

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 05-1258PL
)
FRANKY OTERO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Miami, Florida, on July 29, 2005.

APPEARANCES

For Petitioner: Alfonso Santana, Senior Attorney
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N801
Orlando, Florida 32802

For Respondent: Donald S. Rose, Attorney
622 Courthouse Tower Building
44 West Flagler Street
Miami, Florida 33130

STATEMENT OF THE ISSUE

The issue is whether Respondent had failed to maintain records for at least five years, committed culpable negligence

in the preparation of an appraisal report, or failed to exercise reasonable diligence in the preparation of an appraisal report.

PRELIMINARY STATEMENT

By Administrative Complaint dated January 28, 2003, Petitioner alleged that Respondent is a certified residential real estate appraiser, holding license RD3106. The Administrative Complaint alleges that Respondent prepared and issued an appraisal, on November 20, 2000, for property located at 614 Northwest 2d Street, Delray Beach. The Administrative Complaint alleges that Respondent refused to produce his work file to Petitioner's investigator upon request.

Count I of the Administrative Complaint alleges that Respondent has violated "a standard" of the Uniform Standards of Professional Appraisal Practice, in violation of Section 475.624(14), Florida Statutes.

Count II alleges that Respondent is guilty of failing to retain appraisal records for at least five years, in violation of Sections 475.629 and 475.624(4), Florida Statutes.

The Administrative Complaint alleges that Respondent issued an appraisal report showing that a house had 13 rooms, including seven bedrooms and three bathrooms. However, Respondent's sketch of the floor plan revealed 17 rooms, and his description of the property identified 17 rooms by name. The Administrative Complaint alleges that the report omits any mention that a

comparable property abuts a canal and is within a gated community. The Administrative Complaint alleges that the report states that another comparable is one mile from the subject property, but it actually is more than two miles.

Count III of the Administrative Complaint alleges that Respondent is guilty of culpable negligence, in violation of Section 475.624(2), Florida Statutes.

Count IV alleges that Respondent has violated "a standard" of the Uniform Standards of Professional Appraisal Practice, in violation of Section 475.624(14), Florida Statutes.

Count V alleges that Respondent failed to exercise reasonable diligence in preparing an appraisal report, in violation of Section 476.624(14), Florida Statutes.

At the start of the hearing, the Administrative Law Judge requested Petitioner to specify upon which provisions of the Uniform Standards of Professional Appraisal Practice that it relied in attempting to discipline Respondent's license. Referring to the Uniform Standards of Professional Appraisal Practice, 2000 Edition, Petitioner stated that it relied on Standards 1-1 (b) and (c), 1-5(a) and (b), 2-1(a), 2-2(b)(x), and 3.2(e). Petitioner failed to cite any standard of the Uniform Standards of Professional Appraisal Practice in the Administrative Complaint, although it did allege acts or omissions that violated certain of these standards. On the

basis of this distinction, the Administrative Law Judge ruled that Petitioner could not rely on any violation of Standards 1-5(a) and (b), 2-2(b)(x), and 3-2(e) as, per se, a ground for discipline, although the Administrative Law Judge allowed Petitioner to incorporate the contents of these standards in its counts of culpable negligence and failure to exercise due diligence.

At the hearing, Petitioner called three witnesses and offered into evidence five exhibits: Petitioner Exhibits 1, 5, 7, 9, and 11. Respondent called one witness and offered into evidence no exhibits. All exhibits were admitted except that Petitioner Exhibit 7 was admitted only to prove the contents of the work file and not for the truth of the contents of each document within the work file.

The court reporter filed the transcript on July 27, 2005. Petitioner filed a proposed recommended order on August 12, 2005.

FINDINGS OF FACT

1. Respondent has been a certified residential real estate appraiser since 1998. He holds license RD-3106, and his license has not previously been disciplined. He has worked in the real estate appraisal business since high school and full-time for the past 12 years.

2. In November 2000, Respondent was employed by Southeast Property Appraisers as an independent contractor. Customers of Southeast Property Appraisers would contact the company and request a residential real estate appraisal. With a secretary often making the assignment, Southeast Property Appraisers would then subcontract the work to an independent contractor, such as Respondent. Upon completion of the appraisal report, Southeast Property Appraisers would split the fee with the independent contractor, pursuant to their contractual arrangement.

3. In November 2000, Countryside Mortgage contacted Southeast Property Appraisers and requested a residential appraisal for a residence located in Delray Beach. The secretary assigned the file to Respondent, who undertook the responsibility of preparing the necessary appraisal report.

4. Respondent researched the subject property, but found it a difficult assignment in one respect: the 3407 square-foot, one-story, single-family residence comprises seven bedrooms. Single-family residences with seven bedrooms are not present in great numbers in the vicinity of the subject property.

5. On November 20, 2000, Respondent issued the appraisal report, under his own name. The appraisal report estimates the value of the subject property as \$188,000, based primarily on the sales comparison approach. The report states that it did

not use the income approach because of insufficient sales/rental data.

6. The appraisal report identifies the name of the borrower and lists the sales price of \$188,000, although the report cautions that the appraiser did not receive a copy of the sales contract. The report lists, under a table on the form, 18 rooms by type, including seven bedrooms and three bathrooms. Immediately beneath this table, the report states that the subject property consists of 13 rooms: seven bedrooms and three bathrooms. Both the table and the information beneath the table agree that the total area of the house is 3407 square feet.

7. The appraisal report analyzes three comparables. According to the report, Comparable 1 is eight blocks northwest, Comparable 2 is eight blocks southeast, and Comparable 3 is one mile northeast.

8. Petitioner's problems with the appraisal report concern two matters. First, the report omits any mention that Comparable 1 abuts a canal and is within a gated community. However, Respondent observed the canal, which is a narrow waterway leading into a nearby, small lake. Respondent reasonably determined that the canal did not warrant mention because it did not affect the sales price of the comparable. Respondent underwent a similar process with the gate, which the community association no longer manned or operated, at least

during the daylight hours. Therefore, this omission from the report was also reasonable.

9. Second, Comparable 3 is about one mile from the subject property, not more than two miles as alleged. Driving distance is 1.6 miles, and, as the crow flies, the distance is almost exactly one mile. According to Petitioner's expert witness, the proper way to measure the distance between comparables is as the crow flies.

10. Petitioner's witnesses claimed several other deficiencies with the work papers: no copy of the assignment sheet from the customer indicating the scope of the appraisal, no copy of the purchase contract, no notes of conversations with parties to the documents, no copy of the signed, finished appraisal report, and no documentation of the search for comparables. Respondent's work files in fact lacked these documents.

11. Petitioner's remaining issue with Respondent is that he did not retain his work file after he left Southeast Property Appraisal, which was shortly after the completion of the subject appraisal report. However, Respondent contacted Southeast Property Appraisal and cooperated with Petitioner's investigator in obtaining these materials within a reasonable period of time.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

13. Section 475.624(2) and (4), Florida Statutes, authorizes the Florida Real Estate Appraisal Board to impose discipline if a certificateholder, among other things, is guilty of "culpable negligence" or a violation of any rule or order of the Florida Real Estate Appraisal Board.

14. Section 475.624(14), Florida Statutes, provides for discipline if a certificateholder "[h]as violated any standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice." Section 475.628 adds:

Each appraiser registered, licensed, or certified under this part shall comply with the Uniform Standards of Professional Appraisal Practice. Statements on appraisal standards which may be issued for the purpose of clarification, interpretation, explanation, or elaboration through the Appraisal Foundation shall also be binding on any appraiser registered, licensed, or certified under this part.

15. Two pleading problems limit the issues in this case. First, as noted above, the Administrative Complaint failed to apprise Respondent of the nature of several charges against him. Allegations that an appraiser has violated the Uniform Standards

of Professional Appraisal Practice (USPAP) do not notify a certificateholder of the nature of the charges against him. This document is almost 200 pages long and contains numerous standards and other provisions governing the practice of appraising.

16. In Trevasani v. Department of Health, __ So. 2d __ (Fla. 1st DCA 2005), the Department of Health alleged that a physician failed to create medical records, but did not allege that he failed to maintain possession of these records. However, the Department of Health alleged the violation of a statute that requires the creation and maintenance of medical records. The evidence showed that the physician had created the records, but had failed to maintain possession of them. Reversing the Board of Medicine's final order finding the physician guilty of failing to maintain the records, the court held that the Board could not find the licensee guilty of an act not mentioned in the complaint.

17. In this case, the Administrative Law Judge struck at the start of the hearing those allegations that did not reasonably inform Respondent of the charges against him.

18. The remaining USPAP provisions at issue after the Administrative Law Judge struck the other provisions are:

Preamble. Ethics Rule. Record Keeping.

An appraiser must prepare a workfile for each assignment. The workfile must include the name of the client and the identity, by name or type, of any other intended users; true copies of any written reports, documented on any type of media; summaries of any oral reports or testimony, or a transcript of testimony, including the appraiser's signed and dated certification; all other data, information, and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with this rule and all other applicable Standards, or references to the location(s) of such other documentation.

An appraiser must retain the workfile for a period of at least five (5) years after preparation or at least two (2) years after final disposition of any judicial proceeding in which testimony was given, which period expires last, and have custody of his or her workfile, or make appropriate workfile retention, access, and retrieval arrangements with the party having custody of the workfile.

Standards Rule 1-1.

In developing a real property appraisal, an appraiser must:

* * *

(b) not commit a substantial error of omission or commission that significantly affects an appraisal;

(c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affect the credibility of those results.

* * *

Standards Rule 2-1.

Each written or oral real property appraisal report must:

(a) clearly and accurately set forth the appraisal in a manner that will not be misleading;

* * *

19. Another problem with the pleadings requires the further restriction of the issues. 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 has relied upon the USPAP, 2000 Edition, for the above-cited provisions and standards that Respondent has allegedly violated.

20. However, the Legislature has never incorporated the USPAP, 2000 Edition, into the disciplinary statutes governing the appraisal practice in Florida. The Legislature adopted Section 475.624(14), Florida Statutes, effective May 24, 1991, in Laws of Florida Chapter 91-89, Section 8, and has not re-adopted this subsection of Section 475.624. This subsection imposes USPAP standards and provisions upon appraisers practicing in Florida. The Legislature last amended Section 475.628, Florida Statutes, effective May 27, 1998, in Laws of Florida Chapter 98-250, Section 35. This section imposes USPAP standards upon appraisers practicing in Florida.

21. The Florida Supreme Court has repeatedly held that the Legislature may not delegate legislative authority by enacting a statute that purports to incorporate, without further act of the Legislature, subsequent federal laws or regulations. See, e.g., State v. Rodriguez, 365 So. 2d 157 (Fla. 1978).

22. It appears that the Appraisal Standards Board of The Appraisal Foundation adopts the USPAP. According to the cover page of the USPAP, The Appraisal Foundation is "Authorized by Congress as the Source of Appraisal Standards and Appraiser Qualifications." The Legislature can no more delegate legislative authority to this Congressionally recognized body than it can to Congress. Any attempt to discipline a licensee based on USPAP provisions adopted subsequent to 1991 or USPAP standards subsequent to 1998 would therefore constitute an unconstitutional delegation of legislative authority. Absent evidence of the USPAP provisions and standards in effect at these times, Petitioner has failed to prove any USPAP violations.

23. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

24. The only violation expressly contained in the statutes is culpable negligence; the remaining allegations are based on

USPAP provisions or standards. No evidence establishes that Respondent's appraisal report reflects any negligence whatsoever. In particular, no evidence suggests that the final market value is in any respect misleading or incorrect or that any other element of the appraisal report is misleading or incorrect.

25. Assuming that the USPAP, 2002 Edition, applied to this case, which it does not, Petitioner has failed to prove a violation of any of these provisions or standards, as well. These provisions and standards must be construed and applied in recognition of the fact that disciplinary proceedings are penal in nature, so that disciplinary statutes are interpreted strictly in favor of the licensee. See, e.g., Djokic v. Department of Business and Professional Regulation, 875 So. 2d 693, 695 (Fla. 4th DCA 2003).

26. Petitioner failed to prove that Respondent violated the Record Keeping provision. Petitioner's two contentions are that Respondent failed to maintain a signed copy of the appraisal report and he failed to retain custody of the work file for five years. However, the provision that allows an appraiser to retain a true copy in any media means that he is not required to retain a signed copy because electronic media often fail to maintain the signature. Also, the last clause of the Record Keeping provision clearly allows an appraiser to

retain possession under a document-retrieval arrangement, such as that that Respondent evidently maintained with Southeast Property Appraisal.

27. As Respondent admitted, his documentation was not very good. In particular, his failure to document the process by which he determined which comparables to use is non-existent. This is a vital part of the appraisal practice. Likewise, some documentation as to the scope of the appraisal would seem useful, especially in dealing with client complaints lodged long after the completion of the appraisal. However, Petitioner never alleged these deficiencies. Pursuant to the Trevasani decision, Petitioner may not attach these unmade allegations to the actual allegation of a failure to maintain records for five years, even though the same USPAP provision is violated by these different acts and omissions.

28. Petitioner also failed to prove that Respondent violated USPAP Standards 1-1(b) or (c). Among other problems with the proof, from Petitioner's point of view, is the complete lack of any evidence that any error committed by Respondent "significantly affect[ed the] appraisal" or that any carelessness "in the aggregate affect[s] the credibility" of [the] results."

29. For the same reason, Petitioner has failed to prove that Respondent violated USPAP Standard 2-1(a). No evidence demonstrates how the subject appraisal report is misleading.

RECOMMENDATION

It is

RECOMMENDED that the Florida Real Estate Appraisal Board enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 18th day of August, 2005, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of August, 2005.

COPIES FURNISHED:

Jay Small, Chairman
Florida Real Estate Appraisal Board
Department of Business and
Professional Regulation
400 West Robinson Street, Suite 801N
Orlando, Florida 32808-1900

Leon Biegalski, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Alfonso Santana, Senior Attorney
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N801
Orlando, Florida 32802

Donald S. Rose, Attorney
622 Courthouse Tower Building
44 West Flagler Street
Miami, Florida 33130

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 must be filed with the agency that will issue the final order in this case.