

STATE OF FLORIDA
FLORIDA REAL ESTATE APPRAISAL BOARD

DEPARTMENT OF BUSINESS
AND PROFESSIONAL REGULATION,

Petitioner,

vs.

ELSA G. CARTAYA,

Respondent.

Final Order No. BPR-2005-01354 Date: 3-17-05

FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon M. Nuebel

DOH Case Nos.: 2001-500837, 2001-500227, 2001-50046

DOAH Case Nos.: 2004-1148-PL, 2004-1680 PL

License No.: RD 2343

FINAL ORDER

THIS CAUSE came before FLORIDA REAL ESTATE APPRAISAL BOARD (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on February 8, 2005, in Orlando, Florida, for the purpose of considering Administrative Law Judge John G. Van Laningham's Recommended Order, a copy of which is attached hereto as Exhibit A, in the above-styled cause and Petitioner's Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit B. Petitioner was represented by Assistant General Counsel Alfonso Santana. Respondent was represented by Jerome H. Shevin, Esquire. The Board was represented by Assistant Attorney General Brian J. Stabley.

Upon review of the Recommended Order, considering Petitioner's Exceptions to the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

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EXCEPTIONS

1. Petitioner timely filed several exceptions to the Recommended Order on November 24, 2004.
2. Respondent did not file a response to Petitioner's exceptions.
3. Petitioner's exceptions 1 through 5 are accepted by the Board as they pertain to the application and interpretation of Section 475.624(14) of the Florida Statutes.

FINDINGS OF FACT

4. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.
5. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

6. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, Chapter 475, Part II, Florida Statutes, and Chapter 61J1 of the Florida Administrative Code.
7. The Petitioner's exceptions 1 through 5 are accepted by the Board and are incorporated by reference.

FURTHER:

8. Section 120.57(1)(l) of the Florida Statutes provides that the agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. . . . The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with

particularity the reasons therefor in the order, by citing to the record in justifying the action.

§ 120.57(1)(l), Fla. Stat.

9. Additionally, Section 475.624(14) of the Florida Statutes provides that the board may deny an application for registration, licensure, or certification; may investigate the actions of any appraiser registered, licensed, or certified under this part; may reprimand or impose an administrative fine not to exceed \$5,000 for each count or separate offense against any such appraiser; and may revoke or suspend, for a period not to exceed 10 years, the registration, license, or certification of any such appraiser, or place any such appraiser on probation, if it finds that the registered trainee, licensee, or certificateholder: Has violated any standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice.

§ 475.624(14), Fla. Stat.

10. Section 475.624(14) of the Florida Statutes imposes a duty on all licensed appraisers to comply with the Uniform Standards of Professional Appraisal Practice (USPAP) and other standards for the development or communication of a real estate appraisal. See § 475.624(14), Fla. Stat.

11. Section 475.624(14) of the Florida Statutes does not include a mens rea or intent element that must be proven to establish a violation or that may be used to mitigate a disciplinary offense. A licensee either violates USPAP standards or does not violate USPAP standards regardless of the licensee's intent.

12. The Board's interpretation and application of the law is more reasonable than that put forth by the Administrative Law Judge in this action.

THEREFORE; as to DBPR case no. 2001-500837:

13. The Board considered the factual findings in the Recommended Order and all related case materials.

14. The legal conclusion in paragraph 61 of the Recommended Order as it pertains to Section 475.624(14) of the Florida Statutes is rejected.

15. A more reasonable interpretation of § 475.624(14), Fla. Stat., is that § 475.624(14), Fla. Stat., is a disciplinary offense, which does not include a mens rea or intent element that must be proven to establish a violation or that may be used to mitigate a disciplinary offense. A licensee either violates USPAP standards or does not violate USPAP standards regardless of the licensee's intent.

16. The legal conclusion in paragraph 66 of the Recommended Order as it pertains to Section 475.624(14) of the Florida Statutes is rejected.

17. A more reasonable interpretation of § 475.624(14), Fla. Stat., is that § 475.624(14), Fla. Stat., is a disciplinary offense, which does not include a mens rea or intent element that must be proven to establish a violation or that may be used to mitigate a disciplinary offense. It is also a more reasonable interpretation that Respondent violated § 475.624(14), Fla. Stat., by violating USPAP Rule 2-2(b)(vi).

18. The legal conclusion in paragraph 67 of the Recommended Order as it pertains to Section 475.624(14), Fla. Stat., is rejected.

19. A more reasonable interpretation of § 475.624(14), Fla. Stat., is that § 475.624(14), Fla. Stat., is a disciplinary offense, which does not include a mens rea or intent element that must be proven to establish a violation or that may be used to mitigate a disciplinary offense. It is also a more reasonable interpretation that Respondent violated § 475.624(14), Fla. Stat., by violating USPAP Rule 2-2(b)(ix).

20. The legal conclusion in paragraph 72 of the Recommended Order as it pertains to Section 475.624(14), Fla. Stat., is rejected.

21. A more reasonable interpretation of § 475.624(14), Fla. Stat., is that § 475.624(14), Fla. Stat., is a disciplinary offense, which does not include a mens rea or intent element that must be proven to establish a violation or that may be used to mitigate a disciplinary offense. A licensee either violates USPAP standards or does not violate USPAP standards regardless of the licensee's intent. It is also a more reasonable interpretation that Respondent's intent does not mitigate her USPAP violations.

RECOMMENDED PENALTY

22. Section 475.624, Fla. Stat., authorizes the Board to impose the following penalties upon a licensee for statutory disciplinary violations: "reprimand or impose an administrative fine not to exceed \$5,000 for each count or separate offense against any such appraiser, and may revoke or suspend, for a period not to exceed 10 years, the registration, license, or certification of any such appraiser, or place any such appraiser on probation . . ." § 475.624, Fla. Stat.

23. Additionally, Rule 61J1-8.002(3)(q) of the Florida Administrative Code (F.A.C.) establishes the following penalty for a violation of a USPAP standard under § 475.624(14), Fla. Stat.: "The usual action of the Board shall be to impose a penalty from a 5 year suspension to revocation and an administrative fine of \$1000." Rule 61J1-8.002(3)(q), F.A.C.

24. The recommended penalty in paragraph (3) of the Recommendation Section of the Recommended Order is rejected because it departs from the Board's disciplinary guidelines, relies on mitigating factors not included in § 475.624(14), Fla. Stat., and is not an appropriate penalty for the number of USPAP violations committed by Respondent.

Upon a complete review of the record in this case, the Board REJECTS the penalty recommended by the Administrative Law Judge. The Board modifies the ALJ's recommended penalty to comply with its disciplinary guidelines and also due to the number of USPAP violations committed by Respondent.

PENALTY

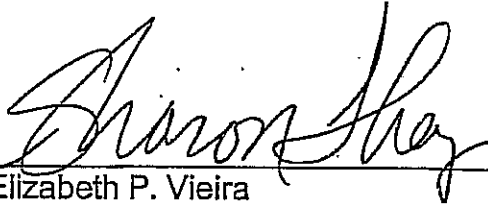
WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that:

Respondent's license is suspended for 2 years. Additionally, Respondent's license is placed on 2 years of probation which is concurrent with Respondent's 2 year suspension. During her 2 year probation term, Respondent must pay a \$3,000.00 administrative fine and \$1,089.00 in costs. While on probation, Respondent must complete a 15 hour USPAP course taught by an AQB qualified instructor. The 15 hour USPAP course shall not be applied towards Respondent's licensure renewal or to satisfy her continuing education requirements for any biennium.

This Final Order shall take effect upon being filed with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this _____ day of _____, 2005.

FLORIDA REAL ESTATE
APPRAISAL BOARD


Elizabeth P. Vieira
Director, Division of Real Estate

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to ELSA G. CARTAYA, 2121 S.W. 83 Avenue, Miami, Florida 33155; Jerome H. Shevin, Esq., Levey, Airan, Brownstein, Shevin, Friedman, Roen & Kelso, LLP, Gables One Tower, Penthouse, 1320 South Dixie Highway, PH 1275, Coral Gables, Florida 33146; John G. Van Laningham, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; Alfonso Santana, DBPR, Division of Real Estate, 400 W. Robinson Street, Suite 801N, Orlando, Florida 32801-1757; and Brian J. Stabley, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, PL-01, The Capitol, Tallahassee, Florida 32399-1050 this 17th day of March, 2005.

