STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case No. 01-3376PL
IAN WESLEY ROSS-JOHNSON,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings by its duly-designated Administrative Judge, Fred L. Buckine, held a formal hearing in the above-styled cause on November 7, 2001, in Clearwater, Florida.

APPEARANCE

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

For Respondent: Ian Ross-Johnson, pro se
575 Indian Rocks Road, North
Belleair Bluffs, Florida 33770

STATEMENT OF THE ISSUE

The issue is whether Respondent knew Orkin Pest Control had neither treated nor warranted property located at 16 Hibiscus

Road, Belleair, Florida, for powder post beetles and falsely represented to buyers at closing that they had, in violation of Section 475.25(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

By Administrative Complaint dated July 18, 2001, the Department of Business and Professional Regulation, Division of Real Estate (Petitioner) alleged that Ian Wesley Ross-Johnson (Respondent) violated Subsection 475.25(1)(b), Florida Statutes. The alleged violation is that Respondent knowingly and falsely represented to John and Michele DeCaprio (Buyers) that there was a current warranty for powder post beetle treatment on the property located at 16 Hibiscus, Belleair, Florida, when, in fact, that statement was not true. The Respondent denied the allegations and requested a formal hearing. On August 24, 2001, the Department forwarded the request for hearing to the Division of Administrative Hearings for formal proceedings pursuant to Subsection 120.57(1), Florida Statutes. On November 7, 2001, in Clearwater, Florida, a formal hearing was conducted.

At the final hearing the Petitioner presented the testimony of four witnesses: Lisa Rhodabeck, Agency Investigator II; Edwin Walhbeck, Walhbeck's Termite and Pest Control; Michelle and Michael DeCaprio, Buyers; and had Exhibits 1-9 admitted into evidence. Respondent testified on his own behalf and presented the testimony of three witnesses, Mary Ann McArthur, Manager,

Arvida Realty Services, listing agent for the Seller and Respondent's managing Broker; Maureen Stilwell, Broker, Coldwell Banker, Residential Real Estate, transactional agent for the Buyers; and Kathy Ross-Johnson, Respondent's wife, and had Exhibits 2-7 admitted into evidence.

A Transcript of the hearing was filed November 28, 2001. Respondent did not file a Proposed Recommended Order. Petitioner's Proposed Recommended Order was filed on December 18, 2001, and has been considered in the preparation of the Recommended Order.

FINDINGS OF FACT

Based upon observation of the witnesses and their demeanor while testifying, the documentary materials received in evidence and the entire record complied herein, the following relevant facts are found:

1. Petitioner is a State of Florida licensing and regulatory agency charged with the responsibility and duty to regulate the practice of persons holding real estate brokers' and salespersons' licenses in Florida and to prosecute administrative complaints pursuant to Section 20.165, Florida Statutes; Chapters 120, 455, and 475, Florida Statutes; and the rules promulgated pursuant thereto.

2. At all times material to this case, Respondent, Ian Wesley Ross-Johnson, is and has been licensed as a real estate

salesperson, holding Florida license number 0648583 in accordance with Chapter 475, Florida Statutes. The last license the state issued Respondent was as a salesperson in association with St. Joe Real Estate Services, Inc., a broker corporation located at 19353 US Highway 19 North, Suite 100, Clearwater, Florida 33764.

3. Michele and John DeCaprio, Buyers, during the months of September and October in 1999, were seeking to purchase a home and in October found 16 Hibiscus Drive, Belleair, Florida, attractive. Buyers contacted their realtor, Maureen Stilwell, Coldwell Banker Residential Realty Division, and through her made an offer to purchase the 16 Hibiscus Drive property to the listing agent, Arvida Realty, with whom Respondent was associated as a salesperson.

4. Buyers, by their admissions, had brought and sold many residential properties in the past and owned five other properties before acquiring the Hibiscus property. In addition to their agency relationship with Ms. Stilwell, they were or had been in agency-relationships with four other Pinellas County realtors. Buyers were astute real estate entrepreneurs, having gained experience with the terms and conditions of residential real estate sales contracts; rights of buyer/seller to cancel the contract; purchase price negotiations; set-off and damage repair limits; terms, conditions and consequences of walk

through inspection prior to closing; and residential real estate closing procedures.

5. Buyers' initial testimony and position was that they were led to believe that a powder post beetle warranty existed on the subject property, without specifically identifying the documents, the party or parties who were misleading them. When one considers Buyers' testimony in its entirety, it becomes apparent that Buyers relied upon their interpretation of Section 8(b) of the Purchase and Sales contract that after execution of the sales contract by the parties at closing, Seller became legally responsible for the cost of treating the house for powder post beetles and for providing Buyers with a powder post beetle warranty.

6. However, as the documentary evidence demonstrated, Buyers knew before closing that the 16 Hibiscus property had never been treated for powder post beetles and that there was no powder post beetle warranty in existence. Documents admitted into evidence, when considered chronologically, revealed the following facts.

7. On or about September 10, 1999, Mrs. Doherty (Seller) executed a Property Disclosure Statement for Arvida Realty Services with Respondent, Ivan Ross-Johnson, as its agent. Through Ms. Stilwell, Seller's disclosure statement was presented to Michele DeCaprio and John DeCaprio, who

acknowledged receipt by their signatures. Seller's disclosure statement represented that the property had no termites, had no current warranty, and was last inspected and treated in January 1999. It was later determined by a certified licensed wood-destroying organism inspection, retained by Buyers, that the property had, in fact, been inspected and treated for subterranean termites and was warranted for subterranean termite treatment. Buyer, upon receipt of their expert's report, knew there had been no powder post beetle treatment and, therefore, no powder post beetle warranty on this property.

8. On or about October 29, 1999, Buyers and Seller entered a Residential Sales Contract for the sale and purchase of the 16 Hibiscus Drive property. Later in November, the parties negotiated and executed an addendum to their contract recording Sellers' reduction of the sales price by $6,000.00 with Buyer's agent, Ms. Stilwell, contributing an additional $500.00 of her commission toward Buyer's closing cost. This all-inclusive maximum damage repair amount of $6,000.00 was for Buyers, in their discretion, to select and make damage repairs.

9. Almost a month before the closing on or about November 17, 1999, Buyers retained Bingham's Termite & Pest Control, a licensed wood-destroying organism inspector/treatment agency, to perform a wood-destroying organism inspection on the subject property, pursuant to Section 482.226, Florida Statutes.

Every licensed inspector/treatment agent for wood-destroying organisms, is required by Section 482.226, Florida Statutes, to post, in the attic crawl space or other visible entrance to the attic, a small notice of the type of wood-destroying organism treatment performed, date of treatment, and provide the home owner with a warranty for the specific treatment provided. The treatment notice must be made of material that will last not less than three years.

10. The scope of the Bingham Termite & Pest Control's inspection, performed by inspector Jerry Westerfield, was limited to "wood-destroying organisms." Wood-destroying organisms means arthropod or plant life, which damages and can reinfest seasoned wood in a structure, namely termites, powder post beetles, oldhouse borers, and wood decaying fungi. The inspection report prepared by Westerfield included the following results, conclusions, and recommendation to Buyers.

> 1. Powder post beetles exit holes and frass in attic on rafters and ceiling joist. Subterranean termite tunnels in attic above bathroom, subterranean termite tunnels in tub trap. Subterranean termite swarmers in closet by front door and in second bathroom.
> 2. Minor visible damage in same areas as number one. Minor visible water rot damage in numerous areas of overhand and north door casing.
> 3. Drill marks for previous subterranean termite treatment. Subterranean treatment sticker for subs dated 4/30/98 Wahlbeck Pest Control.

> Recommend treatment for powder post beetles, if warranty is required. $3,850.00.
> For property: 16 Hibiscus Road."
> [emphasis added]

11. The Bingham report was sent to Buyers on or about November 17, 1999. Buyers, after receipt and review of the Bingham report, knew that the subject property had not been treated for powder post beetles in the past three years. Bringham did not find a treatment sticker, and, therefore, no warranty existed for powder post beetles. Buyers were not misled by Respondent, but rather voluntarily chose not to follow the recommendation of their experts and treat the property for powder post beetles. Neither did Buyers, when negotiating their maximum damage allocation with Seller, insist that Seller treat the house for powder post beetles in addition to reducing the sale price. After concluding the negotiation, Buyers were not misled by Respondent, but rather chose not to spend their negotiated damage allocation of $6,000.00 for the recommended powder post beetle treatment. Had Buyers followed their expert's recommendation and treated the property for powder post beetles, the servicing agency would have provided a warranty for that specific treatment. Buyers were not lead to believe, as they proclaimed, by this report or any other inspection report that there was an existing powder post beetle warranty on the subject property.

12. On or about November 17, 1999, Buyers retained a second licensed certified contractor, Young Home Consulting, to complete a non-exhaustive standard visual inspection of readily available areas limited to observations of apparent conditions at that time, of the 16 Hibiscus Road property. Present for the visual inspection by inspector Neal Fuller were Buyers, Seller, Respondent, and Ms. Stilwell. At the site and upon completion of the inspection, Buyers were given a copy of the report.

13. The Young report found minor termite damage. Young instructed Buyers to obtain all records and disclosures of termite treatment. Attached to Young's report was the Wahlbeck Termite and Pest Control inspection report dated April 25, 1998. The Wahlbeck report reflected evidence of infested subterranean termite damage in exterior, attic, joists, girders, and walls. No damage was shown resulting from powder post beetles, but under the key symbols, Young circled powder post beetles. Buyers were not led, as they proclaimed, by this report to believe that there existed a powder post beetle warranty for the subject property.

14. Buyers after receiving a second inspection report reflecting the property had not been treated for powder post beetles, and, therefore no powder post beetle warranty existed wrote their agent, Ms. Stilwell, expressing their desire for powder post beetle tenting treatment. At this point in the

process, with two reports confirming a need for powder post beetles treatment and a powder post beetle warranty, it is clear that Buyers were not led to believe that there was an existing powder post beetle warranty on the subject property. Buyer's position that they were led to believe a warranty existed is inconsistent with and contrary to facts contained in the several inspection reports.

15. On or about November 20, 1999, Buyers, Respondent and Ms. Stilwell, each with knowledge of the contents of Seller's Disclosure Statement, the Bingham Inspection Report, the Young walk-through Report, the Wahlbeck treatment report, and from Buyers personal inspection of the subject property, met to negotiate Buyers' maximum damage adjustment allocation to be made by Seller. The parties agreed to reduce the purchase price by $6,000.00. This agreement was attached to the sales contract as an addendum.

16. After the negotiated damage allocation, Buyers continued to maintain the position that Respondent promised them that: (i) he would have the house tented at seller's expense; and (ii) he would provide them with the existing warranty for powder post beetles. The position of Buyers is inconsistent with known facts and the recommendations contained in the above referenced inspection reports. The DeCaprios' testimony

regarding promises allegedly made by Respondent on these matters is nonpersuasive and lacks credibility.

17. On or about November 26, 1999, Buyers fax a letter to Respondent regarding Wahlbeck's April 25, 1998, report, requesting Respondent provide them with information about a powder post beetle warranty for their personal research. Buyers' research request, considered in addition to the inspectors' findings and recommendations, reduces Buyers' November 26 fax to a self-serving document. After securing two inspections, both of which informed Buyers that no powder post beetle treatment had been performed on this property and, thus, no resulting warranty existed, Buyers' position that they were led to believe a powder post beetle warranty did exist is unconscionable. Based on the findings contained in the two inspection reports, Buyers would have been led to the only reasonable conclusion that no powder post beetle treatment and no warranty existed on the subject property.

18. On or about December 5, 1999, Buyers met with Respondent, the Seller, and Ms. Stilwell to negotiate the "maximum damage" allocation to be credited to Buyers by Seller for any and all repairs Buyers may choose to make on the property. The parties agreed to reduce the purchase price by $6,500.00 for an all-inclusive maximum damage amount. With knowledge of their experts' recommendations, Buyers chose not to

include the cost of powder post beetle tenting treatment as a part of or in addition to their maximum damage allowance with Seller. The evidence does not establish that on December 5, 1999, Buyers relied on a promise from Respondent to provide them with a powder post beetle treatment and warranty during the negotiations of maximum damage credit. The written statement from Mrs. Doherty (Seller) that: "Mr. and Mrs. DeCaprio were well aware that there was no warranty for powder post beetles,. . ." is credible.

19. On or about December 15, 1999, Buyers, with their agent, Ms. Stilwell, conducted a pre-closing walk-through inspection of the subject property. Buyers were satisfied with the property and signed the walk-through report accepting the property in the "as is" condition. The parties typed at the bottom of the walk through report a disclaimer, to wit: "The $6,500 credit given to Buyers will remove any further claim against this property." At this point in the sale and purchase process, having received their experts' reports recommending treatment for powder post beetles, and having negotiated their maximum damage allocation, and not having received one iota of evidence that powder post beetle treatment and a powder post beetle warranty existed, it is unreasonable to believe that Buyers were led to believe, by any form of communication that

there was a current powder post beetle warranty for treatment on the subject property.

20. At the closing, four days later on December 19, 1999, in the presence of Jeanne Hills, closing agent for Sunbelt Title; Ms. Stilwell, Buyers' agent; and Respondent, Seller's agent, Buyers were given the Bringham's Termite Pest inspection report. Buyers signed the report acknowledging receipt. At this concluding point in the process, it is again unreasonable that Buyers were led to believe that there was a current powder post beetle warranty for treatment on the subject property.

21. From all documentary evidence admitted in evidence and from testimony of the witnesses attending the December 19, 1999, closing, there is no clear, precise, explicit evidence of anyone overhearing Respondent make a promise to Buyers that Orkin had a powder post beetle warranty on the subject property. There is no clear, precise, explicit evidence from a witness of overhearing Respondent make a promise to Buyers that he would secure from Orkin a powder post beetle warranty and deliver it to them at a later date.

22. Mrs. DeCaprio's testimony, " . . .had she asked her agent, Maureen Stilwell, at closing to press Respondent to produce the (powder post beetle) warranty he wouldn't have been able to produce the warranty because one did not exist," confirms the fact that Buyers knew no treatment for powder post

beetles had been performed on this property and, thus, no warranty existed. At this point in the process, its unreasonable to believe a warranty for powder post existed. The position taken by Buyers that Respondent made a promise to provide them a powder post beetle warranty from Orkin after the closing appears to be evidence of a promise falsely made. However, upon closer reflection it is self-serving evidence and, thus, not credible. Mrs. DeCaprio's testimony is disingenuous and, therefore, not credible.

23. Buyers' professed belief that Respondent, by words or deeds, intentionally misrepresented to them the fact that a powder post beetle warranty existed on the subject property, when considered in light of information known to Buyers prior to and at the closing on December 19, 1999, appears to have been based on solely Buyers' conjectures and suppositions. At the closing, Buyers were fully aware of the following facts: One, no treatment for powder post beetle had been performed on the subject property in the preceding three years. Two, if no powder post beetle treatment, no warranty existed for powder post beetle treatment. Three, powder post beetle treatment (tenting the house) would cost an estimated $3,850.00. Four, Seller would not increase Buyers' maximum damage allocation above the previously agreed $6,000.00. Five, treatment for subterranean termites had been performed on the property, and

the subterranean termite warranty was to be provided Buyers. Six, Seller was ready, willing, and able to satisfy Sellers' obligation imposed by the terms and conditions of the Purchase Sale contract at closing. Seven, Buyers would have to pay for the powder post beetles treatment should they decide to have the property treated after the closing. Considering Buyers' acknowledged experience gained from their purchase of more than eight homes in the past, and Buyers' possession of the above information, it is unreasonable that these experienced Buyers could have been or were led to believe a powder post beetle warranty existed on this property. Buyers were not led, as they maintain, by any specific conduct or specific statements made by Respondent, to believe and reply upon the existence of a powder post beetle warranty on the 16 Hibiscus Drive property.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has Jurisdiction over the subject matter and the parties to this proceeding in accordance with Section 120.569 and Section 120.57(1), Florida Statutes.

25. The Department of Business and Professional Regulation, Division of Real Estate, is responsible for licensure and regulation of real estate salespersons in Florida. Chapter 475, Florida Statutes.

26. Subsection 475.25(1)(b), Florida Statutes, is penal in nature. As such, it must be construed strictly in favor of the one against whom the penalty would be imposed. See Holmberg v. Department of Natural Resources, 503 So. 2d 944 (Fla. 1st DCA 1987).

27. The Standard of Proof required to discipline a licensee is that of clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1999); Ferris v. Turlington, 510 So. 2d 292, 295 (Fla. 1987), quoting from Reid v. Florida Real Estate Commission, 188 So. 2d 846, 851, (Fla. 2nd DCA 1966) which stated that:

> The power to revoke a license should be exercised with no less careful circumspection than the original granting of it. And the penal sanctions should be directed only toward those who by their conduct have forfeited their right to the privilege, and then only upon clear and convincing proof of substantial causes justifying the forfeiture.

28. The Court further amplified the clear and convincing evidence standard. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Slomowitz court said:

> Clear 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

> testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

29. Disciplinary action taken against a licensee may be based only upon those offenses specifically alleged in the Administrative Complaint. Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129, (Fla. 5th DCA 1987); Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2nd DCA 1984)

30. The Administrative Complaint alleges that Respondent, Ian Ross-Johnson, violated Section 475.25(1)(b), Florida Statutes, when the following material allegations occurred:

> At the closing on or about December 16, 1999, Respondent provided the Buyers with a copy of the termite warranty from Wahlbeck Termite and Pest Control . . . Knowing that Orkin Pest Control had neither treated nor warranted the property for powder post beetles, Respondent falsely represented to Buyers at closing that they had. After the closing, Buyers learned that Orkin did not treat the property for powder post beetles and therefore, did not have warranty.

31. It is this material allegation in the complaint that Petitioner must prove by clear and convincing evidence. The Administrative Complaint in a licensure revocation case, at a minimum, must adequately detail the reasons or grounds and the

specific statutes and/or administrative rules alleged to have been violated, upon which an agency would seek termination or revocation of Respondent's real estate license. See Woods v. Department of Transportation, 325 So. 2d 25 (Fla. 4th DCA 1976).

32. Petitioner did not allege that Respondent was guilty of that portion of Section 475.25(1)(b), Florida Statutes, concerning violation of a duty imposed upon him by law or by the terms of the sale and purchase contract. However, Petitioner's evidence, both oral and documentary, appears to have been predicated on the principle that paragraphs 5 and/or 8(b) of the Sale and Purchase Contract entitled Buyers to contractual rights and/or entitlements which arose after the closing. However, there is no charge of breach of duty imposed by terms of the contract filed against the Respondent in this cause. Therefore, all evidence adduced by Petitioner in support thereof, is irrelevant and immaterial.

33. The wrongful conduct as enumerated in Subsection 475.25(1)(b), Florida Statutes, concerning fraud, misrepresentation, dishonest dealing by trick, of false pretense, breach of trust, false promise, is charged in the Administrative Complaint to have arisen from the factual conduct, statements and the factual transactions that began in October 1999 and continued to the closing on December 16, 1999. Petitioner's allegation of December 16, 1999, as the date of the

closing date in the complaint is an error. All parties of interest testified and the documentary evidence establishes the closing date to have been December 19, 1999.

34. In order for the alleged charge of a lie to be established, Petitioner must establish by clear and convincing evidence some false statement or misrepresentation of a material fact; that Respondent had knowledge that the representation was false; that Respondent intended that Buyers' rely on that false representation; and that Buyers, indeed, relied on that falsehood.

35. It can not be reasonably inferred that Respondent intentionally made a representation to Buyers that the 16 Hibiscus property had been treated for powder post beetles and, therefore, had a current powder post beetle warranty.

36. Section 482.226, Florida Statutes, provides, in part:

> (1) When an inspection for wood-destroying organisms is made for purposes of a real estate transaction, and either a fee is charged for the inspection or a written report is requested by the customer, a wood-destroying organism inspection report shall be provided by the licensee or its representative qualified under this Chapter to perform such inspections. The inspection shall be made in accordance with good industry practice and standards as established by rule and must include inspection for all wood-destroying organisms. The inspection findings shall be reported to the person requesting the inspection. The report shall be made on a form prescribed by the department and

furnished by the licensee. A copy of the inspection report shall be retained by the licensee for a period of not less than 3 years.

(2)(a) The inspection report must contain the following information and statements:

1. The licensee's name.
2. The date of the inspection.
3. The address of the structure inspected.
4. Any visible accessible areas not inspected and the reason for not inspecting them.
5. The areas of the structure that were inaccessible.
6. Any visible evidence of previous treatments for, or infestations of, wood-destroying organisms.
7. The identify of any wood-destroying organisms present and any visible damage caused.
8. A statement that a notice of the inspection has been affixed to the property in accordance with subsection (4) or subsection (5) and a statement of the location of the notice.

(b) If any pest control treatment is provided at the time of the inspection, the inspection report must also provide the name of each of the wood-destroying organisms for which treatment was provided, the name of the pesticide used, and all conditions and terms associated with such treatment.

(c) An inspection report does not constitute a guarantee of the absence of such organisms or damage or other evidence unless the report specifically states therein the extent of such guarantee.

* * *

(4) When a wood-destroying organisms inspection is provided in accordance with subsection (1), the licensee shall post notice of such inspection immediately adjacent to the access to the attic or crawl

> area of other readily accessible area of the property inspected. This notice must be at least 3 inches by 5 inches in size and must consist of a material that will last at least 3 years. It is a violation of this chapter for anyone other than the property owner to remove such notice at any time. The licensee's name and address and the date of the inspection must be stated on the notice.
>
> (5) In addition to the notice required by subsection (4), any licensee who performs control of any wood-destroying organisms shall post notice of such treatment immediately adjacent to the access to the attic or crawl area or other readily accessible area of the property treated. This notice must be at least 3 inches by 5 inches in size and must consist of a material that will last at least 3 years. It is a violation of this chapter for anyone other than the property owner to remove such notice at any time. The licensee's name and address, the date of treatment, the name of the pesticide used, and the wood-destroying organism for which treatment and the wood-destroying organism for which treatment was performed must be stated on the notice. The contract for treatment between the licensee and consumer must state the location of such notice.

37. The evidence in the record does establish, however, that Respondent and Buyers knew from the November 1999, inspection report that 16 Hibiscus did not have a powder post beetle treatment by Orkin Termite and Pest Control in the preceding three years. Assuming a contrary interpretation of Respondent's conversations and statements to Buyers is taken, the record contains an abundance of evidence that Buyers had an additional expert report dated November 26, 1999, reflecting

that no powder post beetle treatment had occurred at 16 Hibiscus property within the preceding three years. Therefore, it would be unreasonable to conclude that Buyers relied on verbal statements contrary to the written reports from their two wood-destroying organism experts.

38. Petitioner must prove that Respondent's conduct was intentional, Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992). Alternatively, Petitioner may prove a violation through the culpable negligence of Respondent in this transaction.

39. In this case, Respondent was open and fair in his relationship with Buyers. All inspection reports, both required from Seller and those requested and paid for by Buyers, were clear and unambiguous in their findings, conclusions, and recommendations. The property had been treated for subterranean termites. The property had a warranty for subterranean termite treatment. The property had not been treated for powder post beetles. The property, not having been treated for powder post beetles, could not have a warranty for powder post beetles treatment. Two licensed and certified wood-destroying inspectors recommended to Buyers that they should get treatment for powder post beetle on the subject property. Respondent concealed no factual truth from Buyers regarding these determinative issues. In deed, the two inspectors retained by

Buyers gathered the aforementioned information of there having been no powder post beetle treatment on the property within the three years preceding the closing on December 19, 1999.

40. Assuming that Buyers, based upon their knowledge and experience in residential real estate sales and purchases, after their conversations with other parties of interest, and after their inspection of the property, concluded from their conversations with Respondent and believed that there existed a valid powder post beetles warranty, such forced reasoning would be inconsistent with the facts made known to them by their experts.

41. The evidence in the record that could not be reasonably interpreted, but for Buyers' uncorroborated testimonies, that Respondent intentionally engaged in conduct that resulted in or intended to mislead or deny Buyers access to the house; denied or concealed from Buyers any reports of wood-destroying organism inspections on the house, or denied Buyers inspections of the house and many interviews with Seller before closing.

42. Section 475.25, Florida Statutes, sets forth standards for disciplinary actions that can be taken by the Division of Real Estate, and provides in relevant part as follows:

475.25 Discipline. --

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative find not to exceed $1,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

* * *

(b) Had been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other persons engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim of intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.

43. The wrongful conduct charged and enumerated in Subsection 475.25(1)(b), Florida Statutes, concerning false representation and promise is charged to have arisen from the factual conduct and factual transaction that occurred on December 19, 1999, at the closing. In order for the charge of having made a false promise to be established, Petitioner must adduce clear and convincing evidence of some false statement or false representation of a specific material fact, to wit: first, that Respondent had knowledge that the representation was false; second, that the Respondent intended that Buyers rely on that false representation; and, third, that Buyers had indeed relied on that falsehood.

44. The evidence in the record in this case is not clear or convincing that Respondent intentionally made a false statement of fact that Orkin had treated the subject property for powder post beetle. What is clear is that the two licensed inspectors, both retained by Buyers, did not find the legally required treatment sticker evidencing powder post beetle treatment on the subject property when they inspected the property. In this case, there was never a powder post treatment sticker posted on the subject property. For experienced buyers, owners of more than eight homes over the years, it is not reasonable that they would proceed to closing on a $200,000.00 home on mere oral assurances of Seller's agent, that were

contrary to their experts' recommendations, that a warranty for powder post beetle existed.

45. There is no clear and convincing evidence that Respondent made a representation or promise to Buyers that Orkin had treated the subject property for powder post beetle when in fact Orkin had not done so.

46. The evidence is clear that Respondent's conduct evidenced his intent that Buyers rely upon the documents generated and related to this cause, such as Seller's disclosure statement, the purchase and sale contract, the inspection reports secured by both Seller and Buyers, and documents provided by the closing agents. It is equally clear from the testimony and documentary evidence that Buyers, Mr. and Mrs. DeCaprio, relied upon their interpretation of Section 8(b) of the sales contract to conclude they were entitled to a powder post beetle warranty after the closing. The evidence in this case demonstrates that Buyers were not misled by alleged misrepresentations or by alleged promises made by Respondent.

47. The evidence in the record establishes that the Respondent performed in a truthful manner with Buyers at all times material hereto. The evidence in the record also establishes that Respondent was not aware that Buyers' position was based upon their interpretation of Section 8(b) of the sales contract.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and the evidence in the record, including the contents of the exhibits admitted therein, it is, therefore,

RECOMMENDED that:

A Final Order be entered by the Department of Business and Professional Regulations, Division of Real Estate, finding Respondent, Ivan Ross-Johnson, did not make false representations to Buyers and is therefore not guilty of violation of Subsection 475.25(1)(b), Florida Statutes, as alleged in the Administrative Complaint filed in this cause.

DONE AND ENTERED this 9th day of January 2002, in Tallahassee, Leon County, Florida.

FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of January, 2002.

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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 must be filed with the agency that will issue the Final Order in this case.