

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,) Case 03-0717PL
)
vs.)
)
SERGIO A. BECERRA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on April 30, 2003, in Miami, Florida.

APPEARANCES

For Petitioner: Juana Carstarphen Watkins, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
Hurston Building, North Tower
400 West Robinson Street, Suite N-308
Orlando, Florida 32801

For Respondent: Sergio A. Becerra, pro se
665 West 35th Street
Hialeah, Florida 33012

STATEMENT OF THE ISSUES

At issue is whether Respondent committed the violations set forth in the Administrative Complaint dated April 2, 2002, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated April 2, 2002, the Petitioner, Department of Business and Professional Regulation, Division of Real Estate (Petitioner or DBPR), charged Respondent Sergio A. Becerra (Respondent or Becerra), with violations of various provisions of the laws governing the practice of real estate appraisal in Florida. In particular, it is alleged that Respondent failed to exercise reasonable diligence in the development or communication of a real estate appraisal dated February 2, 1996; that Respondent unlawfully obstructed or hindered Petitioner in the performance of its statutory duties, including the duty to investigate complaints against licensees; that Respondent failed to timely notify Petitioner of changes to his current mailing address; and that Respondent failed to retain records related to the February 2, 1996, appraisal for the statutorily required period of time.

The Administrative Complaint contains a typographical error in Count IV on page 4, where it references Section 475.624(2). The reference should be to Section 475.624.(1), the section which was tried by consent, and the Administrative Complaint is

deemed to be amended nunc pro tunc to April 2, 2002, inasmuch as the record of the case demonstrates that Respondent was fully aware of the details of the charges and not prejudiced in his defense by this typographical error.

Respondent timely requested a formal hearing.

At the hearing, Petitioner presented the testimony of Investigative Supervisor Brain Piper, and offered Petitioner's Exhibits 1, 2, and 3 into evidence. Respondent testified in his own behalf and offered Respondent's Exhibits 1, S (sic), and 4 into evidence.

A transcript of the hearing was filed on June 12, 2003. The parties were afforded the opportunity to submit proposed recommended orders. Petitioner did so, and its Proposed Recommended Order has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a state agency responsible for the licensing, regulation and discipline of real estate appraisal licensees in Florida.

2. At all times material to this case, Respondent was a Florida state-certified residential real estate appraiser.

3. Persons holding such licenses are required by law to assure that the state is apprised of the licensee's physical address. The purpose of the law is to assure that state

regulators, as well as clients who may have issues regarding appraisals performed by the licensee, are able to contact the appraiser in a timely manner.

4. At all times material to the charges against him, Respondent registered with Petitioner the address of 5299 West 28th Avenue, Hialeah Gardens, Florida 33016 as his current address.

5. On or about February 2, 1996, Respondent developed and communicated an appraisal report for residential property located at 28204 Southwest 43 Court, Homestead, Florida 33033 (subject property).

6. On or about August 12, 1999, Petitioner received a complaint concerning this appraisal.

7. In furtherance of its legal obligation to investigate such complaints, Petitioner promptly wrote to Respondent at his registered address. The letter was not returned, and thus a legal presumption arises that it was received by the person(s) residing on the premises. That person was Respondent's mother.

8. At the time the letter was sent and received at Becerra's registered address, Becerra himself was living in Colorado.

9. Because Becerra had never notified Petitioner of the change of address; (there is no evidence as to whether Becerra's mother did or did not forward or otherwise deal with her son's

mail) the state was thwarted in its efforts to determine the bona fides of the complaint.

10. Eventually, Becerra came back into compliance with his obligation to provide the state with an accurate address. On January 29, 2002, state investigator Brian Piper (Piper) arranged to meet Becerra at his new location, 665 West 35th Street, Hialeah, Florida, a private residence where Becerra maintained a home office. Becerra knew that the purpose of Piper's visit was to investigate the 1999 complaint regarding his appraisal of the subject property in particular, and Becerra's appraisal business in general.

11. Under Florida law, real estate appraisers must maintain a file with all documents pertaining to an appraisal for at least five years after the date of the issuance of the appraisal, and for at least two years after final disposition of any judicial proceeding in which testimony concerning the appraisal was given, whichever period expires last.

12. Thus, by the time Piper met with Becerra regarding the February 2, 1996 appraisal, Becerra was no longer legally obligated to have documents relating to that appraisal in his possession.

13. He was, however, required to cooperate with Piper's investigation. Instead, he was hostile, suspicious, and secretive in his dealings with Piper.

14. Becerra would have been within his rights to say, unambiguously, that the file concerning this appraisal, or any 1996 appraisal for that matter, had been discarded in the ordinary course of business sometime after the five-year statutory record keeping period expired.

15. Becerra did not make such a representation. Instead, he suggested to Piper that his documents were maintained on a computer, and/or at another location. As an afterthought, he raised the possibility that the documents no longer existed.

16. Piper asked, as he was entitled to do, questions regarding Becerra's practices regarding the development and maintenance of records concerning appraisals. Becerra refused to answer.

17. Frustrated in his efforts to determine whether the complaint regarding the 1996 appraisal was valid, Piper sought to exercise on behalf of the state its right to conduct a spot-audit of Becerra's books and records related to pending appraisals.

18. Observing what appeared to be appraisal request forms taped to the wall of the Becerra's office, Piper sought access to the files concerning these appraisals. Becerra refused to cooperate and demanded that Piper leave his home/office.

19. Becerra did not then and did not at hearing claim that Piper had requested information or made demands that he was not

lawfully entitled to request or make. Instead, he contended that because more than five years had elapsed between the date of the appraisal and the time the state was able to find Becerra to ask him to produce the documents, Becerra cannot be disciplined for failing to produce the documents.

20. The evidence established that Piper and DBPR acted at all times reasonably and in accordance with their legal duty to investigate specific complaints and to, more generally, monitor the operations of state-licensed appraisers to assure that they are performing their jobs in accordance with Florida law and the public interest. The evidence further established that Becerra's failure to fulfill his statutory duty to keep the state informed of his whereabouts was the sole reason the state had been unable to directly inform Becerra of its need to review the documents, and to conduct appropriate investigations into the quality of the February 2, 1996, appraisal; and, later, into the management of his appraisal business at the time of Piper's visit to Becerra's home office on January 29, 2002.

21. A comparison of the February 2, 1996, appraisal for the subject property with public records which were available at the time the appraisal was rendered revealed several discrepancies.

22. For example, the appraisal reported an incorrect folio number for the subject property, an error which Becerra admits.

23. In addition, the appraisal contained inaccurate information regarding the then-owner of the property and the square footage of the house. It also omitted reference to a previous sale, and made no mention of the fact that the subject property was located in a gated community.

24. Transactions cited in the appraisal as comparable sales were not, in fact, comparable. The appraisal left out the impacts of Hurricane Andrew upon the property; those impacts were, at the time of the appraisal, significant.

25. While the evidence is sufficient to establish that the appraisal was not a model of accuracy and attention to detail, the absence of Becerra's records, coupled with the fact that several pages of the appraisal were missing from the (anonymous) complaint which precipitated the investigation, render it impossible to determine whether Becerra did, in fact, fail to fulfill the minimum standards expected in an appraisal prepared by a Florida licensee.

26. By the time the state was able to locate Becerra and conduct its investigation, the statutory period for which documents pertaining to the appraisal had expired, and it was no longer possible to determine whether Becerra had fulfilled his legal duty to maintain the file for five years. Additionally, it was no longer possible to determine whether there were credible explanations for the discrepancies and apparent errors

in the appraisal of the subject property, or whether he had in fact performed the appraisal negligently.

27. Becerra unlawfully failed and refused to cooperate with the state's reasonable inquiry into his current appraisal cases.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.57(1), Florida Statutes.

29. The burden of proof is on the Petitioner to show by clear and convincing evidence that the Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any proposed penalty. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

30. A real estate appraiser is charged with the knowledge of the portions of Chapter 475, Florida Statutes, which relate to his professional obligations. Wallen v. Florida Dept. of Prof. Reg., Div. of Real Estate, 568 So. 2d 975 (Fla. 3rd DCA 1990). In this case, Becerra does not claim to be ignorant of the law. Rather, he asserts that the state cannot base disciplinary action upon the appraisal of the subject property because records relating to it no longer exist.

31. The requirement that the evidence against Becerra be clear and convincing operates in this case to permit Becerra to

benefit from his failure to apprise the state of his whereabouts. By the time Becerra was located, he was able to avail himself of the five-year-rule for document retention to thwart any independent review of the quality of that appraisal.

32. Clear and convincing evidence has been defined as credible, precise, explicit evidence, lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trial of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations. Evans Packing Co. v. Department of Agric. and Consumer Servs., 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), citing Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

33. Having had months to consider his situation, Becerra came to the hearing with a demeanor that reflected contempt for the state's regulatory process. His demeanor at hearing, both under oath and when acting as his own attorney, coupled with the entire record, rendered the tribunal skeptical as to whether Becerra in fact retained the records of the appraisal of the subject property for five years, and whether he conducted the appraisal with the diligence expected of state licensees. However, because those files, and a full copy of the appraisal itself, are not available, it is neither appropriate nor necessary to make a determination as to whether discipline

should be imposed for failure to fulfill minimum professional standards in the preparation of that appraisal. Neither can it be determined with the degree of certainty the law requires that Becerra in fact failed to retain the records of this appraisal for the requisite five years.

34. There is, however, clear and convincing evidence that Becerra failed to fulfill his obligation to keep the state apprised of his whereabouts, and that he hindered the state's investigation into his professional activities on January 29, 2002.

35. The charges proved in this case are serious. It is a privilege, not a right, to hold a real estate appraisal license. Licensees have a legal obligation to cooperate with state officials whose job it is to provide oversight to regulated professions. Becerra's failure to keep the state apprised of his whereabouts prevented the state from being able to timely investigate alleged violations of Section 475.624(14) and (15), Florida Statutes, governing minimum standards for real estate appraisals, as well as alleged violations of the record retention requirements of Section 475.629, Florida Statutes. Thus, those charges must be dismissed.

36. There is, however, clear and convincing evidence that Becerra failed to comply with his obligation to accurately register his office location with the state, in violation of

Section 475.623, Florida Statutes, and actively hindered a state investigator in the performance of his lawful duty in violation of Section 425.626(1)(f), Florida Statutes. The latter offense, in particular, is one for which the state is authorized pursuant to Section 475.624(1), Florida Statutes, to and usually does impose the harshest discipline possible, revocation.

37. Becerra has done nothing to show that he has learned from this disciplinary action. Rather, the record as a whole compels the conclusion that he is completely uninterested in cooperating with reasonable state laws governing the practice of his profession.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law it is RECOMMENDED that a Final Order be entered finding Respondent guilty of violating Section 475.624(1), Florida Statutes, by reason of his violations of Sections 475.623 and 425.626(1)(f), Florida Statutes, imposing a fine of \$5,000 and permanently revoking respondent's real estate appraisal license.

DONE AND ENTERED this 10th day of July, 2003, in
Tallahassee, Leon County, Florida.

Florence Snyder Rivas

FLORENCE SNYDER RIVAS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 2003.

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.