

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-0642PL  
 )  
JAMES EDWARD LESTER, JR., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On September 21, 2009, a duly-noticed hearing was held by means of video teleconferencing with sites in Tallahassee and Panama City, Florida, before Lisa Shearer Nelson, Administrative Law Judge of the Florida Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Minarcin, Esquire  
Department of Business and  
Professional Regulation  
400 West Robinson Street, Suite N801  
Orlando, Florida 32801-1757

For Respondent: Daniel Villazon, Esquire  
Daniel Villazon, P.A.  
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Celebration, Florida 34747

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated the provisions of Section 475.624(2), (14) and (15), Florida Statutes (2006)<sup>1/</sup>, as alleged in the Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On August 6, 2008, Petitioner, Department of Business and Professional Regulation (the Department or DBPR), filed a 12-count Administrative Complaint against Respondent, alleging violations of Section 475.624(2) and (15), Florida Statutes, and violation of Section 475.624(14), Florida Statutes, by violating various portions of the Uniform Standards of Professional Appraisal Practice (USPAP). Respondent disputed the allegations in the Administrative Complaint and requested a hearing pursuant to Section 120.57(1), Florida Statutes. On February 6, 2009, the case was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was originally noticed for hearing by video teleconference on April 29, 2009. The matter was continued twice at the request of Petitioner, and ultimately heard September 21, 2009. On April 13, 2009, Petitioner moved to amend the Administrative Complaint to correct certain dates in the original Administrative Complaint, and the Motion to Amend was granted.

At hearing, Petitioner presented the testimony of Diana Woods and Paul Grimes, and Petitioner's Exhibits 1-6, 8 and 9 were admitted into evidence. Respondent testified on his own behalf and presented the testimony of Kenneth Ardire. Respondent's Exhibit 1 was also admitted. The proceedings were recorded and on October 7, 2009, a two-volume Transcript was filed with the Division.

At the request of the parties, the time for filing proposed recommended orders was extended to October 30, 2009. Both parties timely filed Proposed Recommended Orders, and those submissions have been carefully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The Department of Business and Professional Regulation, Division of Real Estate, is the state agency charged with the licensing and regulation of property appraisers in the State of Florida, pursuant to Section 20.165 and Chapters 455 and 475, Florida Statutes.

2. Respondent, James Lester, Jr., is a Florida state certified general appraiser, holding license number RZ2783. He has been licensed by the Florida Real Estate Appraisal Board since 1991, initially holding a certified residential appraisal license and then a general appraisal license.

3. Kenneth Ardire and Bradley Scott Bozeman formerly worked in the office referred to as J. Lester Company. The business was owned by Respondent's father. Bozeman was a residential appraiser and Ardire was a registered trainee appraiser supervised by Bozeman. During the time material to this Amended Administrative Complaint, Respondent did not act in a supervisory capacity with respect to either Bozeman or Ardire. Neither man currently works for the firm, and Bozeman's appraiser's license has been revoked.

4. In February 2006, Ardire and Bozeman prepared a vacant land appraisal report (Report 3) related to property located on Highway 71 in White City, Florida, for Vision Bank.

5. Respondent was not involved in the preparation of the vacant land appraisal and did not sign the report. Vision Bank also requested a subdivision analysis of the property. Ardire and Bozeman were assigned the report regarding the subdivision analysis because they had prepared the prior report on the same property. They were assigned to this task by an employee in the office other than Respondent.

6. Preparation of a subdivision analysis is considered a commercial appraisal, as opposed to a residential appraisal. Neither Ardire nor Bozeman is licensed to prepare commercial appraisals.

7. For reasons that are unclear, Ardire provided a "draft" report to Vision Bank, which shall be referred to as Report 2. Report 2 is unsigned and contains only the names of Bozeman and Ardire. Report 2 was provided by Vision Bank to Donald Giles, another licensed appraiser. Based on his review of Report 2, Giles filed a complaint with the Department. The complaint was identified as DBPR Case No. 2007-3522.

8. In response to a request from the Department, Bozeman supplied to DBPR a copy of what is now referred to as Report 1 and its supporting work papers. This report indicates that it was prepared by Respondent, Bozeman and Ardire. Based on this

report and workfile, DBPR Case No. 2008-1566 (the current proceeding) was initiated against Respondent.

9. Neither report has numbered pages. Reports 1 and 2 differ in the following ways:

a. Report 1 lists all three appraisers, with purported signatures for each. Report 2 lists only Ardire and Bozeman and contains no signatures. However, both reports state on the second page of the cover letter that "the appraisals attached were written, valued, analyzed and concluded by Kenneth Ardire and Bradley Scott Bozeman."

b. The cover letter for Report 1 is on company letterhead, and is addressed to Vision Bank. The cover letter for Report 2 is on plain paper, and is addressed to Capital City Bank, at the same address listed for Vision Bank. The first page of Report 2 lists Vision Bank as the intended user.

c. On the page labeled "Extraordinary Assumptions," Report 2 contains a sixth assumption which states: "The appraiser completing this assignment has a small interest in the property. However, the appraiser was not biased in his final conclusion of value." This assumption is omitted in Report 1.

d. The certification page in Report 2 also lists Bozeman as having a minor interest in the property, lists Ardire and Bozeman but contains no signatures. The certification page for Report 1 has no reference to Bozeman's interest and has three purported signatures (Ardire, Bozeman and Respondent).

e. On the page entitled Certificate of Value, Report 1 has three signature blocks and three purported signatures (Ardire, Bozeman, and Respondent). Report 2 contains two signature blocks (for Ardire and Bozeman) but no signatures.

f. The third paragraph of the section entitled "Approaches to Value Omitted" in Report 2 contains the following sentences: "The market approach is unique since not all properties are alike. In this case the appraiser compared an area in Lands Landing in Wewahitchka and Honey Hill Subdivision in Wewahitchka." These two sentences are omitted from this section of the report in Report 1.

g. With respect to the Highest and Best Use Discussion, the first two pages in both reports are identical. Report 1 includes an additional two pages entitled "Introduction to the Appraisal Process," which appears to be general information related to the appraisal process as opposed to specific information related to the appraisal performed.

h. The written information contained in the "Public and Private Restriction" section is identical. However, Report 1 also includes maps and pictures of the area.

i. Both reports contain the Land Appraisal Report (Report 3) signed by Ardire and Bozeman. Report 1 contains additional information with respect to the vacant land report not included in Report 2.

j. On the page labeled "Land Sales Comparison Chart," under the Section entitled "Reconciliation and Land Value Estimate," Report 2 contains the sentence, "All the sales are zoned for similar use and felt to have the same potential for use as the subject." This sentence is omitted from Report 1.

k. On the page labeled "Income Approach," Report 2 contains the sentence, "Method 2 is the financing and development method." This sentence is omitted in Report 1.

l. Report 1 contains a blank page entitled "Addendum" followed by pages from a book with a heading "Subdivision Analysis."

10. While there are differences between Report 1 and Report 2, they do not make a significant difference in terms of the quality and usefulness of the reports.

11. Section 475.628, Florida Statutes, requires that appraisers comply with the USPAP. Section 475.628 was last amended in 1998, and was enacted in 1991. USPAP is adopted by the Appraisal Foundation, which is authorized by Congress as the Source of Appraisal Standards and Appraiser Qualifications. Pursuant to Section 475.611(1)(q), Florida Statutes, "Uniform Standards of Professional Appraisal Practice" means the most recent standards approved and adopted by the Appraisal Standards Board of the Appraisal Foundation. Section 475.611 was also enacted in 1991, and the language of this subsection has been unchanged, although renumbered, since that time. To this end,

the Department has submitted as Exhibit 5 the USPAP Standards that became effective January 1, 2005. The most recent amendments for each section of the Standards is reflected on page four of the exhibit. None of these amendments relevant to these proceedings occurred prior to 1998.

12. The Department alleges that Report 1 and the workfile for the report do not conform to several components of the USPAP standards in effect in 2005. Specifically, the Conduct portion of the Ethics Rule provides in part that "[a]n 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." Report 1 violated this section of the Ethics Rule contained in USPAP in that it was difficult for a reader of the report to determine exactly what was being appraised. Moreover, the inclusion of the gross sell-out amount on the first page, described as "potential gross income" in bold type is also misleading, because non-appraisers would infer that the potential gross income was the concluded value of the property.

13. The Recordkeeping portion of the Ethics Rule addresses the need for appraisers to keep a workfile for each appraisal. The rule provides in pertinent part:

An appraiser must prepare a workfile for each appraisal, appraisal review, or appraisal consulting assignment. The workfile must contain:



- 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 written 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.

14. With respect to Report 1, the workfile does not include documentation regarding marketing information for Gulf County, as listed in the report, and also lacks documentation to support any highest and best use analysis, including the four criteria necessary to establish the highest and best use for the property. It also lacks documentation to support the statements in Report 1 regarding the respective public and private restriction section, and lacks any plans or specifications to indicate the type of infrastructure proposed for the subdivision. The workfile also lacks documentation to support the income approach used, and contains no information to support the construction costs, closing costs, real estate taxes, expenses or other calculations used in the Calculations and Comments Section of Report 1. Also missing is any documentation from the identified engineers to support the data used for construction costs. Finally, there is

also no documentation to support the data or calculations in the two-year discounted cash flow analysis in Report 1.

15. With respect to Report 3, the workfile lacks documentation to support the single family price ranges in the neighborhood section of the report; lacks documentation to support the information in the Market Data Analysis Section; and lacks any multiple listing services (MLS) data or public records for the comparable sales used in the report.

16. The Amended Administrative Complaint refers to the Scope of Work Rule. This rule is in actuality entitled Standard 1: Real Property Appraisal, Development and states: "In developing a real property appraisal, an appraiser must identify the problem to be solved and the scope of work necessary to solve the problem, and correctly complete research and analysis necessary to produce a credible appraisal." Report 1 identifies the problem as "estimating the value of the proposed subdivision and determines [sic] a value on a typical lot." However, the Report does not identify the scope of work and does not complete the research and analysis necessary to complete the appraisal properly.

17. Standards 1-1(a), (b) and (c) require the following:

In developing a real property appraisal, an appraiser must:

(a) be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;

- (b) not commit a substantial error of omission or commission that significantly affects an appraisal; and
- (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

18. Report 1 violates these standards because, as discussed more fully below, the report contains several significant errors, including the failure to discuss the four criteria for analyzing highest and best use.

19. Standards Rule 1-2(d) requires that in developing a real property appraisal, an appraiser must identify the effective date of the appraiser's opinions and conclusions. Report 1 stated that the value date of the report and the date of the report itself, were the same as the date of the inspection of the property, June 7, 2006. Mr. Grimes, the Department's expert, explained that this was a violation of the standard because in a situation where the appraiser is estimating a value for a project that is not now in existence, the hypothetical nature of the valuation must be adequately explained, and the effective date of the appraisal should reflect the date in the future when the subdivision is scheduled to be completed. Mr. Grimes' testimony is credited.

20. Standards Rule 1-3 requires the following:

When the value opinion to be developed is market value, and given the scope of work identified in accordance with Standards Rule 1-2(f), an appraiser must:

(a) identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends; and

(b) develop an opinion of the highest and best use of the real estate.

21. Report 1 does not provide an analysis of the highest and best use of the property. While the factors related to such an analysis are defined, there is no discussion of these factors related to the actual property being appraised.

22. Standards Rule 1-4(a),(c) and (g) provides:

In developing a real property appraisal, an appraiser must collect, verify, and analyze all information applicable to the appraisal problem, given the scope of work identified in accordance with Standards Rule 1-2(f).

(a) When a sales comparison approach is applicable, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.

\* \* \*

(c) When an income approach is applicable, an appraiser must:

(i) analyze such comparable rental data as are available and/or the potential earnings capacity of the property to estimate the gross income potential of the property;

(ii) analyze such comparable operating expense data as are available to estimate the operating expenses of the property;

(iii) analyze such comparable data as are available to estimate rates of capitalization and/or rates of discount; and

(iv) base projections of future rent and/or income potential and expenses on reasonably clear and appropriate evidence.

Comment: In developing income and expense statements and cash flow projections, an appraiser must weigh historical information and trends, current supply and demand factors affecting such trends, and anticipated events such as competition from developments under construction.

\* \* \*

(g) An appraiser must analyze the effect on value of any personal property, trade fixtures, or intangible items that are not real property but are included in the appraisal.

23. While the Amended Administrative Complaint refers to all three subparagraphs listed above, the evidence presented dealt solely with the deficiencies related to Standards Rule 1-4(c). Mr. Grimes opined that with respect to Report 1, the income approach to the cash flow analysis did not support the conclusions, projections on income, and with respect to this project, the sale of lots over a period of time. The statements made in the report are conclusory in nature, with little or no explanation of the basis for forming the conclusions.

24. Standards Rule 1-6(a) and (b) provides:

In developing a real property appraisal, an appraiser must:

(a) reconcile the quality and quantity of data available and analyzed within the approaches used; and

(b) reconcile the applicability or suitability of the approaches used to arrive at the value conclusion(s).

25. Report 1 indicates that there are three traditional approaches to value in the valuation process: the cost approach,

the direct sales comparison approach, and the income capitalization approach. While the report states that all three approaches will be considered, the appraisal report omits any discussion of the cost approach and the direct sales comparison approach. By omitting these approaches from the analysis, the report omits an important "check and balance" process that would have caught what Mr. Grimes considered to be a substantial error in the discounted cash flow analysis.

26. Standards Rule 2-1 provides:

Each written or oral real property appraisal report must:

- (a) clearly and accurately set forth the appraisal in a manner that will not be misleading;
- (b) contain sufficient information to enable intended users of the appraisal to understand the report properly; and
- (c) clearly and accurately disclose all assumptions, extraordinary assumptions, hypothetical conditions, and limiting conditions used in the assignment.

27. Hypothetical conditions and extraordinary assumptions are considered to be two different things. As noted in Report 1, an extraordinary assumption is defined as an assumption that presumes certain information to be factual. If found to be false, the information could alter the appraiser's opinions or conclusions. A hypothetical condition is something that assumes conditions contrary to known facts about physical, legal or economic characteristics of the property being appraised, or about conditions external to the property, such as market

conditions or trends, or about the integrity of data used in the analysis. Hypothetical conditions and extraordinary assumptions should be explained separately in an appraisal report, so that the intended user is in a better position to understand the true value of the appraisal.

28. Report 1 lists 6 conditions and assumptions all together. They are that the proposed subdivision is based on 21 lots; that all plans and specs (unidentified) are to be approved and accepted by all governmental authorities; all work will be completed in a quality workmanship manner with quality materials; assumed the subject property can be developed as proposed; and information on the number of lots was made available by the engineer Bailey, Bishop and Lane. The report does not differentiate which are considered hypotheticals and which are considered extraordinary assumptions.

29. The report does not contain sufficient information to enable the intended user of the appraisal to understand the report and to use it for its intended purpose, i.e., to determine whether the highest and best use for the land is subdivision development.

30. Standards Rule 2-2(b) provides in pertinent part:

Each written real property appraisal report must be prepared under one of the following three options and prominently state which option is used; Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report.

\* \* \*

(b) The content of a Summary Appraisal Report must be consistent with the intended use of the appraisal and, at a minimum:

\* \* \*

(ii) state the intended use of the appraisal;  
(iii) summarize information sufficient to identify the real estate involved in the appraisal, including the physical and economic property characteristics relevant to the assignment;

\* \* \*

(vi) state the effective date of the appraisal and the date of the report;

\* \* \*

(ix) summarize the information analyzed, the appraisal procedures followed, and the reasoning that supports the analyses, opinions, and conclusions;  
(x) state the use of the real estate existing as of the date of value and the use of the real estate reflected in the appraisal; and, when reporting an opinion of market value, summarize the report and rationale for the appraiser's opinion of the highest and best use of the real estate;

. . .

31. Report 1 states that the intended use of the appraisal is to determine the fair market value of the property. It also provides sufficient information to identify the real estate involved. However, as noted at finding of fact 18, the effective date of the appraisal, the date of the property inspection and the date of the report are the same. Where, as here, the appraisal is determining value of a proposed subdivision as completed at some future time, the date of the report cannot be



the effective date of the appraisal. The report fails to have any discussion or analysis with respect to the property's highest and best use, and has little or no reasoning or analysis to support the opinions and conclusions contained in the report.

32. Report 1 contains what purports to be Respondent's signature. Clearly, by signing an appraisal report, a property appraiser takes responsibility for the contents of that report. When speaking with the investigator during the investigation of this case, Respondent stated that he had little recollection of the appraisal, but given that his signature was on it, he acknowledged responsibility for whatever errors it contained. However, at hearing, Respondent disputed that it was actually his signature. Respondent's testimony that the signatures contained in Report 1 are not his is credited. Included in the record of this proceeding are other documents, including past appraisals prepared by Respondent, that contain what he acknowledges to be his signature. After carefully reviewing all of the signatures in evidence, it cannot be said with any degree of certainty that the signatures included in Report 1 are indeed the signatures of Respondent.<sup>2/</sup>

#### CONCLUSIONS OF LAW

33. 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 (2009).

34. In this disciplinary proceeding against Respondent's license, Petitioner must demonstrate by clear and convincing evidence that Respondent has committed the allegations charged in the Administrative Complaint. 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).

35. Clear and convincing evidence:

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 lacking in confusion as to the facts in issue. The evidence must be of such a 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 Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983).

36. The Amended Administrative Complaint charges Respondent with violating the following subsections of Section 475.624, Florida Statutes:

The board may deny an application for registration or certification; may investigate the actions of any appraiser registered, licensed, or certified under this part; may reprimand or impose an administrative fine not to exceed \$5,000 for each count or separate offense against any such appraiser; and may 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, if it finds that the registered trainee, licensee, or certificateholder:

\* \* \*

(2) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a contract, whether written, oral, express, or implied, in an appraisal assignment; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the registered trainee, licensee, or certificateholder that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the registered trainee, licensee, or certificateholder, or was an identified member of the general public.

\* \* \*

(14) Has violated any standard for the development or communication of a real estate or 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. Count I of the Amended Administrative Complaint charges Respondent with violating Subsection 475.624(15); Count II with violating Subsection 475.624(2); and Counts III through XII with violating Subsection 475.624(14) by virtue of violating various

portions of the 2005 USPAP Standards.

38. All of the charges in the Administrative Complaint are based upon the assumption that Respondent actually signed Report 1. Paragraph four alleges that Respondent, Ardire and Bozeman "developed and communicated an appraisal report (Report 1) for a proposed subdivision . . . ." Paragraph nine alleges that Respondent made certain errors and omissions in Report 1. In its Proposed Recommended Order, Petitioner states that "[u]pon signing of an appraisal report, the signatory (ies) certify that all certifications listed within the report have been complied with and that the report is compliant with the Uniform Standards of Professional Appraisal Practice. . . . Upon signing of an appraisal report, the signatory (ies) take responsibility for the report as developed and communicated to the client."

39. Both statements in the Proposed Recommended Order are correct. An appraiser who signs an appraisal report takes full responsibility for all of the report, and has an obligation to review everything contained in the report; to make sure the data included in the report are supported by the workfile; and that the report reflects a thorough and accurate description of the appraiser's opinions and conclusions.

40. However, in this case, there is not clear and convincing evidence that Respondent actually signed Report 1, or that he "developed and communicated" the appraisal report. The evidence is clear that Respondent was not involved in developing

or communicating Report 2 or 3. At most, his involvement was to provide Bozeman and Ardire access to reference materials for Report 1.

41. Section 92.38, Florida Statutes (2009), provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence respecting the same, may be submitted . . . to the court in case of a trial by the court, as evidence of the genuineness, or otherwise, of the writing in dispute." The Department could have presented the testimony of a handwriting expert to prove that Report 1 actually contained Respondent's signature, or could have presented the testimony of a lay witness sufficiently familiar with the Respondent's handwriting. Redmond v. State, 731 So. 2d 77, 78 (Fla. 2d DCA 1999). The only person who testified regarding Respondent's handwriting who had sufficient familiarity with the handwriting is Respondent. Here, other exemplars were supplied by both parties that no one disputes are actually Respondent's handwriting. The signatures on Report 1 are simply not the same. The Department has failed to prove by clear and convincing evidence that Respondent signed Report 1, or participated in the development and/or communication of the report in any meaningful way.

42. Evidence was presented at hearing that only Respondent was authorized to prepare a subdivision analysis because this

type of appraisal requires a certified general appraisal's license, and that Respondent was the only certified general property appraiser in the office. However, the Amended Administrative Complaint makes no allegations that Respondent failed to supervise persons in his employ, or that he was responsible for the work of other appraisers in his office. Disciplinary action can only be taken against a licensee based on conduct actually alleged in the charging instrument. Trevisani v. Department of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999). Therefore, if there is not clear and convincing evidence that Respondent developed and communicated the report, or that he signed the report, he cannot be disciplined for its contents or lack thereof.

43. Accordingly, Count I, which charges a violation of Section 475.624(15), Florida Statutes, by failing to exercise reasonable diligence in developing an appraisal, has not been proven by clear and convincing evidence and should be dismissed.

44. Similarly, Count II charges that Respondent violated Section 475.625(2), Florida Statutes, by committing fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence, or breach of trust in any business transaction. The evidence is not clear and convincing that Respondent was actually involved in a business transaction in this case. Accordingly, Count II should be dismissed.

45. Counts III through XII involve alleged violations of Section 475.624(14), by means of violating the USPAP standards, 2005 edition. Even assuming that Respondent signed Report 1, which is not found in this case, a more fundamental problem exists with respect to these counts. Where, as here, a professional standard of conduct is alleged to have been breached, the Department is obligated to present evidence of both the standard and the breach of that standard. Purvis v. Department of Professional Regulation, 461 So. 2d 134 (Fla. 1st DCA 1984). To this end, the Department alleged and submitted into evidence the 2005 USPAP Standards.

46. However, in Abbott Laboratories v. Mylan Pharmaceuticals, 15 So. 3d 642 (Fla. 1st DCA 2009), the First District Court of Appeal recently held that a statute incorporating a federal standard can only be interpreted as applying to editions of the standard in effect at the time of the enactment of the statute. In a lengthy opinion addressing the Legislature's use of the Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book) published by the United States Food and Drug Administration, and its application by virtue of Section 465.0251, Florida Statutes, the court thoroughly examined the doctrine of unlawful delegation of legislative authority. It stated in part:

Abbott argues that reversal is nonetheless required because the ALJ unconstitutionally applied section 465.0251. Abbott contends that the legislature could not have intended

to incorporate updated editions of the Orange Book to govern section 465.0251 because of the long-established constitutional rule in Florida that the legislature's adoption "in advance [of] any federal administrative body which may be adopted in the future would amount to an unlawful delegation of legislative authority." State v. Rodriguez, 365 So. 2d 157, 160 (Fla. 1978).

Article II, § 3 of the Florida Constitution provides:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any power appertaining to either of the other branches unless expressly provided therein.

This constitutional provision has been construed "to prohibit the legislature, absent constitutional authority to the contrary, from delegating its legislative power to others." Gallagher v. Motors Ins. Corp., 605 So. 2d 62, 71 (Fla. 1992). Under this non-delegation principle, Florida courts have long held that while the legislature may enact laws that adopt provisions of federal statutes or other regulations of a federal administrative body that are in existence and in effect at the time the legislature acts, where the legislature incorporates in a Florida statute a future federal act or ruling of a federal administrative body, such incorporation constitutes unconstitutional delegation of legislative power. [Lengthy citations omitted]

Where a statute generally incorporates a federal law or regulation, to avoid holding the subject statute unconstitutional, Florida courts interpret the statute as incorporating only the federal law in effect on the date of adoption of the Florida statute.

15 So. 2d at 654-655.



46. The reasoning in Abbott Laboratories is applicable here. Accordingly, Sections 475.611(1)(q), 475.628 and 475.642(14) must be construed to refer to the USPAP standards in effect at the time of their enactment, i.e., 1991.<sup>3/</sup> Notwithstanding the citation to 2005 USPAP standards in the Administrative Complaint, as a matter of law, 2005 Standards cannot provide a basis for discipline because they have not been incorporated into Sections 475.611(1)(q), 475.628 and 475.642(14), Florida Statutes. Because no evidence was presented regarding the USPAP standards in effect in 1991, the Department has not proven the violations alleged in Counts III through XII of the Amended Administrative Complaint by clear and convincing evidence, and these Counts should be dismissed as well.

#### RECOMMENDATION

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

RECOMMENDED that:

The Florida Real Estate Appraisal Board enter a final order dismissing the Amended Administrative Complaint.

DONE AND ENTERED this 24th day of November, 2009, in  
Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of November, 2009.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, all references to the Florida Statutes are to the 2006 codification.

<sup>2/</sup> For example, compare the signature found at Petitioner's Exhibit 3, page 127 and 129 (the cover letter and certification page for Report 1) with signature on pages 261 and 264 of Petitioner's Exhibit 3 (the cover letter and certification page for another appraisal report prepared by Respondent). The only letter that is reasonably similar is the "E." for Respondent's middle initial. The numerous examples of Respondent's signature contained in the exhibits all contain a legible writing where his first and last name can be easily deciphered, and the capital letters all slant to the right. In the "signatures" included in Report 1, the last name is a scribble and the "J" for Jr., slants to the left.

<sup>3/</sup> The Amended Administrative Complaint clearly references the 2005 USPAP standards, as opposed to the standards in effect in 1991. However, only those standards in effect at the time the legislature enacted the operative statutes can authorize discipline. Therefore, while the reports were clearly deficient under the 2005 standards, and if Respondent were responsible for the developing the reports would provide a basis for showing violations under the 2005 standards, those standards cannot provide a basis for discipline.

COPIES FURNISHED:

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Orlando, Florida 32801-1757

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.