

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 06-3387PL
)
VICTOR HARRISON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided and on March 20, 2007, a formal hearing was held in this case. The authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2006). The hearing was conducted by video-teleconference between sites in Pensacola, Florida, and Tallahassee, Florida. The hearing was held by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Racquel White, Esquire
Department of Business and
Professional Regulation
Hurston Building, North Tower
400 West Robinson Street, Suite N 801
Orlando, Florida 32801

For Respondent: Thomas M. Brady, Esquire
3250 Navy Boulevard, Suite 204
Post Office Box 12584
Pensacola, Florida 32591-2584

STATEMENT OF THE ISSUE

Should the Florida Real Estate Appraisal Board (the Board) take action against Respondent, a licensed real estate appraiser (appraiser), for violations set forth in Chapter 475, Part II, Florida Statutes (1995)?

PRELIMINARY STATEMENT

On August 6, 2003, the Board in Florida Department of Business and Professional Regulation, Division of Real Estate, Petitioner, vs. Victor Harrison, Respondent, FDBPR Case No. 200180524, charged Respondent with violations of Chapter 475, Part II, Florida Statutes (1995), in his capacity as an appraiser. The Administrative Complaint dealt with an appraisal report allegedly developed and communicated on January 9, 1997, for property known as 693 Broad Street, Pensacola, Florida. The exact details of the Allegations of Material Fact are discussed in the Conclusions of Law. Based upon the alleged facts, the Board in five separate counts accuses Respondent of violating Chapter 475, Part II, Florida Statutes (1995), and Standards Rules with the Uniform Standards of Professional Appraisal Practice (1997), commonly known as USPAP. Those counts to the Administrative Complaint are explained in the Conclusions of Law.

On December 10, 2003, the Division of Real Estate legal department received Respondent's response to the Administrative Complaint detailing his position concerning factual allegations

and denying any violation of law alleged in Counts I through V to the Administrative Complaint. Petitioner treated this as a request for formal proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

On September 11, 2006, the Division of Administrative Hearings (DOAH) in the person of Robert Cohen, Director and Chief Judge, received the request for formal hearing, together with a copy of the Administrative Complaint and Respondent's letter requesting hearing. The case was assigned to the present administrative law judge as DOAH Case No. 06-3387PL.

On September 19, 2006, Respondent filed a motion to dismiss the Administrative Complaint for failure to state a claim. On September 20, 2006, Petitioner filed a motion to strike Respondent's motion to dismiss. On September 25, 2006, an order was entered denying the motion to dismiss.

On November 13, 2006, Respondent filed his Objection to Notice of Hearing by Video Conference and Motion for Continuance and Consolidation With DOAH Case No. 06-3389PL. On that same date, a Joint Motion to Continue was filed. On November 13, 2006, an order was entered denying the objection to proceed with a video-teleconference hearing and continuing the case to be heard on January 29, 2007. The request to consolidate was granted to the extent that the present case and DOAH Case

No. 06-3389PL would proceed to hearing on the same date and time upon a common record where appropriate.

On January 12, 2007, Respondent filed a Motion for Continuance, Alternatively Respondent's Attorney's Motion to Withdraw. On January 29, 2007, an order was entered granting the continuance and rescheduling the hearing to be heard on March 20, 2007. Respondent's counsel remained as counsel.

On January 17, 2007, Respondent filed "Respondent's Notice of Filing His Fla. Stat. 57.105 Motion to Dismiss Counts I through V of the Administrative Complaint." On January 5, 2007, Petitioner had filed a response to the pending motion to dismiss. On January 22, 2007, an order was entered denying the motion to dismiss.

On March 12, 2007, Respondent filed an Amended Answer and Affirmative Defenses to the Administrative Complaint.

On March 13, 2007, Respondent's Motion to Compel Discovery was filed. On March 14, 2007, Petitioner filed a Response to Respondent's Motion to Compel. On March 15, 2007, Respondent filed a Reply to Petitioner's Response to Respondent's Motion to Compel Discovery and a Motion to Continue. At hearing, Respondent's Motion to Compel Production and Motion to Continue were denied as explained in the hearing transcript.

On April 23, 2007, Respondent filed a Motion for Leave to File Supplement to his Recommended Order. On April 24, 2007, Respondent filed an amendment to the motion. The purpose of the motion was to allow the submission of information concerning a Final Order in the Peyno case, previously referred to as Respondent's Reserved Exhibit numbered 33 for identification. Counsel for the parties were informed, together with counsel for Respondent in DOAH Case No. 06-3389PL, that the leave to amend was granted to the extent that a copy of the Final Order represented in Respondent's Exhibit numbered 33 would be received in the record, as it has been. This reference in the Preliminary Statement confirms that the Motion for Leave to File Supplement is granted.

At hearing, Petitioner called Fred Clanton and Daniel Ryland as its witnesses. The latter witness, who is a licensed appraiser, was not allowed to testify as an expert for reasons that are explained in the hearing transcript. Petitioner's Exhibits numbered 3 through 9 were admitted into evidence. Respondent testified in his own behalf and adopted the testimony of Fred Catchpole, Respondent in DOAH Case No. 06-3389PL. The Respondent's Exhibit numbered 2, taken from Petitioner's Exhibit numbered 2, the Investigative Report, pages 98 through 142; Respondent's Exhibit numbered 25, taken from the Catchpole exhibits; Respondent's Exhibits numbered 1 through 56 taken from

his pre-hearing exhibits were offered, excluding 3 through 8, 30, 31, 34, 46, 50 and 51, which were not offered. Respondent's Exhibit numbered 25, upon which ruling was reserved, is denied admission. Respondent's Exhibits numbered 32 and 33 initially denied admission are admitted. All other exhibits offered by Respondent were admitted at hearing.

Respondent's Exhibit numbered 56 is Petitioner's responses to the Respondent's first interrogatories in DOAH Case No. 06-3387PL.

In compliance with a prehearing order, the parties entered into a stipulation of undisputed facts. Those undisputed facts are set forth in the findings of fact to the Recommended Order.

On April 13, 2007, a hearing transcript was filed. It only refers to DOAH Case No. 06-3389PL. It is also in association with DOAH Case No. 06-3387PL. On April 16, 2007, Respondent filed a proposed recommended order. On April 23, 2007, Petitioner filed a proposed recommended order. Respondent's proposed recommended order was re-substituted on April 24, 2007, to address a problem with legibility. All written submissions by the parties have been considered in preparing the Recommended Order.

Respondent Harrison's fifth affirmative defense calling for disposition based upon alleged prejudice occasioned by delay in the prosecution is denied.^{1/}

FINDINGS OF FACT

Stipulated Facts:

1. Respondent is a state-licensed appraiser.
2. On or about January 9, 1997, Respondent, Fred Catchpole, and Rhonda Guy developed and communicated an appraisal report for property commonly known as 693 Broad Street, Pensacola, Florida 32819.
3. In developing the subject property appraisal report, the Cost Approach and the Sales Comparison Approach were utilized.

Additional Facts:

4. Eventually the circumstances concerning the Uniform Residential Appraisal Report (the Report) at the 693 Broad Street, Pensacola, Florida, property (the Property) came to Petitioner's attention upon a complaint. On February 13, 2001, the complaint was made. The complaint was made by Daniel Alvin Ryland, a Florida-licensed appraiser who has provided appraisal services in Escambia and Santa Rosa counties in Florida. The investigation of the complaint covered the period February 20, 2001, through December 26, 2001.

5. Benjamin F. Clanton was the principal investigator. At present, he is an investigator supervisor for Petitioner. He has held that position since 2002.

6. Mr. Clanton started investigating appraisal cases in 1995, when he retired from the Birmingham Police Department in Birmingham, Alabama. In that year, he was employed by the Alabama Real Estate Appraisal Board. While there, he took three courses: the Appraisal of Real Estate, a 45-hour course; the Basic How to Appraise, a 25-hour course; and Uniform Standards of Professional Appraisal Practices (USPAP), a 16-hour course. He took an update in USPAP in 1997, a four-hour course. Mr. Clanton continued with Appraisal Institute courses or courses involving appraisal principles and procedures, basic income capitalization, residential case studies and a national USPAP course and other updates.

7. As part of the investigation, Mr. Clanton interviewed Respondent Harrison. Mr. Clanton sought documentation from the Respondent in the interest of the recreation of the Cost Approach in the Report. Mr. Clanton asked for the work files supporting the Report. Respondent provided work files. Discrete information concerning recreation of the Cost Approach was not received by Mr. Clanton.

8. From his observations related to the Cost Approach within the Report, Mr. Clanton describes problems with the calculations of the Cost Approach where the stated effective age in the comments on the Cost Approach was 25 years. That calculated to be significantly different, in his understanding,

than the number used in the depreciation in the Cost Approach. The Report reflected a remaining economic life of 35 years and a total life expectancy of 60 years. He refers to the Report's statement of the effective age of the Property as 15 years. In his testimony, Mr. Clanton describes the age life depreciation method leading to establishment of the effective age but he was never qualified as an expert to allow consideration of the testimony on the age life depreciation method or other issues related to the Cost Approach. Therefore, no further facts are found on that topic.

9. When interviewed by Mr. Clanton, Respondent Catchpole in DOAH Case No. 06-3389PL acknowledged that there were errors in the Cost Approach formulations attributed to Respondent Harrison. The nature of any errors was not explained. Without that explanation they become inconsequential.

10. More particularly, the Property neighborhood is slightly north of Interstate 10 in Pensacola, Florida, west of Pine Forrest Road, to the west side of Highway 29, and south of Alternate 90. The Property is located in what is referred to as the Ensley area. The Property is one of the largest residences in the Ensley area, in particular in Ensley Gardens. Immediately off of Highway 29 are rows of commercial buildings. Behind those rows is a railroad track. The Property is about 200 feet from the railroad track. An Escambia County utilities substation,

pumping station, is located north of the Property. The Escambia County public utilities facility is about 200 feet from the Property. The Property is located north of Broad Street. The Property is on a large lot. Homes across from the Property on Broad Street are located on smaller lots.

11. The property is not in a Planned Unit Development (PUD). The area of the subject property is not homogenous, in that the homes vary widely in quality, design, age and size.

12. By choice of the appraiser, the Sales Comparison Approach was used in determining the appraisal for the Property. There were three comparable sales.

13. At the time the Report was written the Property was 27 years old.

14. Comparable sale one was two years old.

15. Comparable sale two was 12 years old.

16. Comparable sale three was 9 years old.

17. The Property site was 120 feet by 260 feet according to the Report. This was larger than the comparable sales sites.

18. Respondent, in providing information from the work file related to the Report, included information from a Multiple Listing Service (MLS) for January 1997 from the Pensacola Association of Realtors. In reference to comparable sale one, the MLS refers to the location as Creekside Oaks Subdivision, a luxury home under construction and a Parade Home entry.

It refers to a sprinkler system, pantry, cathedral ceilings, security alarm, two+ closets in the master bedroom, separate shower in the master bedroom, an open patio, laundry/utility room, on a golf course, with a two-car garage. It has a whirlpool for the master bedroom bath. It has double pane glass.

19. In relation to comparable sale two, the MLS refers to soaring cathedral ceilings with a fireplace in living room and screen porch, a hot tub and gorgeous yard with pool. The pool is described as an in-ground pool. There is a reference to a unique atrium, an inside laundry, walk-in closets, sprinkler systems, laundry/utility room and security alarm.

20. The MLS pertaining to comparable sale three refers to the Kings Road Subdivision in Cantonment, whereas the Report refers to the location as Pensacola. In relation to comparable sale three on Kings Road in Cantonment, that neighborhood has deed restrictions limiting the type of homes and the size of homes. It has a public sewer. It has underground utilities. It has a concrete curb and gutter. The house is described as having a fireplace, sprinkler system, screen porch, high ceilings, security alarm, two-car garage, with a garden tub in the master bath. It refers to a laundry inside. There is a pool.

21. The Report in the section under the Comparable Sales Approach, under the sales comparison analysis that refers to

design and appeal described the Property and the comparables as ranch/average.

22. The Property and the comparable sales properties were all described as suburban-average as to location. The sites were described as average for the Property and inferior for the comparables with a \$3000 positive adjustment in each comparable sale to compensate for the difference.

23. The Property did not have a pool. Two of the comparable sales had pools.

24. Mr. Clanton asked the Respondent to provide him with a second appraisal report on the Property. Respondent agreed to provide it and mailed it to Mr. Clanton. A second appraisal report was not received by Mr. Clanton. Nothing more is known about a second appraisal report.

25. In the appraiser certification signed by Respondent as appraiser and signed by Respondent Catchpole, DOAH Case No. 06-3389PL, as supervisory appraiser, under item 8 it was stated: "I have personally inspected the interior and exterior areas of the subject property" Within item 8 to the appraisers certification, it went on to say that there was a personal inspection of " . . . the exterior of all properties listed as comparables in the appraisal report. . . . "

26. Respondent in this case did not inspect the interior of the Property as part of the appraisal, by contrast to an awareness of the exterior. Respondent Catchpole, DOAH Case No. 06-3389PL, served as the supervisory appraiser and as such did not inspect the Property in any respect. Respondent Fred R. Catchpole, DOAH Case No. 06-3389PL, reviewed comparable property data in relation to the sales comparison analysis but was not involved in the selection process in choosing comparable sales.

27. The form used in preparing the Report is referred to variously as Freddie Mac Form 70 6/93 and Fannie Mae Form 1004 6/93. In the Report in the section involving subject matter, Fred and Juanita Hicks were listed as borrowers and the current owner of the Property. The property rights being appraised were under the heading "fee simple." There was a reference to a lender/client as Home Star Mortgage Lending.

28. The results of the Report did not lead to any direct harm to a consumer, in particular, the listed borrowers, Fred and Juanita Hicks.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding in accordance with Sections 120.569, 120.57(1), and 455.225, Florida Statutes (2006).

30. In this case the Board has disciplinary authority in accordance with Section 475.624, Florida Statutes (1995), which states:

Discipline. - The board . . . may reprimand, fine, 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 . . .

That provision goes on to describe specific grounds for discipline, some of which are implicated in this action.

31. Respondent is a "certified real estate appraiser" who holds certificate number RH-119 issued by the Department of Business and Professional Regulation on November 18, 1996. § 475.612, Fla. Stat. (2006).

32. In relation to this case the following definitions pertain. § 475.611, Florida Statutes (1995):

(1) As used in this part, the term:

(a) 'Appraisal' or 'appraisal services' means the services provided by certified, licensed, or registered appraisers, and includes:

1. 'Appraisal assignment' denotes an engagement for which a person is employed or retained to act, or could be perceived by third parties or the public as acting, as an agent or a disinterested third party in rendering, an unbiased analysis, opinion, review, or conclusion relating to the nature, quality, value, or utility of specified interests, or aspects of, identified real property.

2. 'Analysis assignment' denotes appraisal services that relate to the employer's or client's individual needs or investment objectives and includes specialized marketing, financing, and feasibility studies as well as analyses, opinions, and conclusions given in connection with activities such as real estate brokerage, mortgage banking, or real estate counseling.

* * *

(c) 'Appraisal report' means any written or oral analysis, opinion, or conclusion issued by an appraiser relating to the nature, quality, value, or utility of a specified interest in, or aspect of, identified real property, and includes a report communicating an appraisal analysis, opinion, or conclusion of value, regardless of title. However, in order to be recognized in a federally related transaction, an appraisal report must be written.

* * *

(e) 'Appraiser' means any person who is a registered real estate appraiser, licensed real estate appraiser, or a certified real estate appraiser. An appraiser renders a professional service and is a professional within the meaning of s. 95.11(4)(a).

(f) 'Board' means the Florida Real Estate Appraisal Board established under this section.

* * *

(i) 'Department' means the Department of Business and Professional Regulation.

* * *

(k) 'Licensed appraiser' means a person who is licensed by the department as qualified to issue appraisal reports for residential real property of one to four residential units or on such real estate or real property as may be authorized by federal regulation.

(l) 'Registered appraiser' means a person who is registered with the department as qualified to perform appraisal services under the supervision of a licensed or certified appraiser.

(m) 'Uniform Standards of Professional Appraisal Practice' means the most recent standards approved and adopted by the Appraisal Standards Board of the Appraisal Foundation.

33. Petitioner bears the burden of proof in this disciplinary case. Proof sufficient to sustain the allegations in the Administrative Complaint must be by clear and convincing evidence. See § 120.57(1)(j), Fla. Stat. (2006); Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The term clear and convincing evidence is explained in the case In re: Davey, 645 So. 2d 398 (Fla. 1994), quoting with approval from Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

34. Recognizing the disciplinary nature of this case Section 475.624, Florida Statutes (1995), in pertinent part, is strictly construed in determining whether a violation has occurred. See State v. Pattishall, 99 Fla. 296 and 126 So. 147

(Fla. 1930); Munch v. Dept. of Bus. and Prof. Reg., 592 So. 2d 1136 (Fla. 1st DCA 1992); Fleishman v. Dept. of Bus. and Prof. Reg., 441 So. 2d 122 (Fla. 3rd DCA 1983); and Lester v. Department of Professional and Occupational Regulation, State Board of Medical Examiners, 348 So. 2d 923 (Fla. 1st DCA 1977).

35. The allegations of material fact in relation to the Administrative Complaint state:

4. On or about January 9, 1997, Fred Catchpole, Respondent, and Rhonda E. Guy developed and communicated an appraisal report (Report) for property commonly known as 693 Broad Street, Pensacola, FL 32819 (Property).

5. The Report estimates the value of the Property as \$167,000.

6. In developing the Report, Respondent utilized a cost approach analysis.

7. The Report states that the remaining economic life is 35 years.

8. The data utilized for the Cost Approach indicates the Property's effective age is 25 years.

9. The Report states that the Property's effective age is 15 years.

10. The Report states that the depreciation value is \$11,100.

11. An \$11,100 depreciation value, when compared to other data used in calculating the cost approach of the Report, indicates that an effective age much smaller than 15 was utilized.

12. In developing the Report, Respondent utilized the sales comparison approach.

13. In developing the sales comparison approach, the Respondent utilized three comparable properties (comparables) separate from the Property.

14. All three comparables utilized were superior to the Property.

15. In developing the sales comparison approach, the Respondent did not make adequate adjustments for all three comparables used.

16. At all times material, the neighborhood surrounding the Property was a depressed area where boarded up residences, condemned residences, commercial properties, and foreclosures are not uncommon.

17. At all times material the Property was in close proximity to the Burlington Northern Railroad tracks.

18. The Burling Northern Railroad tracks are a source of external obsolescence to the Property.

19. At all times material the Property was in close proximity to the Fleetco Truck and Trailer Repair company.

20. The Fleetco Truck and Trailer Repair company is a source of external obsolescence to the Property.

21. At all times material the Property was in close proximity to the Escambia County Utilities Authority.

22. The Escambia County Utilities Authority is a source of external obsolescence to the Property.

23. The Report mentions no external obsolescence.

24. Comparable property one is in a golf course community.
25. Comparable property three is in a golf community.
26. Comparable property two is in an elite subdivision in the Pensacola area.
27. None of the comparables' values are as adversely affected by their surrounding neighborhood as the Property's value is adversely affected by its surrounding neighborhood.
28. All comparables sites, despite their smaller size, are superior in value to the Property.
29. The Report states that all comparable sites are inferior to the Property's site.
30. The Report is a summary appraisal.
31. The Report does not state the intended use of the appraisal.
32. On or about December 18, 2001, Petitioner interviewed Respondent and learned from Respondent that Respondent completed an appraisal of the Property subsequent to the Report.
33. On or about December 18, 2001, Petitioner requester [sic] Respondent provide the data Respondent used in developing the cost approach analysis.
34. Respondent failed to deliver the data requested by Petitioner.
35. On or about December 18, 2001, Petitioner requested Respondent deliver this subsequent appraisal to Petitioner.
36. Respondent has failed to deliver this subsequent appraisal.

37. On or about December 18, 2001, Respondent was asked by Petitioner if the Report was prepared for purposes of a sale or refinance.

38. Respondent could not recall from personal memory or notes whether the Report was prepared for purposes of a sale or refinance.

39. Rhonda Guy completed an inspection of the Property without the assistance of Respondent.

40. The Report contains a certification signed by Respondent that Respondent inspected the interior and exterior of the Property.

41. After January 9, 1997 and after the Report was submitted, Respondent inspected the comparables for the first time.

42. The Report contains a certification signed by Respondent that states Respondent has inspected the interior and exterior of the comparables.

36. Based upon the factual allegations in the Administrative Complaint, Respondent is charged in Counts I through V with statutory violations.

37. Count I states:

. . . Respondent is guilty of failure to retain records for at least five years of any contracts engaging the appraiser's services, appraisal reports, and supporting data assembled and formulated by the appraiser in preparing appraisal reports in violation of Section 475.629, Florida Statutes, and therefore, in violation of Section 475.624(4), Florida Statutes.

38. Section 475.629, Florida Statutes (1995), states:

Retention of records.--An appraiser licensed or certified under this section shall retain, for at least 5 years, original or true copies of any contracts engaging the appraiser's services, appraisal reports, and supporting data assembled and formulated by the appraiser in preparing appraisal reports. The period for retention of the records applicable to each engagement of the services of the appraiser runs from the date of the submission of the appraisal report to the client. These records must be made available by the appraiser for inspection and copying by the department on reasonable notice to the appraiser. If an appraisal has been the subject of or has served as evidence for litigation, reports and records must be retained for at least 2 years after the trial.

39. Section 475.624(4), Florida Statutes (1995), allows discipline if Respondent:

Has violated any of the provisions of this section or any lawful order or rule issued under the provisions of this section or chapter 455.

The failure to comply with the retention requirements at Section 475.629, Florida Statutes (1995) does not constitute a violation of a lawful order or rule under the provisions of the aforementioned section or Chapter 455, Florida Statutes. By extension it could arguably be considered a violation of Section 475.624(1), Florida Statutes (1995), that allows discipline if Respondent, "Has violated any provisions of this part or of

s. 455.227(1)." Section 475.629, Florida Statutes (1995), is found within Chapter 475, Part II, Florida Statutes (1995).

40. Respondent upon request mailed the second appraisal to Mr. Clanton but it was not received. Clear and Convincing evidence has not been established that the appraisal was not made available. § 475.629, Fla. Stat. (1995). No violation has been proven in accordance with Count I.

41. Count II states:

. . . Respondent is guilty of having failed to exercise reasonable diligence in developing an appraisal report in violation of Section 475.624(15), Florida Statutes.

42. Section 475.624(15), Florida Statutes (1995), allows discipline if Respondent:

Has failed or refused to exercise reasonable diligence in developing an appraisal or preparing an appraisal report.

43. No competent evidence was presented from a person with sufficient insight into what constitutes reasonable diligence on the part of a certified real estate appraiser when developing an appraisal or in preparing an appraisal report to allow a legal conclusion to be reached. Therefore no violation has been shown concerning Count II.

44. Count III states:

. . . Respondent has violated a standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal

Practice in violation of Section 475.624(14),
Florida Statutes.

45. Section 475.624(14), Florida Statutes (1995), allows
discipline if Respondent:

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.

46. By virtue of the allegations of material fact, where it
is alleged, "The report does not state the intended use of the
appraisal," as well as the argument set forth in the Petitioner's
Proposed Recommended Order, it is determined that the provision
of USPAP alluded to is Standards Rule 1-2 (1997), which states:

In developing a real property appraisal,
an appraiser must observe the following
specific appraisal guidelines: . . .
consider the purpose and intended use of
the appraisal . . .

47. Petitioner failed to present a witness that was
established as competent to explain the expectations for a real
estate appraiser concerning consideration of the purpose and
intended use of the appraisal as contemplated in USPAP Standards
Rule 1-2. Nothing else presented in the case serves to support
Petitioner's case so that clear and convincing evidence may be
found that Respondent violated USPAP Standards Rule 1-2. No
violation has been proven concerning Count III.

48. Count IV states:

Respondent is guilty of misrepresentation, culpable negligence, or breach of trust in any business transaction in violation of Section 475.624(2), Florida Statutes.

49. Section 475.624(2), Florida Statutes (1995), allows discipline if Respondent:

Has been guilty of . . . misrepresentation
. . . culpable negligence or breach of trust
in any business transaction . . .

Respondent has not been proven guilty of any material misrepresentation, or culpable negligence or breach of trust in the business transaction represented through the Report.

Therefore no violation of Section 475.624(2), Florida Statutes (1995), is proven as alleged in Count IV.

50. Count V states:

. . . Respondent is guilty of having obstructed or hindered in any manner the enforcement of Chapter 475, Florida Statutes or the performance of any lawful duty by any person acting under the authority of Chapter 475, Florida Statutes in violation of Section 475.626(1)(f), Florida Statutes.

51. Section 475.626(1)(f), Florida Statutes (1995), states:

Violations and penalties.--

(1) VIOLATIONS.--

* * *

(f) No person shall obstruct or hinder in any manner the enforcement of this section or the performance of any lawful duty by any

person acting under the authority of this section, . . .

The facts did not prove that Respondent obstructed or hindered the enforcement of this section by the investigator or the performance of the investigator acting under the authority of the section. No violation of Section 475.626(1)(f), Florida Statutes (1995), has been established as alleged in Count V.

RECOMMENDATION

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing the Administrative Complaint against Respondent.

DONE AND ENTERED this 30th day of May, 2007, in Tallahassee, Leon County, Florida.

S

CHARLES C. ADAMS
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 30th day of May, 2007.

ENDNOTE

1/ Concerning the factual predicate for the fifth affirmative defense, Respondent through testimony refers to the delay following the Department's receipt of the citizen's complaint leading to the Administrative Complaint. Reference is made to problems with the memory of witnesses; the regrouping of data to support the appraisal report that cannot be located; neighborhood data no longer available because of delay; the death of owners of the subject property; information from lenders that provided mortgages on the subject property not now available and a change in the Pensacola Association of Realtors MLS system that prohibited the retrieval of data.

In accordance with Section 455.225(4), Florida Statutes (2000), "The department shall also refer to the board any investigation or disciplinary proceeding not before the Division of Administrative Hearings pursuant to chapter 120 or otherwise completed by the department within 1 year after the filing of a complaint." Respondent also cites to the authority set forth in Carter v. Department of Professional Regulation, 633 So. 2d 3 (Fla. 1994) to support his position on the consequences of delay. Recognizing the nature of the Administrative Complaint that forms the basis for this prosecution, the unavailability of the categories of information described is not deemed significant such as to establish prejudice in the defense. This determination is made in recognition that Section 455.225(4), Florida Statutes (2000), in its expectation that the Department shall refer to the Board an investigation or disciplinary proceeding within one year after the complaint was made is not a bar to prosecution. It creates no absolute relief for Respondent when violated. The test in Carter, supra, has been followed as well.

This decision on the Respondent's fifth affirmative defense is reached upon a consideration of the written arguments submitted by the parties post-hearing.

COPIES FURNISHED:

Racquel A. White, Esquire
Department of Business and
Professional Regulation
Hurston Building, North Tower
400 West Robinson Street, Suite N 801
Orlando, Florida 32801

Thomas M. Brady, Esquire
3250 Navy Boulevard, Suite 204
Post Office Box 12584
Pensacola, Florida 32591-2584

Michael Martinez, Acting General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Michael E. Murphy, Director
Division of Real Estate
Department of Business and
Professional Regulation
Hurston Building, North Tower
400 West Robinson Street, Suite N 802
Orlando, Florida 32801

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.