

STATE OF FLORIDA
FLORIDA REAL ESTATE APPRAISAL BOARD

DEPARTMENT OF BUSINESS
AND PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE,

Petitioner,

vs.

FRANKY OTERO,

Respondent.

Final Order No. BPR-2006-02640 Date: 4-21-06
FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By:

Brandon M. Miller

DBPR Case No: 200182417

DOAH Case No: 05-1258PL

License No.: RD 3106

DIVISION OF
ADMINISTRATIVE
HEARINGS

2006 APR 24 A 11:30

FILED

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 7, 2006, in Orlando, Florida, for the purpose of considering Administrative Law Judge (ALJ) Robert E. Meale'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 DBPR Real Estate Division Chief Attorney Bennett M. Miller. Respondent was represented by Donald S. Rose, Esquire. The Board was represented by Assistant Attorney General Brian J. Stabley.

After a review of the complete record in this matter, including consideration of the Administrative Law Judge's Recommended Order, Petitioner's Exceptions, and the arguments of each party, the Board makes the following findings and conclusions:

RULINGS ON EXCEPTIONS

1. Petitioner timely filed exceptions to the ALJ's Recommended Order on September 2, 2005.
2. Respondent did not file a response to Petitioner's exceptions.
3. The Board permitted Petitioner to withdraw exceptions 1, 7, 8, and 9 at the Board meeting.
4. Petitioner proceeded on exceptions 2, 3, 4, 5, and 6.
5. The Board granted Petitioner's exceptions 2, 3, 4, 5, and 6 to the ALJ's Recommended Order.
6. Petitioner's exception 2 as orally amended on the record is granted. The Board granted Petitioner's orally amended exception 2 and rejected the ALJ's conclusions of law in paragraphs 18, 19, and 20 of the Recommended Order because the ALJ has no authority to rule on the constitutionality of a statute or to consider constitutional issues. See Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695, 699 (Fla. 1978); Department of Revenue v. Young American Builders, 330 So. 2d 864, 865 (Fla. 1st DCA 1976); Sarnoff v. Florida Department of Highway Safety and Motor Vehicles, 825 So. 2d 351, 354 (Fla. 2002); Cook v. Florida Parole and Probation Commission, 415 So. 2d 845 (Fla. 1st DCA 1982); Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, et al., 427 So. 2d 153, 157 (Fla. 1982). Since the ALJ has no authority to consider or rule on constitutional issues, the Board struck paragraphs 18, 19, and 20 of the Recommended Order. In rejecting and striking the ALJ's conclusions of law in

paragraphs 18, 19, and 20 of the Recommended Order, the Board finds that its substituted conclusions of law are as or more reasonable than that which was rejected.

7. Petitioner's exception 3 as orally amended on the record is granted. The Board granted Petitioner's orally amended exception 3 and rejected the ALJ's conclusions of law in paragraph 21 of the Recommended Order because the ALJ has no authority to rule on the constitutionality of a statute or to consider constitutional issues. See Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695, 699 (Fla. 1978); Department of Revenue v. Young American Builders, 330 So. 2d 864, 865 (Fla. 1st DCA 1976); Sarnoff v. Florida Department of Highway Safety and Motor Vehicles, 825 So. 2d 351, 354 (Fla. 2002); Cook v. Florida Parole and Probation Commission, 415 So. 2d 845 (Fla. 1st DCA 1982); Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, et al., 427 So. 2d 153, 157 (Fla. 1982). Since the ALJ has no authority to consider or rule on constitutional issues, the Board struck paragraph 21 of the Recommended Order. In rejecting and striking all sentences and conclusions of law in paragraph 21, the Board finds that its substituted conclusion of law is as or more reasonable than that which was rejected.

8. Petitioner's exception 4 as orally amended on the record is granted. The Board granted Petitioner's orally amended exception 4 and rejected the ALJ's conclusions of law in paragraph 22 of the Recommended Order because the ALJ has no authority to rule on the constitutionality of a statute or to consider constitutional issues. See Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d

695, 699 (Fla. 1978); Department of Revenue v. Young American Builders, 330 So. 2d 864, 865 (Fla. 1st DCA 1976); Sarnoff v. Florida Department of Highway Safety and Motor Vehicles, 825 So. 2d 351, 354 (Fla. 2002); Cook v. Florida Parole and Probation Commission, 415 So. 2d 845 (Fla. 1st DCA 1982); Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, et al., 427 So. 2d 153, 157 (Fla. 1982). Since the ALJ has no authority to consider or rule on constitutional issues, the Board struck paragraph 22 of the Recommended Order. In rejecting and striking all sentences and conclusions of law in paragraph 22, the Board finds that its substituted conclusion of law is as or more reasonable than that which was rejected.

9. Petitioner's exception 5 as orally amended on the record is granted. The Board granted Petitioner's orally amended exception 5 and struck the first sentence in paragraph 24 of the Recommended Order because the ALJ made no corresponding finding of fact demonstrating that the only violation expressly contained in the statutes is culpable negligence. Additionally, the Board granted Petitioner's orally amended exception 5 and struck the first sentence in paragraph 25 of the Recommended Order because the ALJ has no authority to rule on the constitutionality of a statute or to consider constitutional issues. See Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695, 699 (Fla. 1978); Department of Revenue v. Young American Builders, 330 So. 2d 864, 865 (Fla. 1st DCA 1976); Sarnoff v. Florida Department of Highway Safety and Motor Vehicles, 825 So. 2d 351, 354 (Fla. 2002); Cook v. Florida Parole and Probation Commission, 415 So. 2d 845 (Fla. 1st DCA 1982);

Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, et al., 427 So. 2d 153, 157 (Fla. 1982). In rejecting and striking the ALJ's conclusions of law in the first sentences of paragraphs 24 and 25 of the Recommended Order, the Board finds that its substituted conclusion of law is as or more reasonable than that which was rejected.

10. Petitioner's exception 6 as orally amended on the record is granted. The Board granted Petitioner's orally amended exception 6 and adopted the first sentence in paragraph 26 of the Recommended Order, but rejected and struck the remaining sentences and conclusions of law in paragraph 26 of the Recommended Order because the ALJ incorrectly focused upon violations not charged in Petitioner's Administrative Complaint instead of the violations Petitioner actually charged in its Administrative Complaint. In rejecting and striking all sentences and conclusions of law in paragraph 26, except for the first sentence, the Board finds that its substituted conclusion of law is as or more reasonable than that which was rejected.

FINDINGS OF FACT

11. The Administrative Law Judge's findings of fact as set forth in the Recommended Order are approved, adopted, and incorporated herein by reference.

12. There is competent, substantial evidence to support the Administrative Law Judge's findings of fact as adopted by the Board.

CONCLUSIONS OF LAW

13. The Board has jurisdiction of this matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes, Chapter 475, Part II, Florida Statutes, and Chapter 61J1 of the Florida Administrative Code.

14. The Administrative Law Judge's conclusions of law as set forth in the Recommended Order, except for rejected and stricken paragraphs 18, 19, 20, 21, 22, the rejected and stricken first sentence in paragraph 24, the rejected and stricken first sentence in paragraph 25, and the rejected and stricken sentences in paragraph 26 (all sentences rejected and stricken but the first sentence of paragraph 26), are approved, adopted, and incorporated herein by reference.

15. There is competent, substantial evidence to support the Administrative Law Judge's conclusions of law as adopted by the Board.

RECOMMENDED PENALTY

16. The Administrative Law Judge's recommended penalty is approved and adopted by the Board in its entirety.

PENALTY

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that:

The Administrative Complaint filed against Respondent is **DISMISSED**.

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 _____, 2006.

FLORIDA REAL ESTATE
APPRAISAL BOARD



Michael E. Murphy, Director
Division of Real Estate on behalf of the
Florida Real Estate Appraisal Board

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 BUSINESS AND PROFESSIONAL REGULATION 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 Respondent Franky Otero, 1949 NE 123rd Street, North Miami, Florida 33181; Respondent's Counsel Donald S. Rose, Esq. Courthouse Tower Building, 44 West Flagler Street, Suite 622, Miami, Florida 33130; Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; Chief Attorney Bennett M. Miller, 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 21st day of April, 2006.



STATE OF FLORIDA
FLORIDA REAL ESTATE APPRAISAL BOARD

FLORIDA DEPARTMENT OF BUSINESS
AND PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE,

Petitioner,

v.

FRANKY OTERO

Respondent.

FILED

Department of Business & Professional Regulation
FLORIDA REAL ESTATE APPRAISAL BOARD

SIGNED *Levi L. Crawford*

DATE *Sept. 2, 2005*

DOAH Case No. 05-1258PL

DBPR Case No: 200182417

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

COMES NOW, Petitioner, by and through the undersigned counsel, and files these exceptions to the Administrative Law Judge's (ALJ) Recommended Order pursuant to Section 120.57(k) and 120.57(l) of the Florida Statutes. As cause therefore Petitioner states:

PROCEDURAL HISTORY

On or about January 28, 2005 Petitioner filed an Administrative Complaint, on the instant case alleging that Respondent violated various sections of Chapter 475, Florida Statutes. Respondent timely disputed some of the allegations of facts, and the case was referred to the Division of Administrative Hearings (DOAH). The case was initially scheduled for hearing on June 9, 2005. On Respondent's Motion to Continue filed on April 27, 2005, the hearing was rescheduled and held on June 29, 2005.

At the hearing, Petitioner presented the testimony of three witnesses, Mr. James Gross, State Certified Real Estate Appraiser, Lance Campbell, State Certified General Real Estate Appraiser and former manager of Southeastern Property Appraisers, L.L.C., and the testimony of Investigator Brian

Piper, current Investigator Supervisor for the Department of Business & Professional Regulation, Division of Real Estate, South Region. Petitioner offered exhibits, 1, 9, 5, 7 and 11. All exhibits were admitted into evidence. The Respondent testified and offered no evidentiary exhibits.

The Petitioner filed a Proposed Recommended Order. The Respondent failed to file a Proposed Recommended Order. Honorable Robert E. Meale, Administrative Law Judge (ALJ), filed a Recommended Order (R O) dated August 18, 2005, recommended dismissing all the charges filed against Respondent. At the start of the hearing, the ALJ struck from the Administrative Complaint those allegations the ALJ believed did not reasonably inform the Respondent of the charges against him. The remaining USPAP provisions at issue after the ALJ struck the other provisions consisted of the Preamble, the Ethic Rule, and Recordkeeping, Standard Rule 1-1(b) and (c), and Standard Rule 2-1(a). The Respondent was also charged with committing culpable negligence in the development of an appraisal report and with failing to use reasonable diligence. The Respondent was found not guilty of violating 475.624(15), Fl. Stat., failing to exercise reasonable diligence in the development and communication of an appraisal report. Petitioner conceded that there was insufficient evidence to prove the charge of culpable negligence to a standard of clear and convincing evidence. On the USPAP violations the ALJ held that

“All USPAP allegations must be stricken because Petitioner has failed to prove up the USPAP provisions and standards in effect as of the most recent enactment of them by the legislature. In this case Petitioner relied upon the USPAP, 2000 Edition, for the above-cited provisions and standards that Respondent has allegedly violated. However, the Legislature has never incorporated the USPAP 2000, Edition, into the disciplinary statutes governing the appraisal practice in Florida.” ALJ’s Recommended Order, paragraph 19-20.

LEGAL STANDARD

1. The Florida Real Estate Appraisal Board ("FREAB") may modify findings of facts of a recommended order pursuant to Section 120.57(1), if it determines from a review of the entire record, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

2. The FREAB may modify the conclusions of law of a recommended order pursuant to Section 120.57(1)(l), Florida Statutes, if the FREAB finds that its substituted conclusion of law is as or more reasonable than that which was rejected or modified.

3. The FREAB may modify the penalty of a recommended order. To do so, the FREAB need only follow a two step process. First, the FREAB should conduct a review of the complete record. Second, the FREAB should state with particularity in its final order the reasons for changing the penalty by citing to the record.

EXCEPTION ONE

4. The Petitioner takes exception with the finding of fact contained in the ALJ's R O paragraph 11. After a review of the entire record, the Board should determine that the findings of fact contained in paragraph 11 were not based upon competent substantial evidence and should be stricken in its entirety. Paragraph 11 contradicts the findings of fact in paragraph 10. Whereas the ALJ finds that the Respondent's work file failed to have a copy of the assignment sheet from the client indicating the scope of the appraisal, did not have a copy of the purchase contract, did not have notes of conversations with parties to the documents, and did not have a copy of the signed, finished, appraisal report.

5. The facts show that the Respondent was on notice to deliver to Petitioner's investigator his work file for the appraisal of the property located at 614 NW 2 street, Delray Beach, Florida 33444, as required pursuant to the § 475.629, Fla. Stat., and demanded in paragraph 6 and Count II of the administrative complaint.

6. The Boards should make findings of fact that are based on the ALJ's finding of fact described in paragraph 10 of the R O. In paragraph 10, the Respondent failed to deliver to Petitioner's investigator a copy of the work file with a copy of the assignment sheet from the customer indicating the scope of the appraisal, failed to contained a copy of the purchase contract, had no notes of conversations with parties to the documents, failed to contained a signed copy of the finished appraisal report and had no documentation of the search for comparables, which are required under § 475.629, Fla. Stat.

7. Florida courts have traditionally held that administrative complaints are not required to meet the technical standard of a pleading in civil or criminal court. *See Seminole County Board of County Commissioners v. Long*, 422 So.2d 938, 940 (Fla. 5th DCA 1982), In administrative proceedings, it is sufficient if the accused is informed with reasonable certainty, the nature of the charges against him, and has a reasonable opportunity to defend against them. *Sanding v. Florida Real Estate Commission*, 187 So.2d 355, 358 (Fla. 2nd DCA 1966) *citing Florida Bd. Of Massage v. Thrall*, 164 So.2d 20, 22 (Fla. 3rd DCA 1964) *and State ex rel. William v. Whitman*, 156 So.2d 705, 709 (Fla. 1934).

EXCEPTION TWO

8. The Petitioner takes exception with the legal conclusion stated in paragraph 20 of the R O, and said paragraph should be stricken in its entirety.

9. The Board should modify the conclusion of law in paragraph 20 of the R O by striking the language contained therein and adding the following: "The Legislature last amended Section 475.628, Florida Statutes effective May 27, 1998 in Laws of Florida Chapter 978-250, Section 35. This section imposed USPAP standards upon appraisers practicing in Florida."

10. That from a review of the entire record, the Board find that its substituted conclusion of law is as or more reasonable than that which was rejected or modified.

EXCEPTION THREE

11. The Petitioner takes exception to the conclusion of law stated in paragraph 21 of the R O the ALJ's recommended order, which should be stricken in its entirety.

12. The Board should modify the conclusion of law in, paragraph 21 of the R O striking the language contained therein and adding the following: "Florida highest court has ruled that "an agency, here the Board, has the principal responsibility of interpreting statutes dealing with matters within their regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985). Accordingly, the interpretation of the applicable USPAP Edition is within the jurisdiction and expertise of the Board. The Florida Real Estate Appraisal Board has substantive jurisdiction in this matter and from a review of the entire record, the Board ~~should find~~ that the Board's substituted conclusion of law is as or more reasonable than that which was rejected or modified.

EXCEPTION FOUR

13. The Petitioner takes exception to the conclusion of law stated in paragraph 22 of the ALJ's recommended order, which should be stricken in its entirety.

14. The Board should modify the conclusion of law in, paragraph 22 of the R O striking the language contained therein and adding the following: "Because agency Boards are charged with the responsibility of enforcing the statutes which govern their area of regulation, courts give great weight to their interpretation of those statutes. See Dep't of Env'tl. Reg. v. Goldring, 477 So.2d 532 (Fla. 1985), Public Employee Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So.2d 987 (Fla. 1987), see also Edward J. Seibert, A.L.A. Architect and Planner, P.A. v. Bayport Beach and Tennis Club Ass'n, 573 So.2d 889 (Fla. 2nd DCA 1990). The Florida Real Estate Appraisal Board is responsible for the implementation and enforcement of appraisal professional standards, and is also responsible with protecting the public. If the implementation of professional standards is to be fairly, consistently, and uniformly applied, compliance must be reviewed by a single experienced governmental body that is responsible for that function.

15. The Board has substantive jurisdiction in the interpretation of applicable statutes governing the practice of appraisers, in particular and specifically the concept and applicability of the Uniformed Standard of Professional Appraisal Standards (USPAP).

16. The Board should find that this conclusion of law is as or more reasonable that that which was rejected or modified.

EXCEPTION FIVE

17. The Petitioner takes exception to the conclusion of law stated in paragraph 25 of the ALJ's recommended order.

18. The Board should modify the conclusion of law in paragraph 25.

19. The first sentence should be stricken in its entirety and substitute the first sentence with the following: "The USPAP 2000 Edition applies in this case."

20. The Board should find that this conclusion of law is as or more reasonable than that which was rejected or modified.

EXCEPTION SIX

21. The Petitioner takes exception to the Administrative Law Judge's conclusion of law that Petitioner failed to prove that Respondent violated the Record Keeping provision.

22. Respondent was charged with failing to comply with the Record keeping provision under USPAP, and was also charged with failing to retain appraisal records for at least a 5 years period, under Count II of the administrative Complaint and in violation of Section 476.629, therefore in violation of Section 475.624(14), Fla. Stat.

23. Florida Statutes require that the appraiser retain records for at least 5 years, to include, original or true copies of any contract engaging the appraiser's service, appraisal reports, and supporting data assembled and formulated by the appraiser in preparing appraisal reports. These records must be made available by the appraiser for inspection and copying by the department on reasonable notice to the appraiser. § 475.629, Fla. Stat.

24. A plain reading of § 475.629, Fla. Stat., clearly shows that the appraiser is responsible

for the retention of records, and supporting documents, and delivering the records and documents to the Petitioner.

25. The Board should move to modify the conclusion of law in the R O, paragraph 26, which should be stricken in its entirety, and the following sentence added, "The more reasonable legal conclusion is that Section 475.629 Florida Statute, makes it a disciplinary offense when an appraiser fails to retain for a period of 5 years, original or true copies of any contract engaging the appraiser's services, appraisal report, and supporting data assembled and formulated by the appraiser in preparing appraiser reports. These records must be made available by the appraiser for inspection and copying by the department on reasonable notice to the appraiser. A violation of §475.629 Fla. Stat., is a violation of section 475.624 (14), Fla. Stat., "Has violated any standard for the development or communication of a real estate appraisal..." ~~That~~ the Board finds, from a review of the entire record, that its substituted conclusion of law is as or more reasonable than that which was rejected or modified."

EXCEPTION SEVEN

26. The Petitioner takes exception to the conclusion of law stated in paragraph 27 of the ALJ's recommended order and the entire paragraph after the fifth sentence should be stricken in its entirety.

27. The Board should modify the conclusion of law in paragraph 27, and after the fifth sentence insert "Florida courts have traditionally held that administrative complaints are not required to meet the technical standard of a pleading filed in civil or criminal court. See Seminole County Board of County Commissioners v. Long, 422 So.2d 938, 940 (Fla. 5th DCA 1982). In

administrative proceedings, it is sufficient if the accused is informed with reasonable certainty of the nature of the charges against him and has a reasonable opportunity to defend against them. Sanding v. Florida Real Estate Commission, 187 So.2d 355, 358 (Fla. 2nd DCA 1966) *citing* Florida Bd. Of Massage v. Thrall, 164 So.2d 20, 22 (Fla. 3rd DCA 1964) *and* State ex rel. William v. Whitman, 156 So.2d 705, 709 (Fla. 1934).

28. The Boards should find that the Respondent was informed of the nature of the charges against him and was provided with sufficient notice of being charged with a violation of § 475.629, Retention of Records, as per paragraph 6 and Count II of the administrative complaint, and hence with a violation of section 475.624(14), Fla. Stat; that the Respondent failed to document this records pursuant to § 475.629, Fla. Stat; and that the Respondent is guilty of count II as charged in the administrative complaint.

29. The Board should find that this conclusion of law is as or more reasonable that that which was rejected or modified.

EXCEPTION EIGHT

30. The Petitioner takes exception to the conclusions of law set for in paragraphs 19, 20, 21, and 22 and asked that they be stricken in their entirety.

31. It is the position of the Petitioner that the ALJ lacks both the jurisdiction and authority to consider or otherwise rule on constitutional issues such as legislative delegation of authority. It is also the position of the Petitioner that the ALJ lacks the jurisdiction and authority to strike pleadings and recommend dismissals of actions based sole on constitutional issues. Gulf Pines v. Oaklawn, 361 So. 2d 695 (Fla. 1978), Dept. of Revenue v. Young American Builders, 330 So.2d 864 (1st DCA

1976), Sarnoff v. DHSMV, 825 So.2d 351 (Fla. 2002).

EXCEPTION NINE

32. The Petitioner takes exception to the recommendation of entering a final order of dismissal of the Administrative Complaint. The Respondent is guilty on Count II, for failure to retain records, as per section § 475.629 Fla. Stat. Pursuant to Rule 61J1-8.002, Florida Administrative Code, the maximum penalty that may be imposed by the Florida Real Estate Appraisal Board (the Board) for a violation, of 475.624(14) ranges from 5 year suspension to revocation and an administrative fine of \$1000.

33. A mitigating factor to be considered by the Board would be that the Respondent has no prior disciplinary record and that no harm to the public was presented in the record.

34. The Board may modify the penalty of a recommended order. To do so, the Board need only follow a two step process.

35. First, the FREAB should conduct a review of the complete record.

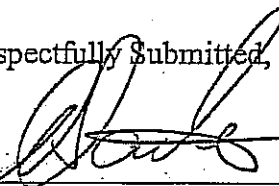
36. Second, the FREAB should state with particularity in its final order the reasons for changing the penalty by citing to the record.

37. The Board should have paragraph 2, in the R O section titled "Recommendation" stricken, and insert "Recommended that the Board finds the Respondent guilty on Count II, as charged in the administrative complaint, as to a violation of section 475.629 and hence of § 475.25(14), Fla. Stat. The Respondent' license is to be suspended for a period of 30 days, the Respondent is to be placed on probation for a one year period, a condition of such probation being the successful completion of 15 credit hour on USPAP, and pay an administrative fine of \$500."

38. The Board should make a findings of fact and conclusion of law that upon a complete review of the record the Board adopts the above penalty, and that said penalty is within the range imposed by the Board in similar cases.

39. The Board should state with particularity, that after a complete review of the record, the ALJ's recommendation was modified due to the Respondent being guilty of a violation of § 475.624.(14), Fla. Stat. and in compliance with the Board's disciplinary guidelines. The penalty imposed by the Board complies with statutory requirement when rejecting the ALJ's recommendation and imposing discipline in accordance with Rule 61J-8002, Disciplinary Guidelines, Florida Administrative Code.

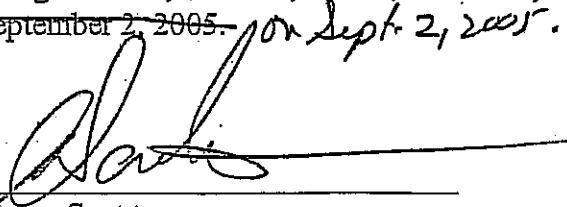
Respectfully Submitted,



Alfonso Santana
Senior Attorney
Florida Bar No. 0318360
Department of Business
and Professional Regulation
Division of Real Estate
400 W. Robinson Street, 801N
Orlando, FL 32801
(407) 317-7150
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Donald S. Rose, Esquire, Courthouse Tower Building, 44 West Flagler Street, Suit 622, Miami, FL 33130, by U.S. mail, and ~~filed with DOAH via facsimile, on September 2, 2005.~~ *on Sept. 2, 2005.*



Alfonso Santana
Senior Attorney

AS/