STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case No. 09-5219PL
JOAQUIN INIGO,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), on January 14, 2010, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Patrick J. Cunningham, Esquire
Department of Business and Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

For Respondent: Steven W. Johnson, Esquire
20 North Orange Avenue, Suite 700
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Respondent committed the violation alleged in the Amended Administrative Complaint in the manner specified therein and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about April 21, 2009, Petitioner issued an Administrative Complaint against Respondent and Mark Tenzer, charging each with one count of violating Section 475.25(1)(b), Florida Statutes. Respondent and Mr. Tenzer each requested an administrative hearing pursuant Section 120.57(1), Florida Statutes. On September 23, 2009, these matters were referred to the DOAH. Respondent's case was docketed as DOAH Case No. 09-5219PL. Mr. Tenzer's case was docketed as DOAH Case No. 09-5220PL.

On September 25, 2009, Petitioner filed a motion requesting leave to amend the Administrative Complaint to add an additional count against Mr. Tenzer. The motion was granted by Order issued October 8, 2009. The Amended Administrative Complaint contains the following "[e]ssential [a]llegations of [m]aterial [f]act":

> 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, of the Florida Statutes and the rules promulgated thereto.

2. Respondent Joaquin Inigo is and was at all times material hereto a licensed Florida real estate sales associate, issued license number 691286 in accordance with Chapter 475 of the Florida Statutes. The last license issued was as an inactive sales associate at 5410 SW 88th Path, Miami, Florida 33173.

3. Respondent Mark Tenzer is and was at all times material hereto a licensed Florida real estate broker, issued license numbers 3008525, 87984, and 3012867 in accordance with Chapter 475 of the Florida Statutes. The last license issued was as an active broker at Foreclosure Specialists Realty, Inc., 10745 SW 104th Street, Miami, Florida 33176; Tenzer Realty Inc. & Associates, 10745 SW 104th Street, Miami, Florida 33176; and Tenzer Realty and Associates, Inc., 10745 SW 104th Street, Miami, Florida 33176.

4. At all times material, Respondent Mark Tenzer was the qualifying broker for Tenzer Realty Inc. & Associates.

5. At all times material, Respondent Mark Tenzer employed Respondent Joaquin Inigo as a sales associate.

6. Respondents were the listing agents for a property located at 14081 S.W. 166th Street, Miami, Florida 33177 ("Subject Property") owned by Wiltamar & Alessandra S. Mendes ("Sellers").

7. On or about January 18, 2008, Respondent negotiated a sales and purchase contract with Mario and Sulena Hernandez for $338,640 for the Subject Property. A copy of the contract is attached hereto and incorporated herein as Administrative Complaint Exhibit 1.

> 8. Respondent[s] concealed from Buyers that the sale and purchase contract was a back-up contract. A copy of the settlement statement is attached and incorporated herein as Administrative Complaint Exhibit 2.
>
> 9. Respondents concealed from Buyers that Respondent Tenzer had an interest in the Subject Property.
>
> 10. Respondent[s] knew or should have known that in reliance on Respondents' full disclosure, the Buyers entered into a contract to purchase the Subject Property.

Count I of the Amended Administrative Complaint is the only one of the complaint's three counts directed against Respondent. It alleges that, "[b]ased upon the foregoing [essential allegations of material fact], Respondent is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in any business transaction in this state, nation or territory; has violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; 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 any such misconduct and committed an overt act in furtherance of such intent, design, or scheme in violation of Section 475.25(1)(b), Florida Statutes."

On October 16, 2009, DOAH Case Nos. 09-5219PL and 09-5220PL were consolidated at the Petitioner's request. The cases were subsequently severed, however, after Petitioner announced at the outset of the final hearing on January 14, 2010, that it was dismissing all charges against Mr. Tenzer.

During the evidentiary proceedings that followed Petitioner's announcement, Petitioner presented the testimony of Felix Mizioznikov, Roger Shapiro, Jack Tenzer, and Sulena Hernandez. It also offered eight exhibits (Petitioner's Exhibits 1 through 8), all of which were received into evidence. Respondent testified on his own behalf. He presented no other evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced, on the record, that the deadline for the filing of proposed recommended orders was 25 days from the date of the filing of the hearing transcript with DOAH.

The hearing Transcript (consisting of one volume) was filed with DOAH on January 29, 2010.

Petitioner and Respondent filed their Proposed Recommended Orders on February 18, 2010, and February 24, 2010, respectively.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been at all times material to the instant case, a Florida-licensed real estate sales associate, holding license number SL-691286.

2. At no time during the almost ten years he has held this license has any disciplinary action been taken against him.[2]

3. From August 31, 2000, to March 31, 2002, and from April 16, 2002, to June 26, 2008, Respondent worked as a real estate sales associate for Tenzer Realty, Inc., and Associates (Tenzer Realty).

4. Jack Tenzer is a Florida-licensed real estate broker. He has owned and operated Tenzer Realty since January 30, 1990.

5. On or about December 13, 2007, Wiltamar Mendes executed a written agreement giving Tenzer Realty the "exclusive right to sell" residential property, located at 14081 Southwest 166th Street in Miami Florida, he and his wife owned (Subject Property). Under the terms of the agreement, "Tenzer Realty [was] to receive only [a] 3% commission" on the sale of the Subject Property, plus a "transaction coordination fee [of] $395.00 at closing."

6. At no time has Mr. Tenzer ever had an interest in the Subject Property.

7. Respondent was the listing agent for the Subject Property, and he represented the Mendeses throughout the sale process.

8. In January 2008, Sulena Hernandez and her husband were looking to purchase a home in the Miami area.

9. Roger Shapiro, a Florida-licensed real estate associate then working for Coldwell Banker, was helping them in their search and acting as their representative.

10. Mr. Shapiro telephoned Respondent to make arrangements for the Subject Property to be shown to Ms. Hernandez.

11. Ms. Hernandez, accompanied by Mr. Shapiro, was subsequently shown the Subject Property by the Mendeses.[3]

12. After the showing, the Hernandezes decided to make an offer on the Subject Property of $338,640.00 (money they hoped to obtain through a 100% financed Veteran's Administration loan[4]), with the "additional [monetary] term" that the Mendeses would "contribute 2% of the sale price toward [the Hernandezes'] closing cost[s]."

13. The offer was written up for the Hernandezes by Mr. Shapiro on a Florida Association of Realtors (FAR)-developed Residential and Sale Purchase Contract form that Coldwell Banker used, on behalf of its clients, for such purposes (FAR Form).

14. This FAR Form had eight pages, not including the "attached addenda." On the bottom of each page were spaces for the buyers

and sellers to put their initials to "acknowledge receipt of a copy of th[e] page."

15. Page 7 of the FAR Form contained the "Addenda" and "Additional Terms" provisions of the contract.

16. The "Addenda" provision began as follows:

> 20. ADDENDA. The following additional terms are included in the attached addenda and incorporated into this Contract (check if applicable):

This introductory language was followed by a lettered checklist of various possible "addenda" items, including "F. VA Financing," "H. As is w/Right to Inspect," "I. Inspections," "P. Back-up Contract," "Q. Broker - Pers. Int. in Prop.," "V. Prop. Disclosure Stmt.," and "Other." Next to (immediately to the left of) each listed item was a box (to be "check[ed] if applicable").

17. On the written offer he prepared for the Hernandezes (Contract Offer), Mr. Shapiro checked the "F. VA Financing," the "H. As is w/Right to Inspect," the "V. Prop. Disclosure Stmt.," and the "Other" boxes,[5] and he attached an appropriately initialed addendum corresponding to each of these checked items.[6] No other boxes were checked.

18. Page 8 of the FAR Form was the signature page.

19. Numbered lines 412 through 416 on page 8, as filled in by Mr. Shapiro (for the Hernandezes), read as follows:

OFFER AND ACCEPTANCE

> (Check if applicable: ☐ Buyer received a written real property disclosure statement from Seller before making this Offer.) Buyer offers to purchase the Property on the above terms and conditions. Unless this Contract is signed by Seller and a copy delivered to Buyer no later than 5 ☐ a.m. ☒ p.m. on January 21, 2008, this offer will be revoked and Buyer's deposit refunded[7] subject to clearance of funds.[8]

20. On numbered lines 417 through 420 on page 8, directly beneath this "Offer and Acceptance" provision, was the following "Counter Offer/Rejection" provision, which contained a box for the Mendeses to check if they wanted to counter the Contract Offer, as well as a box for the Mendeses to check if, alternatively, they wanted to reject the Contract Offer outright:

COUNTER OFFER/REJECTION

> ☐ Seller counters Buyer's offer (to accept the counter offer, Buyer must sign or initial the counter offered terms and deliver a copy of the acceptance to Seller. Unless otherwise stated, the time for acceptance of any counteroffer shall be 2 days from the date the counter is delivered.
> ☐ Seller rejects Buyer's offer.

21. On the next numbered line (421) on page 8, in the spaces provided, Ms. Hernandez signed her name and wrote in the date, "1/18/08." Acting under a power of attorney, she also signed (on numbered line 423) for her husband, who was on military deployment in Afghanistan at the time.

22. The penultimate numbered line (433) on page 8 provided that the "[e]ffective date" of the contract would be "[t]he date on which the last party signed or initialed and delivered the final offer or counteroffer."

23. Ms. Hernandez put her and her husband's initials in the spaces provided on the bottom of page 8, as well as in the spaces provided on the bottom of the preceding seven pages, to "acknowledge receipt of a copy of th[ese] page[s]."

24. Mr. Shapiro sent the Hernandezes' signed, dated and initialed Contract Offer to Respondent (by facsimile transmission) for presentation to the Mendeses for their consideration.

25. Respondent guided the Mendeses through their review of the Contract Offer and provided them with advice.

26. On January 23, 2008, after they had finished going over the Contract Offer with Respondent, the Mendeses (on numbered lines 427 and 428) signed and dated the document. They also initialed the bottom of each of the offer's first eight pages, as well as the bottom of each addendum that had been attached thereto, in the appropriate spaces. This was all done in Respondent's physical presence.

27. On behalf of the Mendeses, Respondent provided (by facsimile transmission) a copy of the signed, dated, and initialed document (Genuine Hernandez Contract[9]) to Mr. Shapiro.

28. By their actions (which Respondent helped orchestrate), the Mendeses signified their intent to accept the Contract Offer, without revision. They checked neither of the boxes in the "Counter Offer/Rejection" provision (on numbered lines 417 through 420 on page 8), nor did they make any written entries elsewhere on the document, or attach any appropriately initialed additional addenda, reflecting a desire to accept an offer from the Hernandezes only on terms different than those set forth in the Contract Offer. Most significantly, for purposes of the instant case, the Mendeses made no changes to the "Addenda" provision. They checked no additional boxes (including the "P. Back-up Contract" box), nor attached any appropriately initialed addendum corresponding to an unchecked item.

29. After receiving the Genuine Hernandez Contract from Respondent, Mr. Shapiro showed it to Ms. Hernandez.

30. Ms. Hernandez, with the help of Mr. Shapiro, proceeded to take those steps necessary for her and her husband to close on the Subject Property on February 29, 2008, the agreed-upon closing date.[10] These steps included having the Subject Property inspected and securing a mortgage loan commitment.[11]

31. Respondent and Mr. Shapiro had occasion to speak with one another over the telephone regarding these post-contract/pre-closing matters. (There was no direct

communication at any time between Respondent and the Hernandezes.)

32. At no time either before or after the effective date of the Genuine Hernandez Contract did Respondent advise Mr. Shapiro that the Mendeses intended to treat their contract with the Hernandezes as a "back-up contract," that is, a contract subordinate to another contract for the sale and purchase of the Subject Property.

33. This was not information that could be gleaned from a review of the Genuine Hernandez Contract. Indeed, the Genuine Hernandez Contract affirmatively indicated that it was not a "back-up contract," inasmuch as the "P. Back-up Contract" box in the "Addenda" provision on page 7 was not checked, nor was there any corresponding "Back-up Contract" addendum attached to the document.

34. Unbeknownst to Mr. Shapiro and the Hernandezes, by the time the Genuine Hernandez Contract became effective (which, according to numbered line 433, was January 23, 2008, "[t]he date on which the last party [the Mendeses] signed or initialed and delivered the final offer"), the Mendeses had already entered into a contract (using the FAR Form) to sell the Subject Property to another couple, Carlos and Aida Garcia, for $330,000.00 (95% of which would be financed), with no seller contribution toward closing costs (Garcia Contract).

35. In the "Addenda" provision (on page 7) of the Garcia Contract (as in that provision of the Genuine Hernandez Contract), neither the "I. Inspections" box, the "P. Back-up Contract" box, nor the "Q. Broker - Pers. Int. in Prop." box was checked.

36. Respondent was aware at the time that the Mendeses executed the Contract Offer and entered into the Genuine Hernandez Contract that it was the Mendeses' intention to proceed with the Garcia Contract as the primary contract[12] and to treat the Genuine Hernandez Contract as merely a "back-up"[13] (providing a ready alternative for the Mendeses, as insurance, in the event their deal with the Garcias fell through).[14]

37. This was information that any reasonably prudent buyer in the Hernandezes' situation would have wanted and expected to have, as Respondent surely must have known. As a Florida-licensed real estate sales associate representing the Mendeses, Respondent had a duty, in the interest of honest and fair dealing, to disclose this information to the Hernandezes (notwithstanding that he was not their agent[15]).

38. Nonetheless, Respondent knowingly and dishonestly participated in a scheme to conceal from the Hernandezes the subordinate status of their contract to purchase the Subject Property.[16]

39. As it turned out, the Mendeses did not need to have a "back-up" buyer, as the Garcias closed on the Subject Property on February 11, 2008, as scheduled. Respondent "attend[ed] the closing with the Garcias."

40. Respondent told neither Mr. Shapiro, nor the Hernandezes, that the Garcias had closed on the Subject Property.

41. Mr. Shapiro found out about the Garcias and their having closed on the Subject Property, not from Respondent, but from a representative of Sunbelt Title (the title company). He obtained this information just a few days before the Hernandezes' scheduled February 29, 2008, closing.

42. Mr. Shapiro, in turn, told Ms. Hernandez about the Garcias' purchase of the Subject Property.

43. Ms. Hernandez was "shocked" to learn that the Mendeses no longer had title to the Subject Property and that therefore she and her husband would not be able to purchase the property from them. She had made all the necessary preparations to move from the rental property she was living in with her husband to the Subject Property. She even had family members who were going to be "flying into town" to help her with the move.

44. Had the Hernandezes known that their contract was only a "back-up" to the Garcias', they would not have done the things they did in anticipation of their scheduled February 29, 2008, closing on the Subject Property.

45. Ms. Hernandez hired an attorney, who contacted Mr. Tenzer to inquire, on the Hernandezes' behalf, about the situation.

46. Mr. Tenzer had no "idea what [the attorney] was talking about."

47. Respondent was unavailable at the time inasmuch as he was out of the country on vacation.

48. Mr. Tenzer therefore went directly to the filing cabinets where all of Tenzer Realty's files (both active and closed) were supposed to be kept and proceeded to look for the file on the Subject Property.

49. Pursuant to established Tenzer Realty office policy (with which Respondent should have been familiar), all contracts dealing with the Subject Property should have been in one file in these filing cabinets.

50. Mr. Tenzer found only the Garcia Contract in the file on the Subject Property. The Genuine Hernandez Contract (to which the Hernandezes' attorney had referred in his conversation with Mr. Tenzer) was not in the file.

51. Unable to locate a contract for the sale of the Subject Property to the Hernandezes, Mr. Tenzer left a note on Respondent's desk asking Respondent to see him about the matter as soon as he returned to the office from vacation. In his note, Mr. Tenzer emphasized that "it was urgent" that Respondent discuss the matter with him "immediately" upon Respondent's return.

52. When Respondent returned to the office, he produced for Mr. Tenzer a document (Purported Hernandez Contract[17]) identical in all respects to the Genuine Hernandez Contract, except that three additional boxes in the "Addenda" provision on page 7 were checked: the "I. Inspections" box; the "P. Back-up Contract" box; and the "Q. Broker - Pers. Int. in Prop." box.[18] (No additional addendum corresponding to any of these items was attached to the document, however; just the boxes were checked.[19]) There were no signatures or initials next to these three checked boxes.[20]

53. Respondent told Mr. Tenzer that this was a "back-up contract" and that the Hernandezes had been so informed.

54. What Respondent had done was alter the "Addenda" provision of the Genuine Hernandez Contract in a weak and transparent attempt to make it appear as if the "back-up" nature of the contract was apparent from its face.

55. Mr. Tenzer asked Respondent where the Purported Hernandez Contract had been "all this time." Respondent responded that he had kept it in his desk drawer. This response drew a rebuke from Mr. Tenzer, who chastised Respondent for not keeping the Purported Hernandez Contract in the file together with the Garcia Contract.

56. Mr. Tenzer then inquired, "Why do we have another contract when one's already closed?" Respondent answered, unresponsively (as well as untruthfully), that he had notified Mr. Shapiro that the Garcias had closed on the Subject Property and that therefore the Hernandezes would not be purchasing the property.

57. Upon reviewing the Purported Hernandez Contract, Mr. Tenzer noticed that the "Q. Broker - Pers. Int. in Prop." box was checked. When he questioned Respondent about this, Respondent told Mr. Tenzer that "that was done in error."[21]

58. The Hernandezes ultimately purchased another home in the Miami area. The purchase price of the home was more than the amount that they had agreed to pay to buy the Subject Property from the Mendeses.

59. A complaint concerning Respondent's dealings in connection with the Subject Property was filed with Petitioner. The complaint was investigated by Felix Mizioznikov, an investigator with Petitioner.

60. As part of his investigation, Mr. Mizioznikov interviewed Respondent, both over the telephone and "in person."

61. During the "in person" interview, Respondent gave Mr. Mizioznikov his file on the Subject Property. The file contained the Garcia Contract, the Genuine Hernandez Contract,[22] and the Purported Hernandez Contract.

62. Mr. Mizioznikov's investigation led to Petitioner's filing the instant charge against Respondent alleging a violation of Section 475.25(1)(b), Florida Statutes.

CONCLUSIONS OF LAW

63. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

64. The Florida Real Estate Commission (Commission) is statutorily empowered to take disciplinary action against Florida-licensed real estate sales associates based upon any of the grounds enumerated in Section 475.25(1), Florida Statutes.

65. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension not exceeding ten years; imposition of an administrative fine not to exceed $5,000.00 for each count or separate offense; issuance of a reprimand; and placement of the licensee on probation. § 475.25(1), Fla. Stat. In addition, the Commission "may assess costs related to the investigation and prosecution

of the case excluding costs associated with an attorney's time." § 455.227(3)(a), Fla. Stat.

66. The Commission may take such action only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes. See § 120.60(5), Fla. Stat.

67. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. See Hollis v. Department of Business and Professional Regulation, 982 So. 2d 1237, 1239 (Fla. 5th DCA 2008); and §§ 120.569(1) and 120.57(1), Fla. Stat.

68. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument. Clear and convincing evidence of the licensee's guilt must be presented for Petitioner to meet its burden of proof. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)("The Department had the burden of proving fraud, misrepresentation or concealment by clear and convincing evidence, in order to justify revocation of Walker's license."); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based

upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

69. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . . 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(citing with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence

that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

70. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits the Commission from taking disciplinary action against a licensee based on conduct not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Trevisani v. Department of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

71. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk, 595 So. 2d at 967. In deciding whether the statute or rule claimed [in the charging instrument] to have been violated was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Djokic v. Department of Business and Professional Regulation, Division of Real Estate, 875 So. 2d 693, 695 (Fla. 4th DCA 2004); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164,

165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

72. In those cases where the proof is sufficient to establish that the licensee committed the violation(s) alleged in the charging instrument and that therefore disciplinary action is warranted, it is necessary, in determining what disciplinary action should be taken against the licensee, to consult the Commission's "disciplinary guidelines," as they existed at the time of the violation(s). See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and Orasan v. Agency for Health Care Administration, Board of Medicine, 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996)("[T]he case was properly decided under the disciplinary guidelines in effect at the time of the alleged violations."); see also State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency

is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

73. The Commission's "disciplinary guidelines" are set forth in Florida Administrative Code Rule 61J2-24.001. At all times material to the instant case, they provided, in pertinent part, as follows:

> (1) Pursuant to Section 455.2273, F.S., the Commission sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon licensees guilty of violating Chapter 455 or 475, F.S. The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties which normally will be imposed for each count during a formal or an informal hearing. For purposes of this rule, the order of penalties, ranging from lowest to highest, is: reprimand, fine, probation, suspension, and revocation or denial. Pursuant to Section 475.25(1), F.S., combinations of these penalties are permissible by law. Nothing in this rule shall preclude any discipline imposed upon a licensee pursuant to a stipulation or settlement agreement, nor shall the range of penalties set forth in this rule preclude the Probable Cause Panel from issuing a letter of guidance.
>
> (2) As provided in Section 475.25(1), F.S., the Commission may, in addition to other disciplinary penalties, place a licensee on probation. The placement of the licensee on probation shall be for such a period of time and subject to such conditions as the Commission may specify. Standard probationary conditions may include, but are not limited to, requiring the licensee: to attend pre-licensure courses; to satisfactorily complete a pre-licensure course; to attend post-licensure courses; to satisfactorily complete a post-licensure

course; to attend continuing education courses; to submit to and successfully complete the state-administered examination; to be subject to periodic inspections and interviews by a DBPR investigator; . . . .

(3) The penalties are as listed unless aggravating or mitigating circumstances apply pursuant to subsection (4). The verbal identification of offenses is descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included.

* * *

(c) Section 475.25(1)(b), F.S.- Guilty of . . . concealment . . . .

* * *

In the case of concealment . . . , the usual action of the Commission shall be to impose a penalty of a 3 to 5 year suspension and an administrative fine not to exceed $5,000.

* * *

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

(b) Aggravating or mitigating circumstances may include, but are not limited to, the following:

1. The degree of harm to the consumer or public.
2. The number of counts in the

> Administrative Complaint.
>
> 3. The disciplinary history of the licensee.
>
> 4. The status of the licensee at the time the offense was committed.
>
> 5. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.
>
> 6. Violation of the provision of Chapter 475, F.S., wherein a letter of guidance as provided in Section 455.225(3), F.S., previously has been issued to the licensee.
>
> * * *

74. The Amended Administrative Complaint issued in the instant case alleges that Respondent violated Section 475.25(1)(b), Florida Statutes, by "conceal[ing] from [the Hernandezes] that the sale and purchase agreement [concerning the Subject Property that they entered into with the Mendeses] was a back up contract."[23]

75. At all times material to the instant case, Section 475.25(1)(b), Florida Statutes, has authorized the Commission to take disciplinary action against a Florida-licensed real estate sales associate who:

> [h]as been guilty of . . . concealment . . . It is immaterial to the guilt of the licensee 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 licensee or was an identified member of the general public.

76. For there to be "concealment" in violation of Section 475.25(1)(b), Florida Statutes, there must be wrongful intent or scienter. See Munch v. Department of Professional Regulation, 592 So. 2d 1136, 1143-44 (Fla. 1st DCA 1992)("It is clear that Section 475.25(1)(b) Florida Statutes, which, in its first clause, authorizes the Commission to discipline a licensee guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in any business transaction is penal in nature. As such, it must be construed strictly, in favor of the one against whom the penalty would be imposed. . . . 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."); and Morris v. Department of Professional Regulation, 474 So. 2d 841, 843 (Fla. 5th DCA 1985)(grounds of "'fraud, misrepresentation, concealment, false promises, dishonest dealing by trick, scheme or device, culpable negligence and breach of trust in a business transaction in

violation of section 475.25(1)(b) . . . alleged by the complaint all require a finding of wrongful intent or scienter . . . .").

77. The wrongful intent or scienter required to establish a violation of Section 475.25(1)(b), Florida Statutes, may be proven by circumstantial evidence. See Walker v. Department of Business and Professional Regulation, 705 So. 2d 652, 654 (Fla. 5th DCA 1998)("DBPR presented undisputed circumstantial evidence that Walker's acts were intentional."); and Baker v. State, 639 So. 2d 103, 104 (Fla. 5th DCA 1994)("Intent is an operation of the mind and is not subject to direct proof, however, intent can be proven by circumstantial evidence."). For instance, it may be inferred from the licensee's actions. See Baptiste v. State, 895 So. 2d 1193, 1194 (Fla. 3d DCA 2005)("On appeal, Baptiste asserts that the state failed to prove beyond a reasonable doubt that he knew or intended that Scooter would shoot the victim. However, where there is no direct evidence of intent, it can be inferred from the circumstances and from the defendant's actions."); Swanson v. State, 713 So. 2d 1097, 1101 (Fla. 4th DCA 1998)("Appellant's actions are sufficient to show intent to participate."); State v Breland, 421 So. 2d 761, 766 (Fla. 4th DCA 1982) ("Actions manifest intent."); G. K. D. v. State, 391 So. 2d 327, 328-29 (Fla. 1st DCA 1980)("Appellant testified that he did not intend to break the window, but the record indicates that he did willfully kick the window, and he may be presumed to

have intended the probable consequences of his actions."); and State v. West, 262 So. 2d 457, 458 (Fla. 4th DCA 1972)("Intent is not usually the subject of direct proof. It is inferred from the acts of the parties and from the surrounding circumstances.").

78. In the instant case, Petitioner established by clear and convincing evidence that Respondent engaged in the wrongful concealment alleged in the Amended Administrative Complaint and, in so doing, violated Section 475.25(1)(b), Florida Statutes. That Respondent acted knowingly, with the intent to deceive, in concealing from the Hernandezes the "back-up" nature of their contract is apparent from the totality of Respondent's actions, including, perhaps most significantly, his subsequent efforts to cover-up the concealment by creating a fraudulent contract document (the Purported Hernandez Contract) and then lying about how it was created. See Baena v. Woori Bank, 515 F. Supp. 2d 414, 421-22 (S.D. N.Y. 2007)("The significance of the subsequent alleged lies is that they speak to whether defendants acted with scienter --an intent to deceive at an earlier point in time. The subsequent lies --the cover up--, if proven, would be strong circumstantial evidence of a bank's state of mind and intentions at the time of entry into the two sets of agreements. . . . Here, it is difficult to conjure up many innocent explanations for a lie about the existence of a second set of agreements.

One who had entered into two sets of agreements innocently and without intent to facilitate the original fraud would be less likely to have lied about them when inquiry was later made."); In re Nature's Sunshine Products Security Litigation, 486 F. Supp. 2d 1301, 1310 (D. Utah 2007)("Evidence that a defendant has taken steps to cover-up a misdeed is strong proof of scienter."); and Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 434 (Tex. 1986)("While a party's intent is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation is made.").

79. Florida Administrative Code Rule 61J2-24.001(3)(c) has provided at all times material to the instant case that where, as in the instant case, an alleged "concealment" (proscribed by Section 475.25(1)(b), Florida Statutes) has been proven, the "usual action of the Commission" is the imposition of "a penalty of a 3 to 5 year suspension and an administrative fine not to exceed $5,000."

80. Having considered the facts of the instant case in light of this rule provision and the remaining pertinent and applicable provisions of Florida Administrative Code Rule 61J2-24.001, it is the view of the undersigned that the Commission should discipline Respondent for his "concealment" by suspending his license for a period of four years and fining him

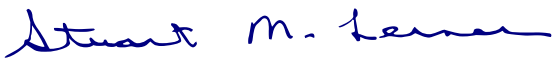
$1,000.00.[24] The Commission should also order Respondent, pursuant to Section 455.227(3), Florida Statutes, to reimburse Petitioner for its reasonable investigative costs in this case. "Due process considerations require, however, that Respondent be given the opportunity to examine and question the reasonableness of such costs before any are imposed." Department of Health, Board of Nursing v. Howard, No. 02-0397PL, 2002 Fla. Div. Adm. Hear. LEXIS 1310 *10 (Fla. DOAH October 30 2002)(Recommended Order).

RECOMMENDATION

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

RECOMMENDED that the Commission issue a Final Order finding Respondent guilty of "concealment" in violation of Section 475.25(1)(b), Florida Statutes, as alleged in the Amended Administrative Complaint and disciplining him for having committed this violation by suspending his license for four years, fining him $1,000.00, and requiring that he reimburse Petitioner for its reasonable investigative costs in this case.

DONE AND ENTERED this 3rd day of March, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of March, 2010.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2009).

[2] From April 1, 2002, through April 15, 2002, Respondent's license was "invalid [by operation of law] due to non-renewal."

[3] Respondent was not at the Subject Property during the showing.

[4] At the time, Mr. Hernandez was in the United States military and on active duty.

[5] On the line next to (immediately to the right of) the "Other" box, he wrote, "mold."

[6] The "H. As is w/Right to Inspect" addendum read as follows:

> H. As Is With Right to Inspect: This clause replaces Paragraphs 6 and 8 of the Contract but does not modify or replace Paragraph 9. Paragraph 5(a), Repair, WDO and Permit Limits are 0%. Seller makes no warranties other than marketability of title. Seller will keep the Property in the

same condition from Effective Date until closing, except for normal wear and tear ("Maintenance Requirement"), and will convey the Property in its "as is" condition with no obligation to make any repairs. Buyer may, at Buyer's expense, by 15 ("Inspection Period") (within 10 days for Effective date if left blank) make any and all inspections of the Property. The inspection(s) will be by a person who specializes in and holds an occupational license (if required by law) to conduct home inspections or who holds a Florida license to repair and maintain the items inspected. Buyer may cancel the Contract by delivering written notice to seller within 5 days (within 5 days if left blank) from the end of the Inspection Period if the cost of treatment and repairs estimated by Buyer's inspector(s) is greater than $1,000.00 ($250.00 if left blank) or if Buyer's inspection(s) reveal open permits or that improvements have been made to the Property without required permits. For the cancellation to be effective, Buyer must include in the written notice a copy of the portions of the inspector's written report dealing with the items to be repaired, and treatment and repair estimates from the inspector or person(s) holding an appropriate Florida license to repair the items inspected or any written documentation of open permit(s) or permits that have not been obtained if a permit is required. Any conditions not reported in a timely manner will be deemed acceptable to Buyer. If Buyer fails to timely conduct any inspection which Buyer is entitled to make under this paragraph, Buyer waives the right to the inspection and accepts the Property "as is." Seller will provide access and utilities for Buyer's inspections. Buyer will repair all damages to the Property resulting from the inspections and return the Property to its pre-inspection condition. Buyer and/or Buyer's representative may, on the day before Closing Date or any other time

> agreeable to the parties, walk through the Property solely to verify that Seller has fulfilled the Maintenance Requirement and the contractual obligations.

[7] As part of their Contract Offer, the Hernandezes put down a deposit of $3,000.00. The deposit was held in escrow by Coldwell Banker.

[8] Mr. Shapiro filled in (in the spaces provided) the time and date by which the Contract Offer had to be signed by the Mendeses and returned to the Hernandezes. The remainder of numbered lines 412 through 416 was pre-printed.

[9] The Genuine Hernandez Contract was offered and received into evidence as Petitioner's Exhibit 4.

[10] Although the Hernandezes had the right (pursuant to the "Offer and Acceptance" provision of the Contract Offer) to revoke their offer after 5:00 p.m. on January 21, 2008, they chose not to exercise this right and opted instead to go ahead with their purchase of the Subject Property on the terms they had offered and the Mendeses (albeit belatedly) had accepted. See, e.g., Ocean Atlantic Development Corp. v. Aurora Christian Schools, Inc., 322 F.3d 983, 997 (7th Cir. 2003)("One question that we must address at the outset is whether Ocean Atlantic's offer to the Koniceks is necessarily a nullity because the Koniceks did not sign it until the offer, by its own terms, had already expired. The offer specified that if not signed and returned to Ocean Atlantic within five days, it 'shall be null and void.' The offer was dated May 24, 2000, but the Koniceks did not sign it and return it to Ocean Atlantic until May 31, 2000--two days beyond the deadline for acceptance. Isenstein-Pasquinelli and the Koniceks assert that this alone renders the offer unenforceable. But as Ocean Atlantic aptly points out, a provision of this sort serves to protect the offeror, and the offeror may, should it so choose, elect to waive strict compliance with the time limit. Here it would appear that notwithstanding the Koniceks' failure to sign and return the offer within the time provided, Ocean Atlantic was nonetheless prepared to overlook their tardiness and proceed with the preparation of a contract. Under these circumstances, we cannot say, as a matter of law, that the offer was null and void simply because the Koniceks did not sign it in a timely fashion.")(citations omitted). The Hernandezes were under the understandable impression at the time they made this choice to

proceed with the purchase that theirs was not a "back-up contract."

[11] The Hernandezes obtained a loan commitment letter from their lender on February 26, 2008, three days prior to the scheduled closing.

[12] The Mendeses received the Hernandezes' Contract Offer before the Garcia Contract was finalized. They chose to give the Garcias, rather than the Hernandezes, first crack at purchasing the Subject Property because of concerns they had that the Hernandezes would have difficulty obtaining 100% financing to make the purchase.

[13] Comment a. of The Restatement (Second) of Contracts, Section 146, provides that, "[w]here an owner of property makes two [otherwise enforceable] agreements to sell the same property to two different buyers . . . , the first in time ordinarily has priority." In the instant case, as between the Garcia Contract and the Genuine Hernandez Contract, the former was "first in time."

[14] The Mendeses were moving to Brazil and wanted to sell the Subject Property as quickly as possible. Having a "back-up" contract with the Hernandezes at the ready would have minimized the delay in the sales process should the Garcias for any reason not have been able to close on the property. Moreover, the Genuine Hernandez Contract, from a seller's perspective, was slightly more attractive, monetarily, than the Garcia Contract, and it would have provided Tenzer Realty (and therefore also Respondent) with a larger commission payout.

[15] See Dullea v. Department of Business Regulation, 599 So. 2d 207, 208 (Fla. 2d DCA 1992)("It also appears that the appellant would be eligible to recover based upon Waddle's violation of a duty imposed upon him by law, namely the duty of honesty, candor, and fair-dealing imposed upon real estate brokers and salespersons, even where there is no principal-agent relationship between the broker and seller."); Ellis v. Flink, 301 So. 2d 493, 494 (Fla. 2d DCA 1974)("We need not decide here whether the record below conclusively demonstrated a genuine issue of fact as to agency, because, as a matter of law, that issue could not be material. The law of Florida is very clear that the defendants, as real estate broker and salesmen, owed the Flinks, a duty of honesty, candor, and fair-dealing (which they obviously breached) even if there were no principal-agent

relationship at all."); and Department of Business and Professional Regulation, Division of Real Estate, v. Shad, No. 98-5636, 1999 Fla. Div. Adm. Hear. LEXIS 5799 *9 (Fla. DOAH April 9, 1999)(Recommended Order)("Petitioner has proven the violation by clear and convincing evidence, in that Respondent intended to withhold the information concerning the findings in the termite inspection report involved in the business transaction. In this connection, Respondent had the duty of honesty, candor, and fair dealing with the Bampings and Ms. Irons, in carrying out his obligation to his client, the Veteran's Administration, notwithstanding the lack of a principal-agent relationship with those persons.").

[16] Contrary to the suggestion made by Respondent in his Proposed Recommended Order, he did have a motive to conceal from the Hernandezes that there was a pre-existing contract that had priority over theirs: the elimination of the possibility that the Hernandezes would reject such an arrangement and not agree to be "back-up" buyers.

[17] The Purported Hernandez Contract was offered and received into evidence at the final hearing as Petitioner's Exhibit 3.

[18] Although these three additional boxes in the "Addenda" provision were checked, there was no checkmark in the "Counter Offer" box on page 8 (to indicate that that there were "counter offered terms").

[19] To the naked eye, the marks in these three boxes, compared to the marks in the "F. VA Financing," the "H. As is w/Right to Inspect," the "V. Prop. Disclosure Stmt.," and the "Other" boxes, appear to be thicker, as if they had been written with a different writing instrument.

[20] The absence of any such signatures or initials belies the claim made by Respondent during his testimony at the final hearing that the Hernandezes "accepted" these additional contract terms.

[21] At the final hearing, Respondent testified otherwise concerning the mark in this box. He claimed that the box had been checked, not in error, but because Mr. Mendes had an inactive real estate license. Respondent explained that he had "always been trained to check that box even if the person had an inactive license." If this were true, one would expect to find

"that box" also checked on the Garcia Contract, which it was not.

Concerning the mark in the "I. Inspections" box on the Purported Hernandez Contract, Respondent testified that the Mendeses checked this box "because they wanted to make sure that [the Hernandezes] couldn't come back and break the deal." According to Respondent's testimony, if this box was checked, the buyer (in this case, the Hernandezes) would "have a certain timeframe" beyond which "they could not back out of the contract" based on the results of an inspection. There was no need, however, for the Mendeses to add such a provision inasmuch as the "H. As is w/Right to Inspect" addendum that the Hernandezes had attached to their Contract Offer already provided the Mendeses with this protection. Further detracting from the credibility of Respondent's testimony on this matter is the fact that the "I. Inspections" addendum, which Respondent claimed the Mendeses insisted on including in their contract with the Hernandezes, was not included in the Mendeses' contract with the Garcias.

Respondent evidently believed that by also checking the "I. Inspections" box and the "Q. Broker - Pers. Int. in Prop." box on the Purported Hernandez Contract (as opposed to just checking the "P. Back-up Contract" box) he would give the document a greater air of legitimacy and increase the chances that his fraudulent alteration of the Genuine Hernandez Contract would go undetected. As it turned out, however, this ploy only made his deceit more obvious.

[22] Respondent would not have had in his possession the Genuine Hernandez Contract (which was dated and signed by the Mendeses on July 23, 2008, and did not have, in its "Addenda" provision, a mark in either the "I. Inspections," the "P. Back-up Contract," or the "Q. Broker - Pers. Int. in Prop." box) if the Mendeses had checked these boxes when he had gone over the Contract Offer with them on that date, as Respondent testified that they had done.

[23] Although the Amended Administrative Complaint further alleged that Respondent also "concealed from [the Hernandezes] that [Mr.] Tenzer had an interest in the Subject Property," it appears from a review of Petitioner's Proposed Recommended Order that Petitioner has abandoned this additional allegation (which, in any event, abandoned or not, was not proven at hearing).

[24] The undersigned has rejected, as too lenient, the six-month suspension proposed by Petitioner in its Proposed Recommended Order. Were the Commission to suspend Respondent for only six months, it would be deviating downward from its "usual action" (as established by Florida Administrative Code Rule 61J2-24.001(3)(c)) in "concealment" cases. The circumstances of the instant case, however, do not justify any downward departure from the normal penalty range established in the rule.

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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.