

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 09-3946PL
)
MICHEAL ANTHONY FACENDO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 22, 2009, by video teleconference, with the parties appearing in Fort Lauderdale, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

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

For Respondent: Norman Malinski, Esquire
Law Offices of Norman Malinski, P.A.
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STATEMENT OF THE ISSUE

Whether the Respondent committed the violations stated in the Amended Administrative Complaint filed September 30, 2009, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an eight-count Administrative Complaint dated March 2, 2009, the Department of Business and Professional Regulation, Division of Real Estate ("Department"), charged Michael Anthony Facendo with having violated Sections 475.623; 475.624(1), (2), (4) and (14); and 475.6221(1), Florida Statutes, and the Uniform Standards of Professional Appraisal Practice ("USPAP") (2006) Record Keeping Section of the Ethics Rule; and USPAP Standards Rules 1-1(c); 1-4(a) and (b); 2-1(a); and 2-2(b)(vi). The charges related to an original and a corrected Uniform Residential Appraisal Report ("Appraisal Report"), which contained signature and effective dates of August 22, 2007. On September 30, 2009, the Department filed a Motion to Amend Administrative Complaint, in which it sought to correct a scrivener's error and substitute reference to USPAP Standards Rule 2-2(b)(viii) for USPAP Standards Rule 2-2(b)(vi) in Count Eight of the Administrative Complaint. The motion was granted in an order entered October 9, 2009, and the case proceeded under the Amended Administrative Complaint dated September 30, 2009.

The Department alleged the following facts in the Amended Administrative Complaint to support the violations charged:

4. On or about August 22, 2007, Michael Facendo . . . developed and communicated an appraisal report (Report 1) for property commonly known as 901 SW Worchester Lane, Port St. Lucie, Florida 34953 (Subject Property), and estimated its value as \$305,000.00[.] Report 1 was the report received by the client and used in the review appraisal. . . .

5. Respondent made the following errors and omissions on Report 1:

A) Misstatement of the Subject Property's zoning classification in the Site section of Report 1;

B) Incorrect location of the Subject Property in the map included in Report 1;

C) Incorrect legal description of the Subject Property in the Subject section of Report 1: and

D) Failure to verify the correct Room Count for comparable sale 1 when there is a discrepancy in the workfile documents.

6. On or about October 8, 2007, a review appraisal (Review Appraisal) was conducted on Report 1. . . .

7. Pursuant to the investigation, Respondent provided a copy of his workfile to the Department regarding the Subject Property. . . .

8. The workfile contained a copy of the appraisal report for the Subject Property (Report 2), that differs from Report 1. . . .

9. Report 2, which has a signature date and effective date of July 22, 2007, [sic] the same dates as Report 1, has the correct zoning classifications for the Subject Property.

10. Respondent made the following errors and omissions on Report 2:

A) Incorrect location of the Subject Property in the map included in Report 1;

B) Incorrect legal description of the Subject Property in the Subject section of Report 1; and

C) Failure to verify the correct Room Count for comparable sale 1 when there is a discrepancy in the workfile documents.

11. The workfile [prepared by Mr. Facendo] lacks a true and complete copy of Report 1.

12. There is no documentation in the workfile to support the FEMA information in the Site section of Report 1 or Report 2.

13. There is no documentation in the workfile to support the One-Unit Housing data in the Neighborhood section of Report 1 or Report 2.

14. There is no documentation in the workfile to support the Present Land Use % data in the Neighborhood section of Report 1 or Report 2.

15. There is no documentation in the workfile to support the 88 comparable properties currently offered for sale in the subject neighborhood as listed in the Sales Comparison section of Report 1 or Report 2.

16. There is no documentation in the workfile to support the 72 comparable sales in the subject neighborhood for the past

twelve months as listed in the Sales Comparison section of Report 1 or Report 2.

17. There is no documentation in the workfile to support the \$3,000 Room Count adjustment made to comparable sale 2 and comparable sale 3 in the Sales Comparison section of Report 1 or Report 2.

18. There is no documentation in the workfile to support the \$5,000 Garage adjustment to comparable sale 2 in the Sales Comparison section of Report 1 or Report 2.

19. There is no documentation in the workfile to support the \$30,000 Pool adjustment to comparable sale 2 in the Sales Comparison section of Report 1 or Report 2.

20. There is no documentation in the workfile to support the \$60,000 Opinion of Site Value in the Cost Approach section of Report 1 or Report 2.

21. The workfile lacks local builder's data for the time frame that the Reports were completed to justify the dwelling square footage price in the Cost Approach section of Report 1 or Report 2.

22. The workfile lacks dated Marshall and Swift pages for the time frame that the Reports was completed to justify the dwelling square footage price in the Cost approach section of the Report.

23. During the investigation it was learned that Respondent failed to register his business name with the Department.

24. During the investigation it was learned that Respondent failed to ensure that his trainee had the same business address as Respondent. . . .

25. Respondent's business address is 13790 NW 4 Street, #101, Sunrise, Florida. The

appraisal was completed on a property located in Port St. Lucie, Florida, which is approximately 85 miles away.

Mr. Facendo timely disputed the material facts stated in the Administrative Complaint and requested an administrative hearing. The Department transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge, and, pursuant to notice, the final hearing was held on October 22, 2009.

At the hearing, the Department presented the testimony of Dawn Luchik and Francois K. Gregoire; Petitioner's Exhibits 1 and 4 through 6 were offered and received into evidence. Mr. Facendo testified in his own behalf, and Respondent's Exhibits 1 and 2 were offered and received into evidence. At the Department's request, official recognition was granted to Chapter 475, Part II (2007)¹ and to Florida Administrative Code Rule Chapter 61J1 (2007).

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on November 5, 2009. The Department timely filed its proposed findings of fact and conclusions of law. Mr. Facendo failed to file his proposed findings of fact and conclusions of law timely. On December 18, 2009, Mr. Facendo filed a Motion for Extension of Time to File Respondent's Proposed Recommended Order, in which he stated that he did not obtain a copy of the transcript of the proceedings

until December 10, 2009. Mr. Facendo requested an extension until December 22, 2009, for filing his proposed findings of fact and conclusions of law. The Department filed a response in opposition to the request. Having considered the grounds for the motion and the arguments stated in the response in opposition to the motion, the Motion for Extension of Time to File Respondent's Proposed Recommended Order is granted, and Mr. Facendo's Proposed Recommended Order, filed December 21, 2009, is accepted. The proposed findings of fact and conclusions of law of both parties have, therefore, been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Florida Real Estate Appraisal Board ("Board") is the entity responsible for licensing, regulating, and imposing discipline upon real estate appraisers operating in Florida. See §§ 475.613(2) and .624, Fla. Stat. (2007).

2. The Department is the state agency responsible for investigating complaints and, upon a finding of probable cause by the Board, issuing administrative complaints and prosecuting disciplinary actions involving real estate appraisers in Florida. See § 455.225(1)(a), (4), and (6), Fla. Stat.

3. At all times pertinent to these proceedings, Mr. Facendo was a state-certified real estate appraiser, having been issued license number RD-2598, and his business office was located in Plantation, Florida.

4. In August 2007, Mr. Facendo's office received a request from University Capital Funding, a mortgage broker, for an appraisal on property known as 901 Southwest Worchester Lane, Port St. Lucie, Florida 34953 ("Worchester Lane property").

5. After receiving the request, Mr. Facendo consulted the Multiple Listing Service with respect to the Worchester Lane property and the neighborhood. Mr. Facendo then went to the Worchester Lane property, measured the property, inspected the interior and exterior of the property, and looked at the homes that were comparable to the Worchester Lane property.

6. Mr. Facendo returned to his office and analyzed the data he had collected during the site visit. He used print sources and online services available in his office to verify the flood zones, neighborhood composition, land sales, and other information necessary to complete the appraisal. Mr. Facendo prepared the Appraisal Report for the Worchester Lane property and provided it to University Capital Funding. Mr. Facendo also compiled a workfile containing documentation he used to develop the Appraisal Report.

7. The Appraisal Report contained three errors:²

Mr. Facendo included the incorrect zoning classification for the Worchester Lane property, identifying it as RM-143, residential multi-family, rather than the correct RS-2, residential; he identified the wrong location for the Worchester Lane property on the map included with the Appraisal Report,³ and he failed to include the lot number in the legal description of the property.

8. Mr. Facendo stated in the Appraisal Report that the property was not in a FEMA (Federal Emergency Management Association) special flood hazard area, and he referenced FEMA Map # 12111C0290F, dated August 19, 1991. He did not include a copy of the map in the workfile he compiled when preparing the Appraisal Report.

9. Mr. Facendo included in the Appraisal Report information regarding neighborhood characteristics, one-unit housing trends, one-unit housing, and present land use percentage. He indicated that the neighborhood was over 75 percent built-up and stable; that one-unit housing trends showed that the supply and demand for housing in the neighborhood were in balance, with marketing conditions partially stable to declining, and time exposure typically between three-to-six months; that the one-unit housing prices ranged from a low of \$188,000.00 for new housing to a high of \$450,000.00 for housing six years old, with a median of

\$305,000.00 for housing three years old; and that the present land use consisted of 80 percent one-unit housing and 20 percent commercial. Mr. Facendo did not include in his workfile documentation to support this information.

10. Mr. Facendo concluded that the value of the Worchester Lane property was \$305,000.00 when calculated under the Sales Comparison Approach method. In the Appraisal Report, Mr. Facendo identified 88 comparable properties currently for sale in the neighborhood, ranging in price from \$175,000.00 to \$360,000.00, and 72 comparable sales in the neighborhood within the previous 12 months, ranging in price from \$188,000.00 to \$450,000.00. Mr. Facendo did not include in his workfile documentation to support the number of properties currently for sale or the number of properties sold within the past 12 months.

11. Mr. Facendo concluded that the value of the Worchester Lane property was \$296,990.00 when calculated under the Cost Approach to Value method. Mr. Facendo placed a value of \$60,000.00 on the property's home site. He calculated the square footage replacement cost new using the cost estimator in his online copy of the Marshall & Swift Residential Cost Handbook and noted in the Appraisal Report that this was the source of his cost data. Mr. Facendo also noted as a comment on the cost approach that he used the Marshall & Swift Residential Cost Handbook "& local builders [estimates]" as the sources of

the cost figures he used to estimate the value of the Worchester Lane property using the cost approach. Finally, Mr. Facendo also consulted the South Florida 2007 Blue Book Construction and the 2007 National Building Cost Manual for cost data, but he did not mention these sources in the Appraisal Report.

12. Mr. Facendo did not include in the workfile he compiled for the Appraisal Report documentation to support his opinion of site value, copies of the Marshall & Swift online calculations of the replacement cost new, copies of the local and national builder's data he used in his calculations, or copies of the Marshall & Swift data to support the square footage prices he used to calculate the value of the Worchester Lane property.

13. Mr. Facendo signed the Appraisal Report on August 22, 2007, and noted on the Appraisal Report that it was effective August 22, 2007.

14. In October 2007, JP Morgan Chase Bank, N.A.,⁴ ordered a review of Mr. Facendo's August 22, 2007, Appraisal Report of the Worchester Lane property. The review appraiser, John Nickerson, prepared a One-Unit Residential Appraisal Field Review Report ("Review Appraisal"), which he signed and dated October 8, 2007. In the review report, Mr. Nickerson opined that there were a number of errors in Mr. Facendo's Appraisal Report, including the zoning classification, the legal description, and the

location of the property. Mr. Nickerson also criticized the comparable properties used by Mr. Facendo in the Sales Comparison section of the Appraisal Report and the site value assigned by Mr. Facendo in the Cost Approach section of the Appraisal Report.

15. At some point, Mr. Facendo was advised by Chase Home Lending of the results of Mr. Nickerson's Review Appraisal, and he was provided with a copy of the report.⁵ In a letter to Chase Home Lending dated August 25, 2008, Mr. Facendo responded to the concerns raised by Mr. Nickerson in the Review Appraisal about Mr. Facendo's Appraisal Report. Mr. Facendo explained the basis for his choice of comparable properties and for the value he placed on the building site, and he discussed his reasons for believing that the conclusions regarding comparable properties and site valuation reached by Mr. Nickerson were flawed.

16. As directed by an employee of Chase Home Lending, Mr. Facendo modified his August 22, 2007, Appraisal Report to include the correct zoning classification of RS-2, residential. Mr. Facendo was expressly directed by the employee of Chase Home Lending not to change anything on the face of the original Appraisal Report except for the zoning classification. Mr. Facendo followed this direction, and he did not revisit the Worcester Lane property or change any other information in the original Appraisal Report. The corrected Appraisal Report was,

therefore, not a new appraisal report based on new information gathered in August 2008 regarding the Worchester Lane property. The corrected Appraisal Report was not effective in August 2008, and did not supersede the original Appraisal Report of August 22, 2007, except for the zoning classification correction.⁶

17. Mr. Facendo submitted the corrected Appraisal Report on the Worchester Lane property to Chase Home Lending on or about August 25, 2008, but he did not alter the original signature date or effective date of August 22, 2007. Mr. Facendo did not, however, include a copy of the original Appraisal Report in the workfile that he transmitted to the Department during the course of its investigation; the workfile contained a copy of only the corrected Appraisal Report.

18. In signing the Appraisal Report, Mr. Facendo certified and agreed that he had complied with the USPAP that were effective when the report was prepared in August 2007.

19. The Ethics Rule of the USPAP (2006) provides in pertinent part as follows:

Record Keeping

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, or 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.

20. USPAP (2006) Standards Rule 1-1(c) provides:

In developing a real property appraisal, an appraiser must:

* * *

(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.

21. USPAP (2006) Standards Rule 1-4(a) and (b) provides:

In developing a real property appraisal, an appraiser must collect, verify, and analyze all information necessary for credible assignment results.

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

(b) When a cost approach is necessary for credible assignment results, an appraiser must:

(i) develop an opinion of site value by an appropriate appraisal method or technique;

(ii) analyze such comparable cost data as are available to estimate the cost new of the improvements (if any); and

(iii) analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation).

22. USPAP (2006) Standards Rule 2-1(a) 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[.]

23. USPAP (2006) Standards Rule 2-2(b)(viii) provides:

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.[footnote omitted.]

* * *

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

* * *

(viii) summarize the information analyzed, the appraisal methods and techniques employed, and the reasoning that supports

the analyses, opinions, and conclusions; exclusion of the sales comparison approach, cost approach, or income approach must be explained.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

25. In the Amended Administrative Complaint, the Department seeks to suspend or revoke Mr. Facendo's appraiser's certificate and to impose an administrative fine. Accordingly, the Department must prove the charges against Mr. Facendo by clear and convincing evidence. Department of Banking & Finance, Div. of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Prof'l Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

26. In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court defined clear and convincing evidence as follows:

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 explicit and the witnesses must be lacking in 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.

Id. The Florida Supreme Court adopted the description of the clear and convincing evidence standard of proof set forth in Slomowitz in Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994), and the court in Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (1992)(citation omitted), followed the Slomowitz test, adding the interpretive comment that "[a]llthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous."

27. In Counts One, Four, Five, Six, Seven, and Eight of the Amended Administrative Complaint, the Department charged Mr. Facendo with having violated Section 475.624(2) and (14), Florida Statutes,⁷ which provides in pertinent part:

The board may deny an application for registration, licensure, 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 appraisal or other provision of the Uniform Standards of Professional Appraisal Practice.

28. As a disciplinary statute, Section 475.624, Florida Statutes, "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Department

of Prof'l Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143
(Fla. 1st DCA 1992).

I. Violation of Section 475.624(2), Florida Statutes.

29. In Count One of its Amended Administrative Complaint, the Department alleged: "Based upon the foregoing, Respondent is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence or breach of trust in any business transaction in violation of Section 475.624(2), Florida Statutes." The "foregoing" apparently was intended to encompass all of the factual allegations in the Amended Administrative Complaint, and, even though the violations charged in Count One were stated in the disjunctive, the Department did not identify in the Amended Administrative Complaint which of the prohibited actions and/or conduct was at issue. In its Proposed Recommended Order, however, the Department elected to pursue the charges of culpable negligence, misrepresentation, and breach of trust in a business transaction against Mr. Facendo.⁸

A. Breach of trust

30. In the first sentence in paragraph 39 of its Proposed Recommended Order, the Department asserts that Mr. Facendo breached the trust of his client by, among other things, misrepresenting the zoning classification of the Worchester Lane property in the original Appraisal Report and misrepresenting

the location of the Worchester Lane property on the location map in the original and corrected Appraisal Report.⁹ Based on the findings of fact herein, the Department has proven by clear and convincing evidence that Mr. Facendo included the incorrect zoning classification in the original Appraisal Report and placed the Worchester Lane property in the wrong location on the location map included with original and corrected Appraisal Report.¹⁰ These errors are not, however, sufficient to establish, by clear and convincing evidence, that Mr. Facendo violated Section 475.624(2) by committing a breach of trust in his appraisal of the Worchester Lane property.

31. In Munch v. Department of Professional Regulation, 592 So. 2d 1136, 1143-44 (Fla. 1973), the court was concerned with a disciplinary action against a real estate broker who was charged with having violated Section 475.25(1)(b), Florida Statutes (1989) by committing "fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence or breach of trust in a business transaction," language that is virtually identical to that of Section 475.624(2), Florida Statutes. The court in Munch stated:

It is clear that Section 475.25(1)(b) is penal in nature. As such, it must be construed strictly, in favor of the one against whom the penalty would be imposed. Holmberg v. Department of Natural Resources,

503 So.2d 944 (Fla. 1st DCA 1987). Reading the first clause of Section 475.25(1)(b) (the portion of the statute which appellant was charged with having violated in Count I of the complaint), and applying to the words used their usual and natural meaning, it is apparent that it is contemplated that an intentional act be proved before a violation may be found. See Rivard v. McCoy, 212 So.2d 672 (Fla. 1st DCA), cert. denied, 219 So.2d 703 (Fla. 1968).

(Emphasis in original.) Therefore, to sustain the charge that Mr. Facendo violated Section 475.624(2), Florida Statutes, by committing a breach of trust, the Department must prove as an element of the charge that Mr. Facendo had the intent to commit the acts giving rise to the prohibited conduct.

32. Within the scope of the allegations in the Amended Administrative Complaint, the Department has proven that Mr. Facendo included the incorrect zoning classification in the original Appraisal Report and identified the location of the Worchester Lane property incorrectly on the location map attached to the original and corrected Appraisal Report. The Department did not present any evidence to establish that these errors were material to the purpose of the Appraisal Report; the Department's expert witness did not disagree with the valuation of \$305,000.000 that Mr. Facendo put on the Worchester Lane property; and the Department did not present any evidence from which it could be reasonably inferred that Mr. Facendo

intentionally included the two items of erroneous information in the Appraisal Report.

33. The court in Munch, when considering disciplinary action taken by the Florida Real Estate Commission against a real estate broker for violation of those provisions of Section 475.25(1)(b), Florida Statutes, pertinent to this proceeding, stated:

Chapter 475 vests in the Florida Real Estate Commission a broad discretionary power and authority to supervise the privileged business of real estate broker and to deal firmly with those engaged in it, even to the point of taking away their means of livelihood by revocation or suspension of license. But such potent administrative weapons must always be reasonably and cautiously, and even sparingly, utilized. The administrative processes of the Commission should be aimed at the dishonest and unscrupulous operator, one who cheats, swindles, or defrauds the general public in handling real estate transactions. Accord Pauline v. Borer, 274 So.2d 1 (Fla. 1973).

592 So. 2d at 1144-45. Similarly, the business of real estate appraiser is a privileged business, and a real estate appraiser owes a duty of care to both his clients and to the general public. In this case, where the Department proved two minor errors in Mr. Facendo Appraisal Report, neither of which was shown to have affected the client's interests or to have affected the validity of the appraised value of the property, it must be concluded that the Department failed to prove by clear

and convincing evidence that Mr. Facendo is guilty of breach of trust in a business transaction.

B. Culpable negligence and misrepresentation

34. In paragraph 39 of its Proposed Recommended Order, the Department also asserts that Mr. Facendo committed culpable negligence and misrepresentation

by failing to maintain the required documentation in the work file; by stating inconsistent quality of construction for the Subject Property, in the use of good at certain points and average at others in the Reports; and by providing the client a copy of Report 2 that was purported to be developed, communicated and signed in August of 2007, when the Respondent, in his testimony at the hearing, stated that this report was not signed, nor corrected until August of 2008.

35. Based on the findings of fact herein, the Department proved by clear and convincing evidence that Mr. Facendo failed to include documentation required by the USPAP (2006) in his workfile. This failure does not, however, constitute culpable negligence in the preparation of the Appraisal Report or misrepresentation of the information contained in that report.

36. The act of culpable negligence incorporates the notion of wrongdoing in the sense that, to commit culpable negligence, a person must act with reckless disregard of the interests of another. See Department of Bus. & Prof's Regulation v. Cartaya, DOAH Case Nos. 04-1148PL and 04-1680PL, paragraphs 52-53

(Recommended Order Nov. 24, 2004)(citing Carrin v. State, 875 So. 2d 719, 721 (Fla. 1st DCA 2004)).¹¹ Likewise, the act of misrepresentation incorporates the notion of wrongdoing in that it requires a person to make a false statement for the purpose of inducing action or inaction on the part of another. See Rocky Creek Retirement Properties v. Estate of Fox, 19 So. 3d 1105, 1110 (Fla. 2d DCA 2009)(Negligent misrepresentation requires, among other elements, a false statement of material fact made with the intent that another rely on the false statement.). The proof offered by the Department falls far short of showing that the omission from Mr. Facendo's workfile of some of the documentation supporting his opinions and conclusions in the Appraisal Report demonstrates either a reckless disregard for the interests of his client, as required to establish culpable negligence, or constitutes a false statement, as required to establish misrepresentation. The Department has, therefore, failed to prove that Mr. Facendo committed culpable negligence or misrepresentation because of this omission.

37. With respect to the second factual allegation upon which the Department bases its charge that Mr. Facendo committed culpable negligence and misrepresentation, the Amended Administrative Complaint contains no allegation of an inconsistency in Mr. Facendo's description of the quality of

construction of the Worchester Lane property. This allegation appears only in the testimony of Mr. Gregoire, and it cannot, therefore, be used by the Department as the basis for a violation of Section 475.624(2), Florida Statutes, in this case. See Cottrill, 685 So. 2d at 1372.

38. With respect to the third factual allegation upon which the Department bases its charge that Mr. Facendo committed culpable negligence and misrepresentation, the Department, first, did not offer any proof that Mr. Facendo signed the corrected Appraisal Report in August 2008. Although the Department did prove by clear and convincing evidence that Mr. Facendo submitted the corrected Appraisal Report to his client on or about August 25, 2008, the Department did not present any evidence to establish that Mr. Facendo committed any wrongdoing in doing so. Based on the findings of fact herein, Mr. Facendo followed his client's instructions and corrected the zoning classification on the original Appraisal Report; addressed other alleged errors in the original Appraisal Report in the rebuttal letter dated August 25, 2009; and provided the client with a copy of the original August 2007 Appraisal Report containing the zoning classification correction. Consequently, the Department has failed to prove by clear and convincing evidence that Mr. Facendo's actions in correcting the zoning classification in the original Appraisal Report and submitting

it to his client constituted culpable negligence or misrepresentation.

39. Based on the foregoing discussion, the Department has failed to prove that Mr. Facendo violated Section 475.624(2), Florida Statutes, by committing culpable negligence, misrepresentation, or breach of trust, and Count One of the Amended Administrative Complaint should be dismissed.

II. Violation of Section 475.624(14), Florida Statutes.

40. In Counts Four, Five, Six, Seven, and Eight of the Amended Administrative Complaint, the Department charged that Mr. Facendo violated Section 475.624(14), Florida Statutes, by violating "standard[s] for the development or communication of a real estate appraisal," specifically, by violating the Record Keeping Section of the Ethics Rule of the USPAP (2006); Standards Rule 1-1(c) of the USPAP (2006); Standards Rule 1-4(a) and (b) of the USPAP (2006); Standards Rule 2-1(a) of the USPAP (2006); and Standards Rule 2-2(b)(viii) of the USPAP (2006). As proof of these violations, the Department presented a copy of the relevant USPAP (2006), which were effective during the times relevant to these proceedings, and the testimony of its expert witness, which was based on the USPAP (2006).

41. Based on the findings of fact herein, the Department proved by clear and convincing evidence that Mr. Facendo

violated the Record Keeping Section of the Ethics Rule of the USPAP (2006) by failing to include in his workfile all of the "data, information, and documentation necessary to support [his] opinions and conclusions."

42. Based on the findings of fact herein, the Department failed to prove by clear and convincing evidence that Mr. Facendo violated Standards Rule 1-1(c) of the USPAP (2006) by rendering appraisal services in a careless or negligent manner because Mr. Facendo's including the incorrect zoning classification, identifying the incorrect location of the Worchester Lane property on the location map, and omitting the lot number from legal description of the property did not constitute a series of errors so serious that they undermined credibility of the results of Mr. Facendo's appraisal.

43. Based on the findings of fact herein, the Department failed to prove by clear and convincing evidence that Mr. Facendo violated Standards Rule 1-4(a) of the USPAP (2006) because, although the proof is sufficient to establish that Mr. Facendo did not include a complete list of the comparable sales data in the appraisal workfile, there was no evidence except the conclusory and unsupported testimony of the Department's expert witness that Mr. Facendo failed to analyze properly the available comparable sales data to reach a conclusion on value. In addition, although he criticized the

method by which Mr. Facendo reached his conclusion that the Worchester Lane property was valued at \$305,000.00 on August 2007, the Department's expert witness did not disagree with Mr. Facendo's valuation.

44. Based on the findings of fact herein, the Department failed to prove by clear and convincing evidence that Mr. Facendo violated Standards Rule 1-4(b) of the USPAP (2006) because, although the proof is sufficient to establish that Mr. Facendo did not include a copy of the source of his cost data in the appraisal workfile, there was no evidence except the conclusory and unsupported testimony of the Department's expert witness that Mr. Facendo failed to develop the \$60,000.00 site value based on the appropriate appraisal method or technique. The Department's proof that Mr. Facendo did not include in his workfile documentation to support his conclusions, calculations, and opinions is not sufficient to prove that Mr. Facendo failed to perform the analyses required by this standard.

45. Based on the findings of fact herein, the Department failed to prove by clear and convincing evidence that Mr. Facendo's appraisal of the Worchester Lane property violated Standards Rule 2-1(a) of the USPAP (2006) because the only evidence presented by the Department to establish that the appraisal was set forth in a misleading manner was the

conclusory and unsupported testimony of the Department's expert witness.

46. Based on the findings of fact herein, the Department failed to prove by clear and convincing evidence that Mr. Facendo violated Standards Rule 2-2(b)(viii) of the USPAP (2006). The only evidence presented by the Department to establish that Mr. Facendo's Appraisal Report failed to summarize the information analyzed and to present the reasoning supporting his analyses, conclusions, and opinions is the conclusory and unsupported testimony of the Department's expert witness, who testified, without explication, that Standards Rule 2-2(b)(viii) of the USPAP (2006) required Mr. Facendo to explain in the addendum to the Appraisal Report his "rationale for no adjustment for date of sale or time."

47. Finally, even though the Department has proven that Mr. Facendo violated the Record Keeping Section of the Ethics Rule of the USPAP (2006), this proof is insufficient to establish that Mr. Facendo violated Section 475.624(14), Florida Statutes. The 2006 edition of the USPAP was not applicable to certified real estate appraisers doing business in Florida in 2007 and 2008. As recently concluded by Administrative Law Judge Susan B. Harrell in Department of Business and Professional Regulation v. Sigmond, DOAH Case No. 09-3685PL (Recommended Order Jan. 12, 2010):

44. In Counts Three through Ten of the Administrative Complaint, the Department alleges that Mr. Sigmond has violated Subsection 475.624(14), Florida Statutes, by violating provisions of the USPAP (2005). 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). The Department submitted in evidence the 2005 USPAP standards.

45. Subsection 475.624(14), Florida Statutes, does not state which version of the USPAP standards is applicable. A statute which incorporates standards such as the USPAP standards can only be interpreted to mean that the USPAP standards applicable are the editions of the standards that are in effect at the time of the enactment of the statute. See Abbott Laboratories v. Mylan Pharmaceuticals, 15 So. 3d 642 (Fla. 1st DCA 2009). Subsection 475.642(14), Florida Statutes, is construed to refer the USPAP standards in effect in 1991, the year of the enactment of Subsection 475.642(14), Florida Statutes.^[12]

46. The Department has failed to present evidence of the USPAP standards that were in effect in 1991. The evidence presented relates to the USPAP standards for 2005 and cannot provide a basis for discipline for a violation of Subsection 475.642(14), Florida Statutes, because they have not been incorporated into Section 475.628 and Subsections 475.611(1)(o) and 475.642(14), Florida Statutes. Counts Three through Ten of the Administrative Complaint should be dismissed.

See also Department of Bus. & Prof'l Regulation v. Lester, DOAH

Case No. 09-0642PL (Recommended Order Nov. 24, 2009); Department

of Bus. & Prof'l Regulation v. Otero, DOAH Case No. 05-1258PL
(Recommended Order Aug. 18, 2005).

48. Accordingly, on the basis of the reasoning in Sigmond,
Counts Four through Eight of the Amended Administrative
Complaint should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of
Law, it is RECOMMENDED that the Florida Real Estate Appraisal
Board enter a final order dismissing all counts of the Amended
Administrative Complaint dated September 30, 2009.

DONE AND ENTERED this 4th day of March, 2010, in
Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2010.

ENDNOTES

^{1/} All references herein to the Florida Statutes are to the 2007 edition unless otherwise indicated.

^{2/} It is noted that no proof was offered with respect to the allegations in paragraphs 17, 18, and 19 of the Amended Administrative Complaint; and these allegations are, therefore, deemed abandoned.

^{3/} The Department's expert witness, Francois Gregoire, testified at the final hearing, however, that Mr. Facendo correctly described the location of the Worchester Lane property in the Neighborhood Boundary section of the Appraisal Report.

^{4/} Mr. Facendo testified that he believed the appraisal was, at some point, forwarded to JP Morgan Chase Bank.

^{5/} The relationship between Chase Home Lending and JP Morgan Chase Bank is not disclosed in the record, but it is presumed that Chase Home Lending is a subsidiary of JP Morgan Chase Bank.

^{6/} In its Amended Administrative Complaint and its Proposed Recommended Order, the Department has referred to the original Appraisal Report and the corrected Appraisal Report as "Report 1" and "Report 2" and has treated the original Appraisal Report and the corrected Appraisal Report as two separate reports for the purposes of the violations alleged. Because the undersigned has found that the original and corrected Appraisal Report are not two separate reports, reference is made in this Recommended Order generally to the "Appraisal Report"; the reports are referred to as the "original Appraisal Report" and the "corrected Appraisal Report" when the context requires that a distinction be made between the Appraisal Report that contains the incorrect zoning classification and the Appraisal Report that contains the corrected zoning classification.

^{7/} In Count Two of the Amended Administrative Complaint, the Department charged Mr. Facendo with having violated Sections 475.6221(1) and, therefore, Section 475.624(4), Florida Statutes; in Count Three of the Amended Administrative Complaint, the Department charged Mr. Facendo with having violated Section 475.623 and, therefore, Section 475.624(1), Florida Statutes. These charges were based on the allegations in paragraphs 23 and 24 of the Amended Administrative Complaint. The Department did not address these charges or allegations in its Proposed Recommended Order; and it omitted from its proposed

Recommendation a recommendation that Mr. Facendo be found guilty of the charges alleged in Counts Two and Three of the Amended Administrative Complaint. The allegations in paragraphs 23 and 24 are, therefore, deemed abandoned, and Counts Two and Three of the Amended Administrative Complaint should be dismissed.

^{8/} Because the Department did not address any alleged violations of Section 475.624(2), Florida Statutes, except those of culpable negligence, misrepresentation, and breach of trust, it has effectively abandoned the charges of fraud, concealment, false promises, false pretenses, and dishonest conduct. Mr. Facendo is, therefore, found not guilty of these prohibited acts.

^{9/} The Department included several other purported misrepresentations in the second sentence of paragraph 39 to support its proposed conclusion that Mr. Facendo committed breach of trust with respect to the Appraisal Report. The Department asserted that Mr. Facendo "[1] misrepresented the Neighborhood Housing Percentages in both Reports; [2] misrepresented the Single Family price and age ranges in the Neighborhood section of both Reports; [3] misrepresented the Cost data in the Cost Approach section of both Reports; and [4] misrepresented compliance with the Uniform Standards of Professional Appraisal Practice in the Certifications of both Report 1 and Report 2." These purported misrepresentations cannot, however, support the charge that Mr. Facendo committed a breach of trust in violation of Section 475.624(2), Florida Statutes.

First, the only mention in the Amended Administrative Complaint of items [1], [2], and [3], quoted above, was in the context of the absence of documentation in Mr. Facendo's workfile to support the information included in the relevant sections of the Appraisal Report. There were no allegations in the Amended Administrative Complaint that the referenced information was incorrect in the Appraisal Report or that Mr. Facendo had misrepresented any of this information. In addition, there was no allegation in the Amended Administrative Complaint related to item [4] quoted above. As a result, these four asserted "misrepresentations" cannot, as a matter of law, be used by the Department as the basis for a violation of Section 475.624(2), Florida Statutes, in this case. See Cottrill v. Department of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) ("Predicating disciplinary action against a licensee on

conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act.").

Secondly, there is no persuasive evidence in the record to establish that the neighborhood housing percentages, the single family price and age ranges, or the cost data included in the Appraisal Report are incorrect. The Department's expert witness, Mr. Gregoire, testified that the information given by Mr. Facendo for these items in the Appraisal Report was incorrect, but this testimony was conclusory and not supported by either testimony or documentary evidence contradicting the information Mr. Facendo included in the Appraisal Report.

^{10/} In its Amended Administrative Complaint, the Department alleged that Mr. Facendo included an incorrect legal description of the Worchester Lane property. See Amended Administrative Complaint, paragraphs 5(C) and 10(B). Mr. Facendo admitted in his testimony at the final hearing that he had omitted the lot number from the legal description of the property. The Department did not, however, raise this factual issue in its Proposed Recommended Order as a basis for its assertion that Mr. Facendo committed a breach of trust. It will be presumed, therefore, that the Department has abandoned this factual allegation as a basis for a violation of Section 475.624(2), Florida Statutes, and the sufficiency of the omission of the lot number from the legal description of the Worchester Lane property to support such a statutory violation will not be addressed in this Recommended Order.

The Department also alleged in its Amended Administrative Complaint that Mr. Facendo failed "to verify the correct Room Count for comparable sale 1 when there is a discrepancy in the work file documents." See Amended Administrative Complaint, paragraphs 5(D) and 10(C). The Department did not, however, present any evidence at the final hearing with respect to this allegation. It will be presumed, therefore, that the Department has abandoned this factual allegation as a basis for a violation of Section 475.624(2), Florida Statutes.

^{11/} Certain portions of Administrative Law Judge John G. Van Laningham's Recommended Order in Cartaya were rejected by the Real Estate Appraisal Board in its Amended Final Order filed May 22, 2006, but the paragraphs of the Recommended Order cited were adopted.

^{12/} Subsection 475.611(1)(o), Florida Statutes, provides that the definition of USPAP means the most recent standards adopted by the Appraisal Standards Board of the Appraisal Foundation. Section 475.628, Florida Statutes, requires that appraisers comply with the USPAP standards. Based on the Abbott Laboratories case, these two statutes must also be interpreted to mean that the most recent standards refer to the standards that were in effect at the time of the enactment of the statutes.

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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.