

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 09-0654PL
)	
ANDREY BARHATKOV,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal administrative hearing in this case on April 2, 2009, in Winter Haven, Florida.

APPEARANCES

For Petitioner: Patrick J. Cunningham, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street
Hurstons Building, Suite N801
Orlando, Florida 32801

For Respondent: No appearance

STATEMENT OF THE ISSUES

Whether Respondent, Andrey Barhatkov, committed the violations alleged in the Administrative Complaint, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On December 13, 2006, Petitioner, Department of Business and Professional Regulation, Division of Real Estate, filed an Administrative Complaint against Respondent, Andrey Barhatkov, alleging him to be "guilty of 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 Petitioner in violation of Section 455.227(1)(j) and 475.42(1)(a), Florida Statutes." On January 10, 2007, Petitioner received Respondent's Petition for Formal Hearing disputing allegations contained in the Administrative Complaint.

On February 9, 2009, the Division of Administrative Hearings received a request for formal proceedings from Petitioner. On that same day, an Initial Order was forwarded to both parties requesting mutually convenient dates for the final hearing. Based on the response of the parties, on February 16, 2009, the case was scheduled for final hearing on April 2, 2009, in Winter Haven, Florida.

The case proceeded, as scheduled, on April 2, 2009. Respondent was not present. Petitioner presented two witnesses, April Durias and Carol Cramer Laoudis, and offered five exhibits, which were received into evidence as Petitioner's Exhibits 1 through 5.

The Transcript of Proceedings was filed with the Division of Administrative Hearings on June 2, 2009. Petitioner timely filed its Proposed Recommended Order.

All statutory references are to Florida Statutes (2005), unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Facts are made:

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

2. Respondent is, and was at all times material hereto, a licensed Florida real estate sales associate issued License No. 660647 in accordance with Chapter 475, Florida Statutes.

3. The last license issued to Respondent was as a sales associate with All American Realty, Inc., 227 North John Young Parkway, Kissimmee, Florida 34741.

4. On or about July 5, 2005, Respondent prepared a residential sale and purchase contract on behalf of a buyer and faxed the contract to Jerome Fortson, who is not a licensed Florida real estate sales associate, broker associate, or

broker, for Mr. Fortson to present to the buyer and obtain the buyer's signature.

5. Having obtained the buyer's signature, Mr. Fortson later appeared on behalf of the buyer at the closing. Respondent was not present at the closing.

6. Respondent admitted that he had Mr. Fortson show the real estate property to the buyer, that he had an arrangement with Mr. Fortson to show properties for him, and that Mr. Fortson was to report back to him for follow-up. Respondent acknowledged that Mr. Fortson was a mortgage broker and that they had an informal business referral agreement wherein Mr. Fortson would arrange financing for buyers that he had shown properties.

7. In the course of this activity, Mr. Fortson, who represented himself as a sales representative for the buyer, contacted the listing agent for information regarding the property and showed the property. Respondent never met the buyer.

8. The real estate agent representing the seller was not aware of Respondent's involvement in the transaction until he requested his share of the commission.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter herein. §§ 120.57(1) and 455.225(5), Fla. Stat. (2008).

10. The burden of proof in this proceeding is on Petitioner. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Petitioner is required to meet its burden by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

11. Subsection 475.25(1), Florida Statutes, authorizes the Florida Real Estate Commission to take disciplinary action against the license of any real estate sales associate if the licensee commits certain specified acts. Listed among the prohibited acts are those listed in Subsection 455.227(1)(j), Florida Statutes, which reads as follows:

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.

12. Petitioner has proved by clear and convincing evidence the allegations of Count I, a violation of Subsections 455.227(1)(j) and 475.25(1), Florida Statutes, in that

Respondent is guilty of the prohibited acts in Subsection 455.227(1)(j), Florida Statutes.

13. Subsection 475.25(1), Florida Statutes, sets forth the penalties for violation of Subsection 455.227(1)(j), Florida Statutes, and reads, in pertinent part:

The commission . . . 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

14. Florida Administrative Code Rule 61J2-24.001(4)(a) reads as follows:

(a) When either the Petitioner or Respondent is able to demonstrate aggravating or mitigating circumstances . . . to a Division of Administrative Hearings hearing officer in a Section 120.57(1), F.S., hearing by clear and convincing evidence, the . . . hearing officer shall be entitled to deviate from the above guidelines in imposing or recommending discipline, respectively, upon a licensee. . . .

No evidence of aggravation or mitigation was presented.

15. "The statutes regulating the activities of real estate brokers in their business were designed for the protection of the public and the safeguarding of persons who deposit their money and place their trust in the hands of real estate brokers." Shelton v. Florida Real Estate Commission, 121 So. 2d

711 (Fla. 2d DCA 1960). The fiduciary relationship between customer and broker, inviting and usually receiving a high degree of trust and confidence, is a proper subject of reasonable regulation. The purpose of the statute is to protect the public by permitting only those who possess special qualifications of aptitude, ability, and integrity to engage in the business. Horne v. Florida Real Estate Commission, 163 So. 2d 515 (Fla. 1st DCA 1964). Section 475.25, Florida Statutes, "requires nothing more of a real estate dealer or broker than an honest, open and fair relationship with his client, such as normally expected of a businessman of sound integrity." Rivard v. McCoy, 212 So. 2d 672 (Fla. 1st DCA 1968).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that Petitioner, Department of Business and Professional Regulation, Division of Real Estate, enter a final order finding that: (1) Respondent, Andrey Barhatkov, violated Subsections 455.227(1)(j) and 475.42(1)(e), Florida Statutes; (2) Respondent's license as a real estate salesperson be suspended for one year, followed by one year of probation; (3) Respondent be fined \$2,000; (4) Respondent be required to attend such remedial ethics and educational courses as are

determined appropriate by Petitioner; and (5) Respondent be required to pay the costs of the investigation and prosecution of this case.

DONE AND ENTERED this 25th day of June, 2009, in
Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th 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.