

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 07-0683PL
)
RICHARD GUILFOYLE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on May 24, 2007, by video-teleconference between sites in Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: D.C. Lindamood, Esquire
Department of Business and Professional
Regulation
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For Respondent: Steven W. Johnson, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed the violations alleged in the Administrative Complaint, and if so, what discipline should be imposed.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Real Estate (Division), alleged in an Administrative Complaint dated October 5, 2006, that Respondent violated several provisions of Chapter 475, Florida Statutes, in connection with a residential appraisal that he performed in June 2005. Respondent requested a formal hearing on the allegations in the Administrative Complaint, and on February 12, 2007, this matter was referred to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing requested by Respondent.

The final hearing was initially scheduled for April 11, 2007, but it was rescheduled for May 24, 2007, on the Division's unopposed motion. The Division presented the testimony of Beverly Ridenauer, Jose Ciro, and Cosme Abreu, and the post-hearing deposition testimony of Ben M. Cole, III.¹ Respondent testified in his own behalf and also presented the testimony of Kristen Guilfoyle. The Division's Exhibits A, B, FF, and PP were received into evidence. Respondent did not offer any exhibits. Official recognition was taken of Sections 475.624,

475.629, and 475.6295, Florida Statutes (2005),² and of the Ethics Rule and Standards Rule 2-1 in the 2005 version of the Uniform Standards of Professional Appraisal Practice and Advisory Opinions (USPAP).

The Transcript of the final hearing was filed on July 9, 2007, without the exhibits received into evidence at the final hearing. The transcript of Mr. Cole's post-hearing deposition was filed on July 12, 2007. The exhibits received at the final hearing were filed on July 20, 2007. The parties were given 10 days from the last of those dates to file proposed recommended orders (PROs), which they did on July 30, 2007. The PROs have been given due consideration.

FINDINGS OF FACT

1. Respondent is a certified residential real estate appraiser. His license number is RD-4163.
2. Respondent was licensed as a registered trainee appraiser in December 2001. He passed the certification exam and received his current license in November 2003.
3. Respondent has not previously had any disciplinary action taken against him by the Division or the Florida Real Estate Appraisal Board (Board).
4. On June 14, 2005, Respondent was engaged by a mortgage company to appraise the single-family residence located at 620 Adirondack Avenue in Orlando ("the subject property").

5. The subject property was owned at the time by Cosme Abreu and his wife. The Abreus also owned a single-family residence located at 623 Adirondack Avenue, which is across the street from the subject property.

6. The subject property was at the time of the appraisal under contract for sale to Jose Ciro, who was a co-worker of Mr. Abreu's.

7. Respondent previously conducted an appraisal of the subject property in March 2005. His firm also conducted several appraisals of the Abreus' property at 623 Adirondack Avenue, including an appraisal on June 14, 2005.

8. Respondent went to the subject property on June 14, 2005, and walked around the inside and outside of the residence taking measurements and observing the condition of the property. He testified that at the time of the appraisal the subject property was in good overall condition; that all of the appliances were in place; that the air conditioner was working; that the carpet and flooring were in place; and that there was no readily observable water damage or rotten wood on the interior or exterior of the residence.

9. Respondent prepared an appraisal report of the subject property on June 14, 2005.

10. Respondent estimated in his report that the market value of the subject property as of the date of the appraisal

was \$185,000. Respondent used the cost approach and the sales comparison approach to arrive at that valuation.

11. The Division's expert appraiser, Ben Cole, III, did not take issue with the methodology used by Respondent in his appraisal of the subject property. Indeed, Mr. Cole stated in his report that: "The [comparative] sales were legitimate transactions, pertinent and in close proximity to the subject. The home was measured correctly and the square footage correctly computed with the room count and placement shown properly."

12. Nevertheless, Mr. Cole testified that the appraisal report prepared by Respondent was misleading because it did not disclose the actual condition of the subject property as of the date of the appraisal. Mr. Cole did not have any personal knowledge as to the condition of the property as of the date of the appraisal; his opinion regarding the misleading nature of Respondent's appraisal report was based upon the assumption that the condition of the subject property at the time of the appraisal was as reflected in the photographs taken in August 2005. However, as discussed below, the validity of that assumption was not established by clear and convincing evidence.

13. Respondent did not take photographs of the subject property in connection with the June appraisal. The exterior photographs of the subject property included in his appraisal

report were the photographs that he took in connection with the March appraisal.

14. Respondent testified that the March photographs accurately depicted the condition of the subject property as he observed it in June, and he stated in his appraisal report that the subject property has been "maintained in good overall condition."

15. Mr. Abreu testified that subject property was in good condition at the time of the appraisal, which was consistent with and corroborated Respondent's assessment of the condition of the subject property.³

16. Mr. Ciro had no direct personal knowledge about the condition of the subject property in June 2005. He did not take possession of the property until mid-August 2005, even though the closing occurred in mid-July 2005.

17. Mr. Ciro had only visited the subject property twice before August 2005. One of those visits occurred prior to the three hurricanes that hit the Orlando area in August and September of 2004. Mr. Ciro could not recall the date of his other visit to the property, but it was before June 2005.

18. Mr. Ciro testified that the subject property was in good condition at the time of his visits, although he acknowledged that he did not closely examine the outside of the

house because it was nighttime when he was at the subject property.

19. The condition of the subject property in August 2005 was not good, as reflected in the photographs and videotape that were received into evidence. For example, the carpet in the family room was missing, appliances were missing, the kitchen sink and cabinets had been removed and were on the back patio, there was a stain of some kind on the ceiling in at least one of the rooms, the backyard was overgrown and full of trash, and there was damage to the soffit on the right-front of the house.

20. Mr. Abreu testified that some of the damage depicted in the photographs and videotape -- e.g., removal of the sink from the kitchen, floor damage caused by a plumbing problem -- occurred between the time of the appraisal and the time that Mr. Ciro took possession of the subject property, and that he was in the process of fixing the damage when Mr. Ciro took possession of the property. Mr. Abreu attributed the remainder of the damage to Mr. Ciro.

21. Mr. Ciro and the Abreus are currently in litigation regarding the sale of the subject property and its condition in August 2005. Respondent is not a party to that litigation.

22. Respondent and Mr. Abreu testified that the August 2005 photographs do not reflect the condition of the property as of the time of the appraisal on June 14, 2005. That testimony

is called into question by the photograph in the appraisal report that appears to show that the soffit damage observed in August 2005 on the right-front corner of the house was present at the time of the March appraisal,⁴ but the evidence was not clear and convincing on that issue.

23. In October 2005, the Division received a complaint from Mr. Ciro regarding Respondent's appraisal of the subject property. Beverly Ridenauer was assigned to investigate the complaint.

24. It took Ms. Ridenauer several months to make contact with Respondent because the address that the Division had on file for him was incorrect.

25. Respondent was not able to produce his work file for the subject property when it was initially requested by Ms. Ridenauer.⁵

26. When the original work file could not be located, Respondent "reconstructed" the file and provided it to Ms. Ridenauer.

27. The original work file was subsequently located and provided to the Division during discovery. There is no evidence of any discrepancies between the "reconstructed" file and the original file.

28. The work file was not offered into evidence, but Respondent testified that it included the property appraiser

records, Multiple Listing Service print-outs, and other information he reviewed and considered in his appraisal of the subject property.

29. Respondent required his trainees to take interior photographs of the property they appraised for his use in reviewing and signing-off on their work, but he did not take interior photographs of properties that he appraised unless the lender specifically requested such photographs. As a result of this case, however, Respondent now takes interior photographs as a standard practice in order to "protect [him]self."

30. There is no statute, rule, or USPAP standard that requires interior photographs to be taken as part of an appraisal. The Division's expert appraiser, Mr. Cole, did not know whether it was even typical for appraisers to take interior photographs; he simply testified that such photographs "would have been helpful" in this case.

CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), 120.60(5), and, 455.225(5), Florida Statutes (2006).

32. The Division is responsible for prosecuting disciplinary cases against licensed real estate appraisers. See § 475.021(1), Fla. Stat. (2006).

33. The Board is responsible for taking final agency action in disciplinary cases against licensed real estate appraisers. See §§ 475.613(2), 475.624 Fla. Stat. (2006); Fla. Admin. Code R. 61J1-1.008, 61J1-8.002

34. The Division has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 295 (Fla. 1987).

35. The clear and convincing evidence standard requires that:

the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994).

36. Section 475.624, Florida Statutes, authorizes the Board to take disciplinary action against a licensed real estate appraiser if the appraiser:

(4) 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.

* * *

(14) 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.

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

37. The Administrative Complaint includes four counts, each of which begins with the phrase "[b]ased upon the foregoing." That phrase refers to the "essential allegations of material fact" that precede the counts in the Administrative Complaint. See Dept. of Business & Professional Reg. v. Price, 2007 Fla. Div. Adm. Hear. LEXIS 249, at ¶ 62 (DOAH May 3, 2007).

38. The "essential allegations of material fact" at issue in this case are:

5. Respondent failed to keep and maintain his work file for the Subject Property Report. Respondent failed to include photographs of the inside of the Subject Property in the Report.

6. . . . Upon taking possession of the Subject Property in August [2005], the Buyer found extensive hurricane damage: there was rotten wood in the soffits, and there was a hole in the air conditioning unit. Interior damage included missing carpet in the living room; missing tile in the utility room; missing kitchen cabinets, sink and countertops; and missing kitchen appliances.

7. Respondent stated in the Report that the Subject Property was in "good" overall condition, and that the tile/terrazzo

flooring and air conditioner were in good condition at the time of the report. However, Respondent is unable to produce any documentation establishing the condition of the Subject Property at the time of the Report.

39. The violations alleged in the four counts of the Administrative Complaint are constrained to these "essential allegations of material fact." ⁶ See, e.g., Trevisani v. Dept. of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005) (licensee may not be disciplined for an offense not charged in the administrative complaint).

40. Count I of the Administrative Complaint alleges a violation of Section 475.624(15), Florida Statutes, based upon Respondent's alleged failure to exercise reasonable diligence in his appraisal of the subject property.

41. There is no statute, rule, or USPAP standard that defines "reasonable diligence." The Division's expert appraiser, Mr. Cole, testified that reasonable diligence includes "a thorough observation and inspection of the subject property" and "thorough research in investigating the [comparable] sales." Respondent expressed a similar understanding of the phrase in his testimony.

42. The Division contends that Respondent failed to exercise reasonable diligence in his appraisal of the subject property because the condition of the property was not what he

described in his appraisal report. Thus, to prove Count I, it is necessary for the Division to establish that the condition of the subject property as of the date of the appraisal was not as described in the appraisal report.

43. The Division failed to meet its burden of proof. Although the condition of the property in August 2005 raises questions about the condition of the property at the time of the appraisal (particularly with respect to the soffit damage), the evidence is not clear and convincing in that regard. Indeed, the only witness presented by the Division who had personal knowledge about the condition of the property as of the date of the appraisal was Mr. Abreu, and he corroborated Respondent's testimony that the property was in good condition at the time of the appraisal.

44. Count II of the Administrative Complaint alleges a violation of Section 475.629, Florida Statutes, which according to the Division is a violation of Section 475.624(4), Florida Statutes.

45. Subsection (4) of Section 475.624, Florida Statutes, refers to violations of "any of the provisions of this section or any lawful order or rule issued under the provisions of this section or chapter 455" (emphasis supplied). By contrast, subsection (1) of Section 475.624, Florida Statutes, refers to violations of "any provisions of this part" (emphasis

supplied). Section 475.629, Florida Statutes, is a different section than Section 475.624, Florida Statutes, but the two sections are in the same part of the Florida Statutes. Thus, a violation of Section 475.629, Florida Statutes, could be a violation of subsection (1) of Section 475.624, Florida Statutes, not subsection (4) as alleged in the Administrative Complaint. Accord Price, supra, at ¶ 60.

46. Section 475.629, Florida Statutes, requires licensed real estate appraisers to "retain for at least 5 years, original or true copies of any contracts engaging in the appraiser's services, appraisal reports, and supporting data assembled and formulated by the appraiser in preparing appraisal reports."

47. The Division failed to prove a violation of Section 475.629, Florida Statutes, even though Respondent was not able to immediately locate his work file for the subject property when requested by the Division's investigator. The work file was subsequently located and provided to the Division, and there is no credible evidence that the file is not Respondent's original work file or that it did not contain the information required by Section 475.629, Florida Statutes.

48. Count III of the Administrative Complaint alleges a violation of "the Record Keeping and Conduct sections of the [USPAP] Ethics Rule," which is a violation of Section 475.624(14), Florida Statutes.

49. The Record Keeping section of the USPAP Ethics Rule provides:

An appraiser must prepare a workfile for each appraisal, appraisal review, or appraisal consulting 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; and
- 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 the appraiser provided testimony related to the assignment, whichever period expires last.

An appraiser must have custody of his or her workfile, or make appropriate workfile retention, access, and retrieval arrangements with the party having custody of the workfile.

Comment: A workfile preserves evidence of the appraiser's consideration of all applicable data and statements required by USPAP and other information as may be

required to support the appraiser's
opinions, conclusions, and recommendations
. . . .

A photocopy or an electronic copy of the
entire actual written appraisal, appraisal
review, or appraisal consulting report sent
or delivered to a client satisfies the
requirement of a true copy

Care should be exercised in the selection of
the form, style, and type of medium for
written records, which may be handwritten
and informal, to ensure that they are
retrievable by the appraiser throughout the
prescribed record retention period.

A workfile must be in existence prior to and
contemporaneous with the issuance of a
written or oral report. A written summary
of an oral report must be added to the
workfile within a reasonable time after the
issuance of the oral report.

A workfile must be made available by the
appraiser when required by state enforcement
agencies or due process of law

50. The Division failed to prove a violation of this rule
for the reasons discussed above in connection with the alleged
violation of Section 475.629, Florida Statutes.

51. The Conduct section of the USPAP Ethics Rule provides:

An appraiser must perform assignments
ethically and competently, in accordance
with USPAP and any supplemental standards
agreed to by the appraiser in accepting the
assignment. An appraiser must not engage in
criminal conduct. An appraiser must perform
assignments with impartiality, objectivity,
and independence, and without accommodation
of personal interests.

In appraisal practice, an appraiser must not perform as an advocate for any party or issue.

* * *

An appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions.

An appraiser must not communicate assignment results in a misleading or fraudulent manner. An appraiser must not use or communicate a misleading or fraudulent report or knowingly permit an employee or other person to communicate a misleading or fraudulent report.

An appraiser must not use or rely on unsupported conclusions relating to characteristics such as race, color, religion, national origin, gender, marital status, familial status, age, receipt of public assistance income, handicap, or an unsupported conclusion that homogeneity of such characteristics is necessary to maximize value.

52. The Division failed to prove a violation of this rule because, as discussed above, the evidence was not clear and convincing that Respondent's appraisal report inaccurately described the condition of the subject property at the time of the appraisal or that the appraisal report was otherwise misleading.

53. Count IV of the Administrative Complaint alleges a violation of USPAP Standards Rule 2-1(a) and (b), which is a violation of Section 475.624(14), Florida Statutes.

54. USPAP Standards Rule 2-1 requires the written appraisal report to "(a) clearly and accurately set forth the appraisal in a manner that will not be misleading" and "(b) contain sufficient information for the intended users of the appraisal to understand the report properly."

55. The Division failed to prove a violation of USPAP Standards Rule 2-1(a) or (b). The evidence was not clear and convincing that Respondent's appraisal report inaccurately described the condition of the subject property at the time of the appraisal or that the appraisal report was otherwise misleading.

56. Because the Division failed to prove that Respondent violated the USPAP rules and standards cited in Counts III and IV of the Administrative Complaint, it failed to prove a violation of Section 475.624(14), Florida Statutes.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Board issue a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 22nd day of August, 2007, in
Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 2007.

ENDNOTES

^{1/} Respondent moved to strike all of Mr. Cole's testimony based upon his "insufficient, and technically illegal review and/or consulting report." See Cole deposition, at 83. See also id. at 11-12; Respondent's PRO, at ¶ 12 (arguing that Mr. Cole's failure to comply with USPAP in his review of Respondent's appraisal "should render his opinions moot"). The motion to strike is denied. However, Respondent's objections during the deposition to Mr. Cole's testimony regarding matters not alleged in the "essential allegations of fact" in the Administrative Complaint are sustained, and that testimony has not been considered. See Conclusions of Law 37-39 and Endnote 6.

^{2/} On July 12, 2007, the Division filed copies of the 2006 version of the statutes that were officially recognized at the final hearing even though the parties agreed that the 2005 version of the statutes applies in this case since the appraisal that is the subject of the Administrative Complaint was performed in June 2005. See Transcript, at 20. There do not appear to be any material differences between the 2005 and 2006 versions of these statutes, and unless otherwise indicated, all statutory references in this Recommended Order are to the 2005 version of the statutes.

^{3/} The testimony of Mr. Abreu and Respondent was not consistent in all respects. For example, Mr. Abreu testified that he saw Respondent take photographs of the interior of the subject property, but Respondent testified that he did not take any photographs of the property in connection with the June appraisal. The inconsistencies, and the pending litigation between Mr. Ciro and the Abreus, affected the weight given to Mr. Abreu's testimony, but those issues did not undermine his testimony altogether.

^{4/} Compare Exhibit A, page 11, top photograph (March 2005 photograph) with Exhibit FF, picture 10 (August 2005 photograph).

^{5/} There is conflicting evidence as to what Respondent and his wife/office manager, Kristen Guilfoyle, told Ms. Ridenauer regarding the missing work file. Respondent and Mrs. Guilfoyle testified that they told Ms. Ridenauer that they could not find the file because it was likely in one of the boxes that was destroyed when their air conditioning unit broke and flooded the room in which the files were kept. Ms. Ridenauer testified that she was never told about a flood in the file room and that she was only told that the file could not be found. It is immaterial to the outcome of this proceeding why the work file could not be produced or what Ms. Ridenauer was told in that regard, but these inconsistencies have been taken into account in assessing the credibility of Respondent and Mrs. Guilfoyle.

^{6/} The Division presented evidence of other deficiencies in the appraisal report, including Respondent's failure to note in the report or take into account in the valuation of the subject property the fact that three of the four properties used in the sales comparison approach had newer roofs than the subject property. Respondent timely objected to such evidence, and it has not been considered.

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.