

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 08-1756PL
)
ELEANOR BORLING DIONEDA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On June 20, 2008, an administrative hearing in this case was conducted by video teleconference between Orlando and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jason W. Holtz, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite 801N
Orlando, Florida 32801-1757

For Respondent: Eric W. Ludwig, Esquire
250 North Orange Avenue, Suite 1250
Orlando, Florida 32801

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations set forth in the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated August 14, 2007, the Department of Business and Professional Regulation, Board of Real Estate (Petitioner), alleged that Eleanor Borling Dioneda (Respondent) violated Subsection 455.227(1)(j), Florida Statutes.

The Respondent disputed the allegations of the Administrative Complaint and requested a formal hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of three witnesses and had Exhibits numbered 1 through 5, 7, and 8 admitted into evidence. The Respondent had one exhibit admitted into evidence.

A Transcript of the hearing was filed on July 2, 2007. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was licensed as a real estate sales associate, holding Florida license number 3035990.

2. In late spring of 2005, the Respondent was contacted by Arnold Macabugao, a California resident who was interested in acquiring a home in Orlando, Florida, for himself and his wife.

3. The Respondent was aware of a house for sale at 14213 Sports Club Way, Orlando, Florida 32837, which she apparently thought would be suitable for the Macabugaos' purchase.

4. The owner of the house was Jack Girton. Mr. Girton did not reside in the property at any time material to this dispute.

5. The Girton house was inhabited by a woman identified as Kim Capiello. Ms. Capiello was an acquaintance of Mr. Girton's. Ms. Capiello had no ownership interest in the property. All documents related to the purchase of the property by the Macabugaos identified Mr. Girton as the owner.

6. During negotiations on the property, the Respondent provided all documents to Ms. Capiello. It is reasonable to conclude that Ms. Capiello transmitted the documents to Mr. Girton.

7. There is no evidence that the Respondent dealt directly with Mr. Girton at any time during the sales process. The weight of the evidence establishes that the Respondent negotiated the Macabugaos' purchase of the Girton property through Ms. Capiello.

8. At some point in the negotiations, the Respondent received a document titled "SIDE AGREEMENT TO PURCHASE CONTRACT" from Ms. Capiello. The document, which required payment of \$10,000 directly to Ms. Capiello by the Macabugaos, in relevant part, provided as follows:

This side agreement is between Buyers named above and Kim Capiello wherein the buyers agree to give \$10,000 to Kim Capiello for services rendered in the search and purchase of the above named property. This agreement is contingent upon the buyers securing a loan, its lender determining a firm closing date and last but not the least, actual closing and funding of the above named property.

The amount will be paid as follows:

\$5,000 to be paid at the time the Purchase contract is signed by all parties for the above property and contingent upon the buyers securing a loan and its lender determining a firm closing date.

\$5,000 to be paid the day after the closing under the condition being that the above property has been vacated and in move in condition.

Kim Capiello further agrees that this side agreement is between her and the buyers only and has nothing to do with the actual purchase agreement entered into by the buyers and Jack Girton. (Emphasis in original)

9. The Respondent facilitated the payment of the \$10,000 by the Macabugaos to Ms. Capiello pursuant to the side

agreement. The Respondent transmitted the document to the Macabugaos, who signed it. A signature purportedly of Ms. Capiello is also on the document.

10. The Respondent instructed the Macabugaos on how to make the payments. She collected the funds from them. The Respondent used her personal checking account as a transfer mechanism for one of the \$5,000 payments.

11. The side agreement does not identify the date of execution, but Mr. Macabugao testified that he signed the side agreement after the sales contract had been signed. The executed sales contract between the Macabugaos and Mr. Girton was dated June 7, 2005.

12. Mr. Macabugao testified that he had no communication with Ms. Capiello.

13. The evidence fails to establish the Macabugaos' rationale for agreeing to make the payments to Ms. Capiello, other than the fact that the Respondent transmitted the document to the Macabugaos and instructed them on how to make the payments.

14. None of the sales documents suggested that Ms. Capiello held licensure in Florida as a real estate professional.

15. Based upon a review of the Petitioner's licensure files, the Petitioner's investigator testified that Ms. Capiello

was not licensed in Florida as a real estate professional in any capacity. There was no credible evidence to the contrary, and the investigator's testimony has been credited.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2007).

17. Subsection 455.227(1)(j), Florida Statutes (2005), provides as follows:

455.227 Grounds for discipline; penalties; enforcement.--

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

* * *

(j) Aiding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to this chapter, the chapter regulating the profession, or the rules of the department or the board.

* * *

(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.

18. The Petitioner has the burden of establishing the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

19. The Petitioner has alleged that the Respondent assisted Ms. Capiello to act as a broker for compensation in the referenced real estate sales transaction. Subsection

475.01(1)(a), Florida Statutes (2005), provides the following applicable definition:

"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. (Emphasis supplied)

20. Ms. Capiello met the definition of broker in this case because she took part in the negotiations with the seller of the property and received \$10,000 from the buyers for her services. The Respondent used Ms. Capiello as a conduit for negotiations between the buyers and seller of the Girton property, after which the Respondent directed the buyers to pay \$10,000 to Ms. Capiello.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Petitioner enter a final order finding Eleanor Borling Dioneda guilty of violating Subsection 455.227(1)(j), Florida Statutes (2005); imposing a two-year license suspension followed by a two-year probationary period; imposing a fine of \$5,000; and requiring completion of a remedial professional education course to be determined by the Petitioner.

DONE AND ENTERED this 11th day of August, 2008, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2008.

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.