

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
)  
Petitioner, )  
)  
vs. ) Case No. 04-1326  
)  
INFINITI REALTY, LLC; )  
JACQUELINE M. MULLIGAN; RICHARD )  
T. PRICE; ANITA B. TURNER; )  
MARGHERITA A. MCDANIEL; STEVEN )  
CRAIG THOMAS; and SHAW W. )  
O'NEILL, )  
)  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

In accordance with proper notice this cause came on for formal proceeding and hearing, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, on June 23, 2004, in Deland, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Alfonso Santana, Esquire  
Division of Real Estate  
400 West Robinson Street, Suite N-801  
Orlando, Florida 32802

For Respondents: Steven W. Johnson, Esquire  
100 South Bumby Avenue, Suite B  
Orlando, Florida 32803

STATEMENT OF THE ISSUE

The issues to be resolved in this proceeding are two-fold. First it must be determined whether Infiniti Realty, LLC (Infiniti) is guilty of having employed persons as sales associates who do not hold a valid and current licenses as sales associates. Secondly, it must be determined whether those individual sales persons, the Respondents in this case, operated as sales associates for any person or entity not registered as their employing broker, in violation of Subsections 475.42(1)(b)and (e), Florida Statutes (2002) and, derivatively, in violation of Subsection 475.25(1)(e), Florida Statutes (2002). If the violations or any of them are proven, it must be determined what if any penalty should be imposed on the Respondents' real estate licensure.

PRELIMINARY STATEMENT

This cause arose upon the filing of an Administrative Complaint in which the Petitioner Agency alleges that the Respondent Infiniti employed, used or engaged services of the Respondents, named above, who are not the holders of valid, current licenses as sales associates, for a period from December 30, 2002, through February 11, 2003. This is because their licenses were allegedly not registered with Infiniti as their broker, in purported violation of Section 475.42(1)(c), Florida Statutes (2002), and, correspondingly, in violation of

Section 475.25(1)(e), Florida Statutes (2002). The Petitioner contends that the named Respondents operated as sales associates for that period of time until February 11, 2003, for a person not registered as their employer in violation of Section 475.42(1)(b), Florida Statutes, and also 475.25(1)(e), Florida Statutes (2002).

The Respondents elected to dispute the charges and avail themselves of the right to a formal proceeding to contest them. They requested a formal hearing, which was conducted on June 23, 2004. The cause came on for hearing, as noticed, at which the Petitioner presented the testimony of one witness, Mr. James Courchaine, an investigator for the Department of Business and Professional Regulation, Division of Real Estate (Department) and offered Petitioner's Exhibits one, seven, eight, nine, ten (a-f), and twelve, which were admitted into evidence. The Respondents presented the testimony of one witness Carolyn Cass-Lamore and the Respondents each testified on their on behalf. (The Respondents also relied on some the Petitioner-sponsored exhibits.)

Upon conclusion of the proceedings the parties elected to obtain a transcript thereof and to submit Proposed Recommended Orders. The Proposed Recommended Orders were timely submitted and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is an agency of the State of Florida charged with enforcing the statutory provisions pertaining to real estate licensure and to persons and entities holding real estate licensure and practicing the profession of real estate in Florida both as sales persons and brokers, in accordance with Chapters 455, and 475, Florida Statutes (2002), and rules promulgated thereunder.

2. The Respondent, Infiniti was, at all times pertinent hereto, a real estate corporate brokerage licensed in Florida holding license number CQ1015795.

3. The other named Respondents, at all times pertinent hereto, have been real estate sales persons licensed in the State of Florida. Infiniti is located at 511 North Oceanshore Boulevard, Flagler Beach, Florida 32136.

4. The Respondents all practice their profession in Flagler Beach, Florida. The broker for Infiniti is Ms. Carolyn Cass-Lamore. The owner, a licensed sales person, is Mr. Sean O'Neill, who organized the new real estate brokerage known as Infiniti Realty, LLC in late 2002. Most of the staff, including the Respondents in question, had formerly been employed as sales persons at Connie Boyle Realty, located in the Flagler Beach area. The Respondents became increasingly dissatisfied with their practice and with business and working conditions at

Connie Boyle Realty, because they felt that the business was not being properly operated. Consequently, they elected to leave Connie Boyle Realty and form their own firm, with Mr. O'Neill as owner and Ms. Cass-Lamore as the licensed broker.

5. With this in mind, the Respondents all executed "forms 2050," which provide for a change of employer registration for sales persons and/or the means by which sales persons inform and record with the Petitioner agency their change of employment from one broker to another broker or brokerage. These forms were completed after consultation between Ms. Cass-Lamore and Mr. O'Neill on Friday, December 27, 2002. The Respondents Mr. O'Neill and Ms. Cass-Lamore had to act quickly to change the registration with the Department because a newspaper advertisement announcing the advent and operation of Infiniti Realty was published, or they learned that it was to be published, one or two weeks before they had requested it to be published. Consequently, they had to act hurriedly to inform Ms. Boyle that they were leaving the employ of her firm and to also file their appropriate change of registration forms with the Real Estate Commission (Commission), because they would have to get into business sooner than they had originally planned with the new firm.

6. In any event, the change of registration forms were completed on December 27, 2002. Mr. O'Neill was to file the

forms with the Real Estate Commission. Consequently, on that day, Ms. Cass-Lamore faxed the forms for all the Respondents to Mr. O'Neill in Philadelphia. He, in turn, dispatched the forms to the Petitioner agency by Federal Express from Philadelphia, for overnight delivery, to be received by the Commission on December 30, 2002, in order to comply with the statute regarding changes of registration and changes of employing brokers. This fact is supported by Mr. O'Neill's testimony and that of Ms. Cass-Lamore, as well as evidence of the transaction obtained by Mr. O'Neill and submitted in the form of Petitioner's Exhibit Nine, in evidence. The relevant documents for change of registration were also sent by fax to the local Board of Realtors for Flagler Beach. The Commission registered Infiniti as a corporation and Ms. Cass-Lamore as the broker, but for some reason did not immediately register the above-named Respondents, Ms. Mulligan, Ms. Turner, Ms. McDaniel, Mr. Steven Thomas, and Mr. O'Neill as being employed by the broker and corporation.

7. In early January 2003, however, approximately January 4th, Mr. Thomas, one of the Respondents looked for his registration status on the Agency's website and, at that point, observed that he and the other Respondents had indeed been registered as being employed as sales agents with Infiniti. All the Respondents were thus notified that their status was active and legal at that point, in order to practice with Infiniti.

8. For unknown reasons at a later time the registrations of the Respondents were either deleted from or not completed in the records of the Agency and Infiniti and the other Respondents were required to resubmit the form 2050. As result of contact with the Petitioner's investigator, this fact and the apparent lapse of registration (after registration had been originally recorded for the Respondents with Infiniti) resulted in charges being filed against the Respondents for practicing with a new broker without being properly registered as such.

9. The greater weight of the evidence establishes that the Respondents genuinely believed that they were properly licensed. They exercised due diligence in filing the required documents to establish that their licenses were transferred or were to be transferred to Infiniti. Mr. O'Neill timely dispatched the required transfer documents to the Commission by Federal Express, overnight delivery, and it is most likely given the facts and circumstances proven, that the documents were received by the Commission. This is especially the case, given Mr. Thomas' testimony that in the first week of January he inquired of the Commission's website and observed that all of the Respondents were recorded thereon as having active licenses with Infiniti at that point. Sometime later, for unknown reasons, their names were apparently deleted from the Agency's record as being active licensee with Infiniti. The testimony of

Mr. O'Neill and Mr. Thomas is accepted as credible in this regard.

10. It is thus determined that the Respondents, due to efforts of Mr. O'Neill and Ms. Cass-Lamore, timely and reasonably exercised diligence in filing the required licensure transfer documents with the Real Estate Commission and the Respondents' names were recorded as having been transferred as to their licensure to the Infiniti brokerage. If their names were then deleted from the Agency's records sometime later, requiring them to be re-entered, effective February 11, 2003, it can only be presumed to have occurred through some ministerial error or omission. It may be, as Ms. Mulligan, in her testimony, opined, that only a portion of the licensure information was originally entered in the Commission's computer file and that the entirety of it was either mis-placed or entered much later.

#### CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

12. The burden of proof in this proceeding lies with the Petitioner to prove by clear and convincing evidence that the Respondents committed violations of Subsections 475.42(1)(b) and (c) Florida Statutes (2002) and Subsection 475.25(1)(e),



Florida Statutes (2002). Clear and convincing evidence has been defined as credible, precise, explicated evidence, lacking confusion as to the facts in issue. It must be of such weight that it that it produces in the mind of the trier of fact the firm belief or conviction as to the truth of the allegations.

Evans Packing Company vs. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, N.5 (Fla. 1st DCA 1989); Slomowitz vs. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

13. Disciplinary statutes are penal in nature and must be strictly interpreted against the imposition of discipline and in favor of the person sought to be penalized. Munch vs. Department of Business and Professional Regulation, 592 So. 2d 1136, 1143 (Florida 1st DCA 1992); Fleishman vs. Department of Business and Professional Regulation, 441 So. 2d 1121, 1133 (Florida 3rd DCA 1983).

14. Section 475.25 Florida Statutes (2002) authorizes the Florida Real Estate Commission to impose disciplinary action against a licensee for violation of the statutory authority referenced above. Subsection 475.42(1)(c), Florida Statutes (2002) provides in pertinent part: "a broker may not employ, or continue in employment any person as a sales associate who is not the holder of a valid and current license as a sales associate, and therefore in violation of Section 475.25(1)(e), Florida Statutes."

15. Subsection 475.42 (1)(b), Florida Statutes (2002) provides pertinently: "a person licensed as a sales associate may not operate as a broker or operate as a sales associate for any person not registered as her or his employer, and therefore, in violation of Section 475.25(1)(e), Florida Statutes."

16. In consideration of the greater weight of the evidence of record, including the determination as to credibility of certain witnesses culminating in the above findings of fact; it appears that the Respondents were conscientious with regard to compliance with the licensing or license transfer obligations and thus, in substantial part, comported with the above-referenced professional standards and requirements. They made timely effort to inform the commission, by the filing of the forms through overnight, Federal Express delivery, of their transfer from Connie Boyle Realty to the Respondent Infiniti. The testimony and evidence produced by both the Respondents and the Petitioner, based in part upon the determination as to credibility, shows that the statutory provisions referenced above were complied with by the Respondents. The mailing of a document to the direct address creates a presumption that the item mailed was in fact received by the addressee. W.T. Holding Inc. vs. State of Florida, 682 So. 2d 124 (Florida 5th DCA 1996). The testimony of Mr. Thomas, Ms. Cass-Lamore, and Mr. O'Neil, considered together with Petitioner's exhibit Nine,

establish that at the very least, a substantial likelihood that the documents in question were sent by overnight Federal Express delivery to the correct address for the Commission. Thus the Petitioner's evidence in support of the charges concerning failure to properly file the transfer documents and properly register licensure with a new employer is not clear and convincing, and the complaint should be dismissed.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and argument of the parties, it is therefore

RECOMMENDED that a final order be entered by the Florida Real Estate Commission finding that the Respondents are not guilty of the statutory violations charged and that the administrative complaint be dismissed in its entirety.

DONE AND ENTERED this 7th day of October, 2004, in  
Tallahassee, Leon County, Florida.



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P. MICHAEL RUFF  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of October, 2004.

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.