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Final Order No. BPR-2003-00017 Date:

FILED

1-6-03

Department of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By:

Brandon M. Nichols

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
FLORIDA REAL ESTATE COMMISSION

FILED
04 JUL 15 AM 10:00
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE

AP

Petitioner

vs.

CASE NO. 9882454; 9883934; 9885059

DOAH NO. 02-1644PL. REM-CWS

MARVIN L. POPKIN

Respondent

FINAL ORDER

On October 16, 2002, pursuant to Sections 120.569 and 120.57(1) of the Florida Statutes, the Florida Real Estate Commission heard this case to issue a Final Order.

Administrative Law Judge Robert E. Meale of the Division of Administrative Hearings presided over a formal hearing and issued a Recommended Order on August 14, 2002. A copy of which is attached hereto as Exhibit A and made a part hereof.

Petitioner filed Exceptions to the Recommended Order. A copy of Petitioner's Exceptions is attached hereto as Exhibit B and made a part hereof.

Respondent filed a Response to Petitioner's Exceptions. A copy of Respondent's Response to Petitioner's Exceptions is attached hereto as Exhibit C and made a part hereof.

Respondent filed a Motion to Reconsider or Mitigate. A copy of Respondent's Motion to Reconsider or Mitigate is attached hereto as Exhibit D and made a part hereof.

After hearing argument on Petitioner's ore tenus Motion to Strike Respondent's Motion to Reconsider or Mitigate, the Commission denies Petitioner's Motion to Strike Respondent's Motion to Reconsider or Mitigate and finds that Respondent's Motion to Reconsider or Mitigate shall be

treated as timely filed Respondent's Exceptions to the Recommended Order.

The Commission adopts the Recommended Order with the modifications outlined below.

After completely reviewing the record and being otherwise fully advised, the Commission accepts Petitioner's Exception No. 1 because "the administrative law judge's ruling is not based upon competent substantial evidence, to wit: the motion to quash subpoena was on its face, number one, fatally deficient; number two, it was not timely served by any evidence, which the onus is on the Respondent to prove; and number three, it was not a motion to quash that covered all of the items subpoenaed in the subpoena duces tecum." The Commission, therefore, amends this finding to read: The only response that Petitioner received was a motion seeking to partially quash the subpoena, specifically Nations Bank Account 3871501409 and its records.

After completely reviewing the record and being otherwise fully advised, the Commission accepts Petitioner's Exception No. 2 because the Department "had the legal authority to issue a subpoena for [the records of] that brokerage corporation." The Commission, therefore, finds that Petitioner proved Count Four, the failure to comply with a subpoena.

After completely reviewing the record and being otherwise fully advised, the Commission accepts Petitioner's Exception No. 3 because "the motion to quash subpoena was fatally flawed on its face. The burden should not have shifted to Petitioner to disprove or prove its timeliness." The Commission, therefore, amends paragraph twenty-seven to read: "Respondent referred the subpoena to his attorney, who delivered to Petitioner a motion seeking to partially quash the subpoena. However, the motion was fatally flawed on its face."

After completely reviewing the record and being otherwise fully advised, the Commission accepts Petitioner's Exception No. 4 because "Respondent did not cooperate with the investigation." The Commission, therefore, finds that the Petitioner proved Count Five, obstructing or hindering the enforcement of Chapter 475, Florida Statutes.

After completely reviewing the record and being otherwise fully advised, the Commission accepts Petitioner's Exception No. 5 because "there is an error . . . regarding the penalties." The Commission, therefore, amends paragraph thirty to read:

Rule 61J2-24.001, Florida Administrative Code, provides the applicable penalty guidelines for these violations. Rule 61J2-24.001 does not provide a guideline penalty for a violation of Chapter 475.5015, Florida Statutes. Rule 61J2(3)(f) applies to violations of any provision of Chapters 475 or 455, Florida Statutes. The penalties

under Rule 61J2-24.001(3)(f) range from an eight-year suspension to revocation and a \$1000 fine. Rule 61J2-24.001(3)(cc) applies to the failure to comply with a subpoena. The penalties under Rule 61J2-24.001(3)(cc) range from a \$1000 fine and a six-month suspension to a five-year suspension. Rule 61J2-24.001(3)(dd) applies to the obstruction or hindrance of Chapter 475, Florida Statutes. The penalty under Rule 61J2-24.001(3)(dd) is revocation.

After completely reviewing the record and being otherwise fully advised, the Commission rejects Petitioner's Exception No. 6.

After completely reviewing the record and being otherwise fully advised, the Commission rejects Petitioner's Exception No. 7.

Based upon a complete review of the record; Respondent's Response to Petitioner's Exceptions; and Respondent's Exceptions, the Commission modifies the penalty in the Recommended Order.

Therefore, the Commission ORDERS the suspension of Respondent's real estate license for one day.

The Commission further ORDERS probation for a period of three years with the following terms and conditions:

The licensee shall notify the Division of Real Estate of any changes in employment.

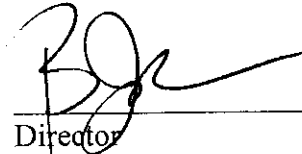
1. The licensee shall not violate any provisions of Chapter 475, Florida Statutes, or Rules adopted by the Commission.
2. The licensee shall not be found guilty or convicted of any crime in any jurisdiction.
3. The licensee shall pay an administrative fine of \$1,000.00.
4. The licensee shall satisfactorily complete a thirty-hour broker management course and provide proof of completion to the Division of Real Estate.

This Final Order shall be effective thirty days from date of filing with the Clerk of the Department of Business and Professional Regulation. However, any party affected by this Order has the right to seek judicial review, pursuant to Section 120.68 of the Florida Statutes, and to Section 9.110 of the Florida Rules of Appellate Procedure.

Within thirty days of the filing date of this Final Order, review proceedings may be instituted by filing a Notice of Appeal with the Clerk of the Department of Business and Professional Regulation at Suite 308N, 400 West Robinson Street, Orlando, Florida 32801. At the same time, a

copy of the Notice of Appeal with applicable filing fees must be filed with the appropriate District Court of Appeal.

DONE AND ORDERED this 16th day of October 2002 in Orlando, Florida.



Director
Division of Real Estate

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by U.S. Certified Mail to: Franks M. Marks, Esquire, 3127 Ponce De Leon Blvd., Coral Gables, Florida 33134; the Division of Administrative Hearings, 1230 Apalachee Parkway, Tallahassee, FL 32399-3060; and a copy provided to Lorenzo Level, Esquire, DBPR, 400 W Robinson Street 802N, Orlando, FL 32802, this 6th day of January 2003.

Brandon M. Nichols