;
- (o) Penalties imposed for related offenses under Subsection (l) above;
- (p) Any other relevant mitigating or aggravating factors under the circumstances.

(3) Penalties imposed by the Board pursuant to Subsection (l) above may be imposed in combination or individually, and are as follows:

- (a) Refusal to certify to the Department an application for licensure.
- (b) Revocation or suspension of a license.
- (c) Imposition of an administrative fine not to exceed \$1,000 for each count or separate offense.
- (d) Requirement of bonding in amounts not to exceed \$100,000 for auctioneers and \$300,000 for auction businesses.
- (e) Issuance of a reprimand.
- (f) Placement of the licensee on probation for a period of time and subject to such conditions as the Board may specify, including requiring the auctioneer to successfully complete the licensure examination.

Petitioner points out that prior to August 29, 1993, the bond requirements in Rule 61G2-7.030(3)(d) were \$25,000 for auctioneers and \$50,000 for auction businesses; and that, effective August 29, 1993, the said Rule was amended and the bond requirements became \$100,000 for auctioneers and \$300,000 for auction businesses.

45. Several aggravating factors should be considered in

determining the penalty to be imposed upon the Respondents. The

factors to be considered are found at Rule 61G2-7.030(2)(a), (b), and (p).

46. As to Rule 61G2-7.030(2)(a), severity of the offense, the circumstances associated with the numerous violations committed by the Respondents involving Mr. Carusillo in Case No. 95-5047 demonstrate that the Respondents have a disregard for the auctioneering laws protecting consumers and auctioneers, alike. Further, the loss suffered by Mr. Carusillo was great. The offenses committed by Respondents in Case No. 95-5047 are very severe.

47. Regarding Rule 61G2-7.030(2)(b), danger to the public, the circumstances of the violations committed in Case Nos. 95-5044, 95-5045, 95-5046, and 95-5047 demonstrate Respondents disregard for the rights of consumers in the transactions involving the practice of auctioneering. Also, the failure of Respondents to maintain a surety bond that would have provided some protection for consumers in the event of a wrong causing damages demonstrates Respondents further disregard for the laws protecting consumers in the practice of auctioneering. Respondents are a danger to the public.

48. As to Rule 61G2-7.030(2)(p), other relevant aggravating factors under the circumstances, in Case Nos. 95-5044, 95-5045, and 95-5046 the circumstances of the violations committed demonstrate the other factors to be considered. The failure to maintain a surety bond was in direct contradiction of the special

conditions placed upon Respondent Sherwin for licensure and demonstrates his disregard for the Petitioner's authority and responsibility for the practice of auctioneering. The continued operation of Respondent Auction House for at least 15 months after it became unlicensed, as a result of its license not being renewed, demonstrates again Respondents disregard for the laws regulating the practice of auctioneering.

49. Also, regarding Rule 61G2-7.030(2)(p), the numerous violations committed by Respondents are considered as an aggravating factor.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board of Auctioneers enter a final order:

1. Finding that Irwin Sherwin violated Subsection 468.389(1)(l) and (k), Florida Statutes, of Counts I and II, respectively, in Case No. 95-3710.

2. Finding Beach Auction House violated Subsection 468.389(1)(e), Florida Statutes, in Case No. 95-5044.

3. Finding Irwin Sherwin, d/b/a Beach Auction House, Inc., violated:

a. Subsection 468.389(1)(j), Florida Statutes, of Counts I and II in Case No. 95-5045.

b. Subsection 468.389(1)(e), Florida Statutes, in Case



No. 95-5046.

c. Subsection 468.389(1)(j), Florida Statutes, of Count I  
in Case No. 95-5047.

d. Subsection 468.389(1)(e), Florida Statutes, of Count II in Case No. 95-5047.<sup>6</sup>

e. Subsection 468.389(1)(h), Florida Statutes, of Count III in Case No. 95-5047.

f. Subsection 468.389(1)(c), Florida Statutes, of Count V in Case No. 95-5047.

4. Imposing a \$8,000 administrative fine against Irwin Sherwin.

5. Imposing a \$6,000 administrative fine against Beach Auction House, Inc.

6. Revoking the license of Irwin Sherwin.

7. Revoking the license of Beach Auction House, Inc.

DONE AND ENTERED this 17th day of February, 1998, in Tallahassee, Leon County, Florida.

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ERROL H. POWELL  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of February, 1998.

#### ENDNOTES

<sup>1/</sup> The hearing on July 16, 1997, was held by video teleconference.

<sup>2/</sup> Petitioner presented the testimony of Tanya Braunshteyn by

deposition, Petitioner's Exhibit No. 6.

<sup>3/</sup> The normal surety bond requirement for an auctioneer was \$10,000. Subsection 468.385(9), Florida Statutes (1987).

<sup>4/</sup> Also, as part of the plea agreement, Respondent Sherwin's business was subject to a civil audit by the North Carolina Department of Revenue. Respondent Sherwin testified that the audit results, which showed that sales and use tax was not paid for certain periods of time, continue to be disputed by him and are being resolved through an administrative process in North Carolina. The felony convictions will not be affected by the outcome of the administrative process regarding the disputed sales and use tax.

<sup>5/</sup> Respondent Sherwin testified that he did not know that the surety bonds had been cancelled until he was notified by the Petitioner. Furthermore, he testified that the lapse of the surety bonds was inadvertent and had to be the result of a miscommunication between himself and his insurance broker who was delegated the responsibility for obtaining the surety bonds. The above reasons expressed by Respondent Sherwin do not relieve him, as the licensee, of the responsibility of ensuring that the surety bonds required to engage in the practice of auctioneering are maintained. Moreover, Respondent Sherwin produced no documentation in support of his belief that the surety bonds had been obtained and maintained during the period of time that the Respondents engaged in the practice of auctioneering.

<sup>6/</sup> Counts II and IV in Case No. 95-5047 are combined and considered one violation of Subsection 468.389(1)(e), Florida Statutes. See Conclusions of Law.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.