

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 01-1086PL
)
DALE SMALLEY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 21, 2001, by video teleconference, in Miami and Tallahassee, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rania A. Soliman, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-308
Hurston Building, North Tower
Orlando, Florida 32801

For Respondent: Harold M. Braxton
Qualified Representative
9132 Southwest 78th Place
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STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Administrative Complaint dated May 3, 2000, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated May 3, 2000, the Department of Business and Professional Regulation, Division of Real Estate, ("Department") charged in Count I that Dale Smalley violated a standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice, in violation of Section 475.624(14), Florida Statutes (1999); the Department charged in Count II of the Administrative Complaint that Mr. Smalley is guilty of culpable negligence or a breach of trust in a business transaction, in violation of Section 475.624(2), Florida Statutes (1999). These violations are based on the factual allegations that Mr. Smalley knew or should have known that the signature of the supervisory appraiser on an appraisal report was not genuine and that he failed to maintain a workfile for the appraisal report. Mr. Smalley timely filed a request for a formal hearing, and the Department transmitted the matter to the Division of

Administrative Hearings for assignment of an administrative law judge. The formal hearing was held on May 21, 2001.

At the hearing, the Department presented the testimony of Brian A. Piper and Lance Campbell, and Petitioner's Exhibits 1 through 4 were offered and received into evidence. Mr. Smalley testified in his own behalf, and Respondent's Exhibit 1 was offered and received into evidence but was then withdrawn. At the Department's request, official recognition was taken of Chapters 120, 455, and 458,¹ Florida Statutes (1999). Subsequent to the hearing, after notice and an opportunity to be heard, the undersigned, on her own motion, took official recognition of that portion of the Ethics Rule contained in the 1999 edition of the Uniform Standards of Professional Appraisal Practice ("USPAP") promulgated by the Appraisal Standards Board of the Appraisal Foundation entitled "Record Keeping."

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on June 25, 2001, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in preparing this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for investigating complaints filed against registered, licensed, or certified real estate appraisers and for prosecuting disciplinary actions against such persons. Section 455.225, Florida Statutes (2000). The Florida Real Estate Appraisal Board is the state agency charged with regulating, licensing, and disciplining real estate appraisers registered, licensed, or certified in Florida. Section 475.613(2), Florida Statutes (2000).

2. At the times material to this proceeding, Mr. Smalley was a registered assistant real estate appraiser in Florida. Since November 1999, Mr. Smalley has been a certified residential real estate appraiser in Florida.

3. Mr. Lance Campbell was registered with the Department as Mr. Smalley's supervisory appraiser from approximately October 1997 to October 1999;² both Mr. Campbell and Mr. Smalley were employed at the time by Southeastern Property Appraisals. In order for a licensed or certified appraiser to be registered as the supervisory appraiser for a registered assistant appraiser, a form furnished by the Department must be completed and signed by both the registered assistant appraiser and the certified appraiser, and the form must be filed with the Department. In order for Mr. Campbell to become registered with the Department as his supervisory appraiser, Mr. Smalley

completed the portion of the registration form to be completed by the registered assistant appraiser and gave it to Mr. Campbell so he could complete the remaining portion of the form. Mr. Campbell submitted the completed form to the Department.

4. After the first few months of their professional relationship, Mr. Campbell was not necessarily aware of Mr. Smalley's appraisal assignments because Mr. Smalley usually received assignments directly from the client. Once Mr. Smalley completed an appraisal report, it was his practice to hand in the report and the accompanying workfile for Mr. Campbell's review and signature. It was Mr. Campbell's practice to review Mr. Smalley's appraisal reports and workfiles, sign the reports, process them, and send them to the clients.

5. As Mr. Smalley's supervisory appraiser, Mr. Campbell found that Mr. Smalley always did a thorough job on his appraisal reports and maintained complete workfiles that included the data necessary to support his appraisal reports. In Mr. Campbell's opinion, Mr. Smalley is a very qualified appraiser.

6. In June 1999, Mr. Smalley was retained by Allstate Mortgage Corporation ("Allstate") to appraise residential property located at 15315 Southwest 178th Terrace, Miami,

Florida. Allstate requested that Frank Otero sign the appraisal as Mr. Smalley's supervisory appraiser.

7. At the times material to this proceeding, Mr. Otero was a state-certified residential real estate appraiser who was employed by Southeastern Property Appraisals. Mr. Otero was not registered as a supervisory appraiser for Mr. Smalley when Allstate requested that he act as Mr. Smalley's supervisory appraiser for the subject appraisal. Consequently, Mr. Smalley obtained a copy of the Department registration form from Mr. Campbell, completed his portion of the form, and gave it to Mr. Otero so he could complete his portion of the form. Mr. Smalley assumed that Mr. Otero had done so and that Mr. Otero had submitted the form to the Department.

8. The USPAP contain a provision requiring real estate appraisers to keep records of each appraisal they perform. The Ethics Rules of the 1999 edition of the USPAP include the following provision:

Record Keeping

An appraiser must prepare a workfile for each assignment. The workfile must include the name of the client and the identity, by name or type, of any other intended users; true copies of any written reports, documented on any type of media; summaries of any oral reports or testimony, or a transcript of testimony, including the appraiser's signed and dated certification; all other data, information, and documentation necessary to support the

appraiser's opinions and conclusions and to show compliance with this rule and all other applicable Standards, or references to the location(s) of such other documentation.

An appraiser must retain the workfile for a period of at least five (5) years after preparation or at least two (2) years after final disposition of any judicial proceeding in which testimony was given, whichever period expires last, and have custody of his or her workfile, or make appropriate workfile retention, access, and retrieval arrangements with the party having custody of the workfile.

Comment: A workfile preserves evidence of the appraiser's consideration of all applicable data and statements required by USPAP and other information as may be required to support the findings and conclusions of the appraiser. For example, the content of a workfile for a Complete Appraisal must reflect consideration of all USPAP requirements applicable to the specific Complete Appraisal assignment. However, the content of a workfile for a Limited Appraisal need only reflect consideration of the USPAP requirements from which there has been no departure and that are required by the specific Limited Appraisal assignment.

A photocopy or an electronic copy of the entire actual written appraisal, review, or consulting report sent or delivered to a client satisfies the requirement of a true copy. As an example, a photocopy or electronic copy of the Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report actually issued by an appraiser for a real property Complete Appraisal or Limited Appraisal assignment satisfies the true copy requirement for that assignment.

Care should be exercised in the selection of the form, style, and type of medium for written records, which may be handwritten and informal, to ensure they are retrievable by the appraiser throughout the prescribed record retention period.

A workfile must be in existence prior to and contemporaneous with the issuance of a written or oral report. A written summary of an oral report must be added to the workfile within a reasonable time after the issuance of the oral report.

A workfile must be made available by the appraiser when required by state enforcement agencies or due process of law. In addition, a workfile in support of a Restricted Use Appraisal Report must be available for inspection by the client in accordance with the Comment to Standards Rule 2-2(c)(ix).

9. As he went about preparing the subject appraisal, Mr. Smalley compiled a workfile consisting of the data on which he based his appraisal, including photographs, diagrams, maps, and printouts on the property sales in the neighborhood, known as "comparables." Mr. Smalley maintained a hard copy of the workfile, and he also put the workfile into the office computer.

10. In reporting the results of his appraisal of the subject property, Mr. Smalley used the "Uniform Residential Appraisal Report," which is identified as "Freddie Mac Form 70." Mr. Smalley entered the data on which he based his appraisal and his conclusion regarding the value of the property on the form, he typed his name on the line on the second page of the form

reserved for the name of the appraiser, and he typed "Franky Otero" on the line on the second page of the form reserved for the name of the supervisory appraiser. The date of "July 15, 1999" was typed in the space below the typed names.

11. Mr. Smalley signed his name on the line above his typed name. Then, as was his usual practice with Mr. Campbell, Mr. Smalley left the report and the workfile in a designated area for Mr. Otero to pick up so he could review the appraisal report and the workfile and sign the appraisal report.

12. After he completed the appraisal report, Mr. Smalley included in the hard-copy of the workfile a copy of the two-page report. The copy of the appraisal report Mr. Smalley retained in the workfile was printed from the workfile he maintained on the computer, and this copy of the report did not contain either his signature or that of Mr. Otero.

13. On August 12, 1999, the Department received an anonymous complaint in which it was asserted that the value assigned in the appraisal report to the property located at 15315 Southwest 178th Terrace, Miami, Florida, was too high; a copy of the appraisal report containing signatures purporting to be those of Mr. Smalley and Mr. Otero was attached to the complaint filed with the Department. The Department forwarded a copy of the complaint to Mr. Otero.

14. At some point after he received notification of the complaint, Mr. Otero telephoned Mr. Campbell to advise Mr. Campbell that he, Mr. Otero, was being investigated by the Department with respect to a complaint it had received about an appraisal report prepared by Mr. Smalley. Mr. Campbell set up a meeting with Mr. Otero and Mr. Smalley. Prior to the meeting, Mr. Otero sent Mr. Campbell a copy of the subject appraisal report by facsimile transmittal. The copy of the report that Mr. Otero sent to Mr. Campbell contained signatures above the typed names of Mr. Smalley and of Mr. Otero.

15. Mr. Otero's primary concern at the meeting, and the focus of the discussion, was the allegation in the complaint that the value assigned to the property in the appraisal report was too high. There was also some discussion about whether Mr. Otero had signed the appraisal report.

16. The first time Mr. Smalley saw a copy of the report containing a signature above Mr. Otero's typed name was at the meeting with Mr. Campbell and Mr. Otero.

17. The Department's investigator interviewed Mr. Smalley on March 9, 2000. During the interview, the investigator reviewed Mr. Smalley's workfile on the subject appraisal and copied selected documents from the file, with Mr. Smalley's assistance. One document that the investigator copied from Mr. Smalley's workfile was the copy of the two-page appraisal

report that Mr. Smalley had printed from the workfile he maintained on the computer, which copy did not contain signatures of Mr. Smalley and Mr. Otero.

18. The Department's investigator obtained a computer printout of Mr. Smalley's licensure file. According to the Department's investigator, the printout did not show that Mr. Otero was registered with the Department as a supervisory appraiser for Mr. Smalley in July 1999. As a result, the Department issued to Mr. Smalley a Uniform Disciplinary Citation dated March 13, 2000, charging that a Uniform Residential Appraisal Report was submitted to Mr. Smalley's client with the signature of a supervisory appraiser who was not registered with the Department.

Summary

19. The evidence presented by the Department is not sufficient to establish with the requisite degree of certainty that Mr. Smalley failed to maintain a workfile for the subject appraisal, that he failed to maintain a workfile while he was preparing the appraisal that contained the data on which he relied in completing the appraisal, or that he was required to include in the workfile a copy of the signed appraisal report.

20. The evidence presented by the Department is not sufficient to establish with the requisite degree of certainty that the signature on the appraisal report was not Mr. Otero's

signature, that Mr. Smalley signed Mr. Otero's signature to the subject appraisal report, or that Mr. Smalley knew or should have known that Mr. Otero was not registered as one of his supervisory appraisers.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2000).

22. In its Administrative Complaint, the Department seeks to impose penalties against Mr. Smalley that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving by clear and convincing evidence that Mr. Smalley committed the violations alleged in the Administrative Complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

23. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

24. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L. Ed. 2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davie, 645 So. 2d 398, 404 (Fla. 1994).

25. Section 475.624, Florida Statutes (1999), provides that the Florida Real Estate Appraisal Board may, inter alia, revoke or suspend the license, registration, or certification of

a real estate appraiser or may reprimand, fine, or put on probation any such appraiser if the appraiser has committed any one of several acts enumerated in the statute.

26. Section 475.624 is a penal statute and, as such, must be strictly construed in favor of Mr. Smalley. See Munch v. Department of Professional Regulation, Division of Real Estate, 592 So. 2d 1136, 1138 (Fla. 1st DCA 1992),

27. Section 475.628, Florida Statutes (1999), provides:

Each appraiser registered, licensed, or certified under this part shall comply with the Uniform Standards of Professional Appraisal Practice. Statements on appraisal standards which may be issued for the purpose of clarification, interpretation, explanation or elaboration through the Appraisal Foundation shall also be binding on any appraiser registered, licensed, or certified under this part.

28. Section 475.624(14), Florida Statutes (1999), provides that disciplinary action may be taken against an appraiser who "[h]as violated any standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice." The Department included in its Administrative Complaint the factual allegation that Mr. Smalley "failed to maintain a workfile for the appraisal report." This factual allegation is the basis for the charge in Count I of the Administrative Complaint that Mr. Smalley "violated a standard for the development or

communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice, specifically the conduct portion of [the] Ethics Rule, in violation of § 475.624(14), Fla. Stat.(1999)."³ Based on the findings of fact herein and for the reasons set forth below, the Department has failed to satisfy its burden of proving by clear and convincing evidence that Mr. Smalley violated Section 475.624(14), Florida Statutes (1999), as alleged in the Administrative Complaint or as argued by the Department in its Proposed Recommended Order.

29. Although the Administrative Complaint alleges only that Mr. Smalley failed to maintain a workfile and the Department stipulated at the hearing that Mr. Smalley maintained a workfile on the subject appraisal, the Department takes the position in its Proposed Recommended Order that

[t]hough Respondent was able to produce a complete workfile at the hearing, Inv[estigator] Piper testified that when he reviewed the subject file, the workfile did not contain signed copies of the appraisal report or supporting data. . . . Though Respondent maintained a workfile, he failed to maintain a complete workfile containing a signed appraisal report at the time he developed and communicated the appraisal report.

30. First, the Department has failed to prove by clear and convincing evidence the factual allegation that Mr. Smalley failed to include in his workfile for the subject appraisal the

data required by the USPAP record-keeping rule. At the hearing, the Department stipulated that Mr. Smalley maintained a workfile for the subject appraisal, and it stipulated that the workfile contained those documents identified by Mr. Smalley during his testimony, which documents included data to support the appraisal.⁴ The testimony of the Department's investigator that Mr. Smalley's workfile did not contain the data to support the appraisal and/or that the data in the workfile was accumulated "after the fact" does not meet the standard for clear and convincing evidence: The investigator's testimony was not precise and explicit regarding the documents that were contained in the file, and his bare assertion in his testimony that the data in the workfile he examined was collected "after the fact" is without any point of temporal reference and is unsupported by any explanation of the basis for his conclusion.

31. Second, although the Department has proven by clear and convincing evidence that the workfile maintained by Mr. Smalley did not contain a signed copy of the appraisal report, this proof is not sufficient to establish that Mr. Smalley violated the record-keeping provision of the USPAP. The provision contains a series of items that must be included in an appraiser's workfile, and each item in the series is set off from the others by a semi-colon. By its terms, the provision requires that an appraiser keep "true copies of any

written reports, documented on any type of media"; the requirement that an appraiser must provide a "signed and dated certification" applies only to "summaries of any oral reports or testimony, or a transcript of testimony." The Comment to the USPAP provision explains that the true copy maintained in the workfile must be "of the entire actual written appraisal . . . sent or delivered to the client."

32. The only evidence offered by the Department to support its contention that the USPAP provision requires an appraiser to include in his workfile a signed copy of the appraisal report is, again, the bare assertion of the Department's investigator in his testimony at the hearing. The Department did not present any evidence to establish that it is the practice in the industry to keep a signed copy of the appraisal report in the workfile, and neither the USPAP provision nor the Comment contains any such requirement. The Department did not allege in the Administrative Complaint, and there was no evidence to establish, that the contents of the copy of the appraisal the Department's investigator obtained from Mr. Smalley's workfile were any different from the contents of the copy of the appraisal sent to the Department with the anonymous complaint.⁵ Therefore, the Department has failed to prove that Mr. Smalley's workfile did not contain a "true copy" of the appraisal report sent to Mr. Smalley's client.

33. Section 475.624(2), Florida Statutes (1999), provides that disciplinary action may be taken against an appraiser when the appraiser "[h]as been guilty of . . . culpable negligence, or breach of trust in any business transaction in this state" The Department included in its Administrative Complaint the factual allegation that Mr. Smalley "knew or should have known that the signature of the supervisory appraiser was not the genuine signature of the person it purported to represent." This factual allegation is the basis for the Department's charge in Count II of the Administrative Complaint that Mr. Smalley "is guilty of culpable negligence or breach of trust in a business transaction in violation of § 475.624(2), Fla. Stat. (1999)." Based on the findings of fact herein and for the reasons set forth below, the Department has failed to satisfy its burden of proving by clear and convincing evidence that Mr. Smalley violated Section 475.624(2), Florida Statutes (1999), as alleged in the Administrative Complaint or as argued by the Department in its Proposed Recommended Order.

34. In its Proposed Recommended Order, the Department took the position that Mr. Smalley committed culpable negligence or a breach of trust with respect to the subject appraisal, first, because he forged Mr. Otero's signature to the appraisal report and, second, because he knew or should have known that Mr. Otero was not his supervisory appraiser.

35. The Department has failed to prove by clear and convincing evidence that the signature on the appraisal report was not Mr. Otero's signature. The Department's investigator testified that Mr. Otero's attorney told him that Mr. Otero said he did not sign the subject appraisal report, and the investigator further testified that Mr. Otero sent him a letter in which he denied having signed the report; this letter was not offered into evidence, nor was any document purportedly containing Mr. Otero's signature offered into evidence to provide a point of comparison with the signature on the appraisal report purported to be that of Mr. Otero. Mr. Campbell testified that Mr. Otero told him that he (Mr. Otero) had not signed the appraisal report. The testimony of both the Department's investigator and Mr. Campbell is hearsay; it would not be admissible over objection in a civil action; and it does not supplement or explain other evidence. This testimony is not sufficient, therefore, to support a finding of fact that the signature on the appraisal report is not Mr. Otero's signature. See Section 120.57(1)(c), Florida Statutes (2000).

36. Furthermore, even if the Department had proven that the signature on the appraisal report is that of Mr. Otero, the Department has failed to prove by clear and convincing evidence that Mr. Smalley affixed the signature to the report.

Mr. Campbell's testimony that Mr. Smalley admitted during the meeting with Mr. Campbell and Mr. Otero that he had signed Mr. Otero's name to the appraisal was precise and explicit, however, he did not distinctly remember other details of the discussion that took place during the meeting. Weighed against Mr. Campbell's testimony is the testimony of the Department's investigator that, during his interview with Mr. Smalley on March 9, 2000, Mr. Smalley denied that he signed Mr. Otero's signature to the appraisal report and Mr. Smalley's testimony that he did not sign Mr. Otero's name to the report. Having considered all of the evidence of record and assessed the credibility of the witnesses and the persuasiveness of the testimony, the undersigned is not firmly convinced that Mr. Smalley signed Mr. Otero's name to the subject appraisal report, especially since the Department offered no cognizable proof to establish that the signature on the appraisal report was not Mr. Otero's signature.

37. Finally, the Department has failed to prove by clear and convincing evidence that Mr. Smalley knew or should have known that Mr. Otero was not registered with the Department as his supervisory appraiser. The Department offered no cognizable proof to establish that Mr. Otero was not registered with the Department as a supervisory appraiser for Mr. Smalley. The only evidence offered to support this contention was the absence of

any mention of Mr. Otero in the "certified" summary of the contents of the Department's licensure file and the testimony of the Department's investigator that the computer printout of Mr. Smalley's licensure file did not show that Mr. Otero was registered as Mr. Smalley's supervisory appraiser. The certified summary of the contents of Mr. Smalley's licensure file is uncorroborated hearsay,⁶ and the investigator's testimony, likewise, was uncorroborated hearsay, based as it was solely on the investigator's review of a computer printout that was not offered into evidence at the hearing, much less established as a business record maintained by the Department.

38. Even if the Department had presented clear and convincing evidence that Mr. Otero was not registered with the Department as a supervisory appraiser for Mr. Smalley, the Department failed to present any evidence to establish that Mr. Smalley knew that Mr. Otero was not registered as one of his supervisory appraisers, and it failed to present any evidence from which it could be inferred that Mr. Smalley should have known that Mr. Otero was not registered as one of his supervisory appraisers. In any event, the Department is precluded from disciplining Mr. Smalley on the basis of this allegation both because it did not allege facts in its Administrative Complaint relating to this charge,⁷ and because the Department has already issued Mr. Smalley a citation

charging him with submitting an appraisal report to a client with the signature of a supervisory appraiser not registered with the Department.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Real Estate Appraisal Board enter a final order dismissing the Administrative Complaint filed against Dale Smalley.

DONE AND ENTERED this 31st day of August, 2001, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2001.

ENDNOTES

^{1/} The relevant chapter is actually Chapter 475, Florida Statutes.

^{2/} Section 475.611(1)(1), Florida Statutes (1999), defines a "registered assistant appraiser" as "a person who is registered with the department as qualified to perform appraisal services under the supervision of a licensed or certified appraiser." Rule 61J1-7.006, Florida Administrative Code, provides: "Whenever a registered appraiser signs an appraisal report, the

registered appraiser's primary or secondary supervising licensed or certified appraiser(s) must also sign the appraisal report."

^{3/} Although the Department did not specify in the Administrative Complaint the specific provision of the USPAP allegedly violated by Mr. Smalley, he did not request a more definite statement of the charges against him.

^{4/} Mr. Smalley offered his workfile into evidence, and it was received over the objection of the Department as Respondent's Exhibit 1. Counsel for the Department then stated: "I will stipulate to everything that's maintained in the file, it does not have to be admitted, I don't have a problem with it not being admitted as actual evidence. I will stipulate to Mr. Smalley['s] maintaining a workfile." (Tr. at 95.) In consideration of the Department's stipulation, Mr. Smalley withdrew Respondent's Exhibit 1.

^{5/} In fact, a comparison of the first two pages of Petitioner's Exhibit 2, the copy of the appraisal report the Department's investigator obtained from Mr. Smalley's workfile, and the first two pages of Petitioner's Exhibit 4, which was purportedly sent to the Department attached to the anonymous complaint, reveals that the contents of the two documents are identical; the only difference is that Petitioner's Exhibit 4 contains what purport to be the signatures of Mr. Smalley and Mr. Otero.

^{6/} The information recited in the "certified" summary of the contents of Mr. Smalley's licensure file is hearsay when it is offered to prove the contents of the file. A certification is properly used to certify the authenticity of the documents contained in the licensure file and attached to the certification, see Section 90.902(4), Florida Statutes, and the hearsay nature of the documents can be overcome by the testimony of a qualified witness establishing that the documents are business records. See Section 90.803(8), Florida Statutes.

^{7/} See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) ("Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act.")

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.