

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-5802PL  
 )  
MICHAEL W. BUGG, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On April 10, 2009, a duly-noticed hearing was held by means of video teleconferencing in Jacksonville and Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick Cunningham, Esquire  
Department of Business and  
Professional Regulation  
400 West Robinson Street  
Hurston Building-North Tower, Suite N801  
Orlando, Florida 32801

For Respondent: William Haley, Esquire  
Brannon, Brown, Haley,  
Robinson & Bullock, P.A.  
Post Office Box 1029  
Lake City, Florida 32056-1029

STATEMENT OF THE ISSUES

The issues to be decided in this proceeding are whether Respondent was guilty of the violations alleged in the two-count

Administrative Complaint and if so, what penalties should be imposed.

PRELIMINARY STATEMENT

On January 17, 2008, the Department of Business and Professional Regulation, Division of Real Estate (Division), filed a two-count Administrative Complaint charging Respondent with violating Section 455.227(1)(j)(aiding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to Chapter 455, 475 or the rules of the Division) and Section 475.25(1)(e) by virtue of Section 475.42(1)(c), Florida Statutes (employing any person as a sales associate who is not the holder of a valid and current license as sales associate, and thus violating any part of Chapter 475, Florida Statutes). On February 12, 2008, Respondent filed an Election of Rights disputing the allegations in the Administrative Complaint and requesting a Section 120.57(1) hearing. On November 19, 2008, some nine months later, the Division forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge.

A Notice of Hearing issued on November 25, 2008, scheduling the case for hearing to be conducted February 19, 2009. At the request of Respondent, the hearing was continued and rescheduled for April 10, 2009, and proceeded as scheduled.

Petitioner presented the testimony of Fred Seli and Marsha Creviston, and Petitioner's Exhibits 1-5 were admitted into

evidence. Respondent testified on his own behalf and presented the testimony of Clifton Coates, and Respondent's Exhibits A-F were admitted. The proceedings were recorded and a Transcript was filed with Division of Administrative Hearings on May 6, 2009. At the request of the parties, the time for filing proposed recommended orders was extended until May 22, 2009. Respondent filed a Proposed Recommended Order May 20, 2009. Petitioner's Proposed Recommended Order was filed May 26, 2009, and no objection to its late filing has been entered. Both submissions have been carefully considered in the preparation of this Recommended Order.

Respondent also filed a Request for Official Recognition on May 11, 2009, asking for official recognition of the Department of Professional Regulation, Division of Real Estate, Florida Real Estate Commission News & Report, Summer 1992, Volume XL. The Department has not filed any objection to the request, and it is hereby granted. Unless otherwise indicated, all references shall be to the codification of the Florida Statutes in effect at the time of the conduct alleged, i.e., 2005.

#### FINDINGS OF FACT

1. Petitioner is the state governmental agency charged with the licensing and regulation of real estate brokers and sales associates, pursuant to Section 20.165 and Chapters 120, 455, and 475, Florida Statutes.

2. Respondent is and was at all times material to these proceedings, a licensed real estate broker, issued license number BK-3013375.

3. Respondent is the qualifying broker for Lifestyles Realtors, LLC, d/b/a Belleza (Lifestyles), located at 1400 Marsh Landing Parkway, Suite 112, Jacksonville, Florida, and was the qualifying agent at the time of the events giving rise to this case. Lifestyles is an agency that works primarily for developers.

4. On or about August 2005, Lifestyles employed Clifton Coates. At the time he was hired, Clifton Coates was not licensed as a real estate sales associate or broker in the State of Florida. He was a long-time friend of the Respondent.

5. At the inception of his employment, Mr. Coates worked in marketing under the supervision of the vice president of marketing, Katie Armstrong. In that capacity, he worked on floor plans, brochures, and communications with the developer for a major project with which the company was involved. He did not have a role in terms of contact with potential buyers of real estate.

6. The project was a condominium project called Esplanade. Lifestyles started selling units of the project in November 2005. At that time, the project was still under construction. When the sales began in November, volume was very heavy, so Mr. Coates began working with the sales team, which consisted of two

licensed agents on the premises, Julie Seago and Marcia Creviston. He did so at the developer's request because of his familiarity with the particular type of development being marketed.

7. Throughout his employment, Mr. Coates was a salaried employee. He did not receive commissions from any of the properties sold. He wore a name tag that simply listed his name and the name of the company.

8. When customers came into the sales office, Mr. Coates would see that they were comfortable, take down preliminary information such as their name and address and what their plans were, and input the information into a computer. He would hand out preprinted brochures, and would relay prices provided by the developer. He did not show the actual property, but would show customers a scaled model of the project that was on display in the sales area. Mr. Coates dealt only with people who came into the sales office. No evidence was presented to show that he took any action to advertise the project or induce people to come look at it.

9. If the customer indicated a desire to purchase a unit, Mr. Coates would enter the information regarding the unit the customer wanted, pull the fields from the initial welcome information, and the computer would self-populate the remaining information for a contract.

10. Mr. Coates could not change or negotiate anything related to price of a unit, the price of upgrades, the amount of the deposit or where it went. All of these items were controlled by the developer.

11. Once Mr. Coates entered the information into the computer and a contract was generated, Mr. Coates would take the printed contract and the customer to Julie Seago, a licensed sales agent. Ms. Seago would go over the contract with the customers and, should the customer ultimately decide to purchase the property, would sign the contract on behalf of Lifetsyles.

12. Based on the evidence presented, a contract with Gina Gatlin was signed by Ms. Seago. There was no credible evidence presented regarding the Gatlin sale other than that Ms. Seago signed the contract and an internal listing existed showing Mr. Coates as the agent for the sale. However, this internal listing identifies people as "agent" based upon whose computer terminal is used to input data, as opposed to any information regarding licensure.

13. Mr. Coates took the real estate examination and became a licensed agent in April 2006. Until that time, he abided by the instructions given to him when he first worked with the sales team. At that time, he was given a list of "do's and don'ts" that purported to be from the Florida Real Estate Broker's Guide published by the Florida Association of Realtors. This same list

was also printed in the Florida Real Estate Commission's newsletter in the summer of 1992.

14. The list, upon which Mr. Coates and Respondent relied, indicated that it was permissible for an unlicensed person to answer and forward telephone calls; write ads for approval of a supervising broker or licensee; receive, record and deposit earnest money and deposits; type contract forms for approval by a licensee and supervising broker; prepare flyers and promotional information for approval by licensee and supervising broker; answer oral questions about listings if the answer could be obtained from preprinted materials; and hand out objective, written information on a listing, along with other activities not relevant to these proceedings. Mr. Coates' activities did not vary from these permissible activities.

15. In short, Mr. Coates did not show properties, but only a model. He did not negotiate prices. He did not hold himself out as a licensed agent; did not receive commissions; and did not set closing dates. Mr. Coates did not engage in the unlicensed sale of real estate, and Respondent did not assist him in doing so.

#### CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

17. The Department seeks to discipline Respondent's license as real estate broker. It therefore has the burden of proving the allegations of the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

18. Count I of the Administrative Complaint charges Respondent with violating Section 455.227(1)(j), Florida Statutes, which provides:

(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.

19. The Legislature has defined the terms "broker" and "salesperson" in Section 475.01, Florida Statutes:

(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, . . . sells, . . . or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of . . . any real property or any interest in or concerning the same, . . . , 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 . . . selling, . . . real property of others or interests therein, . . . 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 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 therefore . . . . A broker renders a professional service and is a professional within the meaning of s. 95.11(4)(a). . . . (Emphasis supplied.)

\* \* \*

(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. . . .

20. The Division has not demonstrated by clear and convincing evidence that Respondent committed the violation alleged in Count I. Mr. Coates was employed initially for another purpose, i.e., to work on floor plans and other marketing materials needed for the developer. He assisted the sales team once the units began to sell. However, he was salaried, received no commissions, exercised no discretion and engaged in no negotiations. He referred only to preprinted materials and a scaled model, and relayed cost information controlled and provided by the developer. At Respondent's request, Mr. Coates followed the guidelines printed in the Florida Real Estate Commission's newsletter regarding what an unlicensed person can

do and did not engage in those activities that were identified as prohibited.

21. Count II of the Administrative Complaint asserts that Respondent is guilty of having employed any person as a sales associate who is not the holder of a valid and current license as a sales associate, in violation of Section 475.42(1)(c), Florida Statutes, and therefore violated Section 475.25(1)(e), Florida Statutes.

22. Section 475.42(1)(c) provides:

(c) A broker may not employ, or continue in employment, any person as a sales associate who is not the holder of a valid and current license as sales associate; but a license as sales associate may be issued to a person licensed as an active broker, upon request and surrender of the license as broker, without a fee in addition to that paid for the issuance of the broker's active license.

23. Section 475.25(1)(e) provides:

(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.

24. The Department has not demonstrated by clear and convincing evidence the allegations in Count II because it has not demonstrated that Mr. Coates was employed as a sales associate. As noted above, the term sales associate is defined by statute. Given that the Department did not prove that Mr. Coates acted within the definition of a real estate broker, he also did not act as a sales associate. Therefore, no violation of Section 475.42, and by extension, Section 475.25(1)(e) has been proven.

RECOMMENDATION

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

RECOMMENDED:

That the Florida Real Estate Commission enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 17th day of June, 2009, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of June, 2009.

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.