

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 06-4543PL  
 )  
FRANCIS ANTHONY SEVERINO, SR., )  
P.A., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Notice was provided and on February 8, 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 commenced at 10:15 a.m., in the Volusia County Courthouse, Hearing Room 3, Room 314, 101 North Alabama Avenue, Deland, Florida. Charles C. Adams, Administrative Law Judge, conducted the hearing.

APPEARANCES

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

For Respondent: Timothy M. Goan, Esquire  
Timothy M. Goan, P.A.  
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Palm Coast, Florida 32137

STATEMENT OF THE ISSUE

Should discipline be imposed against Respondent's Florida real estate sales associate license?

PRELIMINARY STATEMENT

On October 17, 2006, FDBPR Case No. 20050012304, Petitioner brought an Amended Administrative Complaint against Respondent.

The Amended Administrative Complaint was based upon these allegations:

4. In and around September 2004, Respondent was the sales associate for Joaquin Torres and Marina [sic] Hopson (Torres) in the closing on the purchase and sale of real property located at 98 Ulysses Trail, Palm Coast, Florida, receiving a commission for this transaction. . . .

5. On or about August 6, 2004, Joaquin Torres and Marina [sic] Hopson (Torres) entered into a purchase and sale agreement for the real property located at 9 Rockwell Lane, Palm Coast, Florida. A copy of this agreement and accompanying documents is [sic] attached hereto and incorporated as Administrative Complaint Exhibit 2.

6. Respondent was the sales associate on the above transaction.

7. The closing did not occur on the above transaction.

8. Respondent thereafter demanded a \$6,000.00 from Joaquin Torres and Marina [sic] Hopson (Torres).

9. On or about October 12, 2004, Respondent received a payment for the services of real estate in the amount of \$6,000.00, payable by

Joaquin Torres and Marina [sic] Hopson  
(Torres), check number 483, and drawn on  
Cypress Bank. . . .

COUNT I

Based upon the foregoing, Respondent is guilty of having collected any money in connection with any real estate brokerage transaction except in the name of the employer and with the express consent of the employer and is guilty of commencing or maintaining any action for a commission or compensation against any person except his registered employer in violation of Section 475.42(1)(d), Florida Statutes and, therefore, in violation of Section 475.25(1)(e), Florida Statutes.

COUNT II

Based upon the foregoing, Respondent is guilty of dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in any business transaction in violation of Section 475.25(1)(b), Florida Statutes.

COUNT III

Based upon the foregoing, Respondent is guilty of exercising influence on the client for the purpose of financial gain of the licensee or a third party in violation of Section 455.227(1)(n), Florida Statutes.

In response to the Amended Administrative Complaint by executing an election of rights form, Respondent disputed paragraphs 4, 8, and 9, of the factual allegations, thereby requesting a hearing pursuant to Section 120.57(1), Florida Statutes (2006). The election of rights form was executed on November 3, 2006.

Petitioner forwarded the case to the Division of Administrative Hearings (DOAH), in the person of Robert Cohen, Director and Chief Judge, for a formal proceeding pursuant to Sections 120.59 and 120.57(1), Florida Statutes (2006). The case was filed on November 13, 2006, and assigned as DOAH Case No. 06-4543PL. A Notice of Hearing was provided and the case heard on the aforementioned date.

Petitioner presented James Pierce, Marine Torres, and Galina Trutina-Demchuk as its witnesses. Petitioner's Exhibits numbered 1 through 11 were admitted. Respondent presented Marine Torres as his witness and testified in his own defense. Respondent's Exhibits numbered 1 through 10 were admitted. Consistent with a response to an order of prehearing instructions, the parties entered into a stipulation of facts acknowledging those facts set out in Paragraphs 1 through 3 and 5 through 7 to the Amended Administrative Complaint. The stipulated facts are found in the findings of fact to this Recommended Order.

On February 21, 2007, a hearing transcript was filed. On February 26, 2007, Respondent filed a proposed recommended order. On February 27, 2007, Petitioner filed a proposed recommended order. The proposed recommended orders have been considered in preparing the Recommended Order.

FINDINGS OF FACT

Stipulated Facts:

1. Petitioner is a state government licensing and regulatory agency charged with the responsibility and duty to prosecute Administrative Complaints pursuant to the laws of the State of Florida, in particular Section 20.165 and Chapters 120, 455 and 475, Florida Statutes, and the rules promulgated pursuant thereto.

2. Respondent is and was at all times material hereto a licensed Florida real estate sales associate, issued license number 3015177, in accordance with Chapter 475 of the Florida Statutes.

3. The last license issued was as a sales associate with Diane Lynne Severino, P. O. Box 354491, Palm Coast, Florida 32135-4991.

4. On or about August 6, 2004, Joaquin Torres and Marine Hopson (Torres) entered into a purchase and sale agreement for the real property located at 9 Rockwell Lane, Palm Coast, Florida.

5. Respondent was the sales associate on the above transaction.

6. The closing did not occur on the above transaction.

Additional Facts:

7. According to Petitioner's records, the following constitutes the history of Respondent's sales associate license:

Francis Anthony Severino, Sr., Sales Associate, License #SL-3015177

From January 1, 2004 to October 4, 2004, he was a sales associate affiliated with Team Real Estate, Inc. doing business as Realty Executives Fun Coast Team license number CQ 1008966, a brokerage corporation located at 185 Cypress Point Parkway, suite 4, Palm Coast, Florida 32164;

From October 4, 2004 to March 31, 2005 said licensee was invalid due to no employing broker or no filing of a request to remain a sales associate under another broker.

From March 31, 2005 to the Present he is a sales associate affiliated with Diane Lynne Severino license number BK 666867, a brokerage sole proprietorship doing business as Severino Realty located at 170 North Beach Street, Daytona Beach, Florida 32114.

Petitioner's Exhibit numbered 1.

8. In his testimony Respondent indicated that his affiliation with Team Real Estate, Inc. ended on September 13, 2004, when he became inactive with that firm. Respondent's Exhibit numbered 2 is a copy of a DBPR RE-2050-1 Request for Change of Status form intended to establish the separation from that business. Mark Vost the real estate broker for Team Real Estate, Inc. filled out, signed, and sent it in. It has a fax stamp of September 13, 2004. The request by Mark Vost to

inactivate Respondent as a sales associate with Team Real Estate, Inc., through the form DBPR RE-2050, was dated September 13, 2004, and officially received by the Department of Business and Professional Regulation on October 4, 2004.

9. More significantly, Respondent testified that he filled out a DBPR RE-2050-1 a Request for Change of Status to be affiliated with Severino Realty whose broker was Diane L. Severino. At that time, Ms. Severino was Respondent's wife. A copy of the Request for Change of Status is found as Respondent's Exhibit numbered 3. It is dated September 13, 2004. Unlike Respondent's Exhibit numbered 2, Respondent's Exhibit numbered 3 does not have a fax stamp showing the date of transmission. Respondent indicated that he personally went to the fax machine in the office of Severino Realty and transferred his license to Petitioner by fax machine. On September 13, 2004, the date reflected on the form, Petitioner did not confirm the fax receipt by Petitioner. Respondent's explanation is that the fax machine upon which the transfer to Severino Realty of his sales associate license "did not have a receipt that prints out." Respondent in his testimony stated " . . . When I dialed the phone I got the dial tone, it rang, it answered, it made that beeping noise, and it never came and said anything that it did not go through and that it was an error. So I just assumed that it was accepted, because normally when a fax machine answers you, that beeping

sound and it means that it is acknowledged and if it does not answer it's a busy signal and you try dialing again." According to Respondent, from that point forward he assumed that his sales associate license had been transferred from Team Real Estate, Inc. to Severino Realty. It had not. Petitioner had evidence of the change of status of Respondent's license to inactive with Team Real Estate, Inc. It did not have evidence of the activation of Respondent's sales associates license with Severino Realty, even should one accept Respondent's testimony that he tried to fax the DBPR RE-2050-1 form designating a change in his broker to Diane L. Severino of Severino Realty on September 13, 2004.

10. Ultimately the portrayal of Respondent's license history established in Petitioner's Exhibit numbered 1 is accepted where Respondent is recognized as being affiliated with Severino Realty commencing March 31, 2005.

11. Respondent was involved with the Torres in a number of real estate transactions. One involved a purchase of a residence at 98 Ulysses Trail in Palm Coast, Florida, through a contract between Joaquine Torres and Holiday Builders, Inc. On July 21, 2004, the parties signed the contract. The total purchase price was \$180,190.00. Respondent was named in the Sales/Forms FHA-VA-Std. in the portion of the forms described as "Realtor Referral" and Realty Executive is written next to his name. This is



understood to refer to Team Real Estate, Inc. where Respondent was employed as a sales associate. The real estate commission involved with the purchase was 6 percent. Petitioner's Exhibit numbered 2. The real estate commission due Realty Executives (Team Real Estate, Inc.) was \$8,129.00 in Respondent's name. Petitioner's Exhibit numbered 2. On September 24, 2004, when the purchase was settled at closing, the \$8,1029.00 was paid, in relation to the property at 98 Ulysses Trail. Petitioner's Exhibit numbered 3.

12. On September 24, 2004, the Torres as seller, with Severino Realty being reflected as the broker signed an Exclusive Right of Sale Listing Agreement for the 98 Ulysses Trail property. The price reflected was \$229,800.00 with a broker's commission of 5.5 percent. The listing agreement bore one signature, that of the seller. The form did not name the authorized listing associate or broker. It referred to the brokerage firm name as Severino Realty. Petitioner's Exhibit numbered 4.

13. Earlier, Mr. Torres entered into a "Showcase Home Purchase Completed Field Model Agreement" with Holiday Builders, Inc. for a residence at 9 Rockwell Lane, Palm Coast, Florida. On August 6, 2004, the parties signed the agreement. Petitioner's Exhibit numbered 5.

14. On September 24, 2004, an Exclusive Rights of Sale Listing Agreement form was prepared between the Torres and Severino Realty on 9 Rockwell Lane, listing the sales price as \$164,900.00. At the time, the Torres did not own the home. The brokerage commission was 5.5 percent. A seller's signature was attached. No other signature was provided. No one was listed as associate or broker. Petitioner's Exhibit numbered 6.

15. The Torres' contract on 9 Rockwell Lane never closed due to the inability of the Torres to provide sufficient funds to conclude the purchase.

16. On October 7, 2004, the Torres executed a Promissory Note to pay Respondent \$5,000.00 upon the first sale of homes at 98 Ulysses Trail, 9 Rockwell Lane and 14 Ethel Lane. The amount was to be paid in 180 days from the date of the note payable at PO Box 354491, Palm Coast, Florida 32135 or "at such other place as payee or holder may specify in writing or in person." Petitioner's Exhibit numbered 7.

17. On October 7, 2004, Mark Vost, broker/manager for Realty Executives Fun Coast Team Real Estate, Inc., wrote the title company that would be handling the closing on the 9 Rockwell Lane Property to advise that \$5,000.00 of commission should be credited to the buyer with the balance of \$879.00 being paid to Realty Executives the Fun Coast Team. Respondent's Exhibit numbered 8. This coincides with the settlement charges

in the settlement statement for the 9 Rockwell Lane property that did not close on the anticipated date. October 12, 2004, was the scheduled closing date. Petitioner's Exhibit numbered 9.

18. After the Torres purchase of 9 Rockwell Lane did not close, Respondent telephoned Ms. Torres and said that she would have to pay him \$6,000 because of the percentage (commission) he was losing. He made more than one call. Respondent told Ms. Torres that the failure to close on the 9 Rockwell Lane property was not his problem. Respondent told Ms. Torres that she had to pay because she did not buy the property at 9 Rockwell Lane, that he lost his time and lost his commission and that it was her fault. Respondent told Ms. Torres to give him a check. Eventually, Respondent came to the Torres home to get money from the Torres that he said was due. Based upon the demand for money, Ms. Torres wrote a check payable to Frank Severino in the amount of \$6,000.00. The face of the check stated the purpose for the check as "9 Rockwell Lane." The check was written on October 12, 2004, the date Respondent went to the Torres' home. The payment was not intended as any form of gift or gratuity to Respondent. Respondent deposited and cashed the check. A replica of the check and its execution is found as Petitioner's Exhibit numbered 10.

CONCLUSIONS OF LAW

19. 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(5), Florida Statutes (2006).

20. The Department of Business and Professional Regulation licensed Respondent as a sales associate, license number 3015177. § 475.181(1) Fla. Stat. (2006). Petitioner intends to impose discipline upon that license for alleged violations set forth in the Amended Administrative Complaint.

21. In a disciplinary case Petitioner bears the burden of proof to establish to allegations in the Amended Administrative Complaint. That proof must be by clear and convincing evidence. See 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).

22. Recognizing the penal nature of this case, the underlying statutes cited in the Amended Administrative Complaint have been strictly construed. See State v. Pattishall, 99 Fla. 296 and 126 So. 147 (Fla. 1930), and Lester v. Department of

Professional and Occupational Regulation, State Board of Medical Examiners, 348 So. 2d 923 (Fla. 1st DCA 1977).

23. To decide the outcome in this case certain definitions in effect when the events described took place are necessary.

Section 475.01, Florida Statutes (2004), states:

(1) As used in this part:

(a) 'Broker' means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property

information or lists. A broker renders a professional service and is a professional within the meaning of s. 95.11(4)(a). Where the term "appraise" or "appraising" appears in the definition of the term "broker," it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser, and those appraisal services which may be performed by a registered trainee appraiser as defined in part II. The term "broker" also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term "broker" also includes any person or entity who undertakes to list or sell one or more timeshare periods per year in one or more timeshare plans on behalf of any number of persons, except as provided in ss. 475.011 and 721.20.

\* \* \*

(c) 'Commission' means the Florida Real Estate Commission.

(d) 'Customer' means a member of the public who is or may be a buyer or seller of real property and may or may not be represented by a real estate licensee in an authorized brokerage relationship.

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

\* \* \*

(i) 'Real property' or 'real estate' means any interest or estate in land and any interest in business enterprises or business opportunities, including any assignment, leasehold, subleasehold, or mineral right; however, the term does not include any cemetery lot or right of burial in any cemetery; nor does the term include the renting of a mobile home lot or recreational

vehicle lot in a mobile home park or travel park.

(j) 'Sales associate' means a person who performs any act specified in the definition of 'broker,' but who performs such act under the direction, control, or management of another person. A sales associate renders a professional service and is a professional within the meaning of s. 95.11(4)(a).

\* \* \*

(m) 'Voluntarily inactive status' means the licensure status that results when a licensee has applied to the department to be placed on inactive status and has paid the fee prescribed by rule.

(2) The terms 'employ,' 'employment,' 'employer,' and 'employee,' when used in this chapter and in rules adopted pursuant thereto to describe the relationship between a broker and a sales associate, include an independent contractor relationship when such relationship is intended by and established between a broker and a sales associate. The existence of such relationship shall not relieve either the broker or the sales associate of her or his duties, obligations, or responsibilities under this chapter.

24. Count I to the Amended Administrative Complaint accuses Respondent of violating Section 475.42(1)(d), Florida Statutes (2004), where it states in pertinent part:

(1) VIOLATIONS.--

\* \* \*

(d) A sales associate may not collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer

and with the express consent of the employer; and no real estate sales associate, whether the holder of a valid and current license or not, shall commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer at the time the sales associate performed the act or rendered the service for which the commission or compensation is due.

25. As a consequence of any violation related to Section 475.42(1)(d), Florida Statutes (2004), Respondent is accused of violating Section 475.25(1)(e), Florida Statutes, (2004) which states:

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$1,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

\* \* \*

(e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

26. Clear and convincing evidence has been presented to show that Respondent's collecting the \$6,000.00 from Ms. Torres was in connection with a real estate brokerage transaction for 9



Rockwell Lane in the interest of the Torres, constituting a payment other than in the name of an employer and without the express consent of an employer, action in connection with a real estate brokerage transaction directed to someone other than the employer.

27. By virtue of the violation in relation to Section 475.42(1)(d), Florida Statutes (2004), Respondent has also violated Section 475.25(1)(e), Florida Statutes (2004).

28. Count II of the Amended Administrative Complaint accuses Respondent of a violation of Section 475.25(1)(b), Florida Statutes (2004), that would subject Respondent to discipline if he:

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state . . . .

29. Clear and convincing evidence has been provided that Respondent was engaged in dishonest dealings by a scheme or device or breach of trust in association with the matters at 9 Rockwell Lane and his demand, receipt, and cashing of the check from Ms. Torres for the time and effort put forth in the 9 Rockwell Lane situation that did not go to closing. This was dishonest dealing and a breach of trust in a business transaction

in his demand and collection of monies that he was not entitled to receive.

30. Count III of the Amended Administrative Complaint accuses Respondent of a violation of Section 455.227(1)(n), Florida Statutes (2004), which states:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

\* \* \*

(n) Exercising influence on the . . . client for the purpose of financial gain of the licensee . . . .

31. Clear and convincing evidence has been provided to prove that Respondent exercised influence on Ms. Torres for financial gain in collecting the \$6,000.00 from her in relation to the 9 Rockwell Lane matter when he was not entitled to collect money.

32. In addition to the disciplinary opportunities that have been set out under Section 475.25(1), Florida Statutes (2004), for violations of that chapter, discipline may be imposed for the violations in association with Chapter 455, Florida Statutes, where at Section 455.227(2), Florida Statutes (2004). It states:

(2) When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act

which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:

(a) Refusal to certify, or to certify with restrictions, an application for a license.

(b) Suspension or permanent revocation of a license.

(c) Restriction of practice.

(d) Imposition of an administrative fine not to exceed \$5,000 for each count or separate offense.

(e) Issuance of a reprimand.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

33. Florida Administrative Code Rule 61J2-24.001 sets forth guidelines for imposition of penalties associated with violations that have been found. The punishment includes the possibility of an administrative fine, as well as a range of punishment from license suspension to license revocation. A violation of Section 475.25(1)(b), Florida Statutes, carries a recommended punishment of revocation.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered finding Respondent in violation of Sections 455.227(1)(n) and 475.25(1)(b), (d) and (e), Florida Statutes (2004), and revoking Respondent's sales associate license.<sup>1/</sup>

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

**S**

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CHARLES C. ADAMS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of March, 2007

ENDNOTE

1/ Petitioner requested that Respondent be required to pay costs associated with the prosecution of this case. § 455.227(3), Fla. Stat. (2004) No proof was offered concerning the cost amount. In addition, Petitioner would not be entitled to collect the assessed cost absent a final order finding against Respondent.

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.