

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-0387
)
CARA S. CACIOPPO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on July 22, 2010, in Wildwood, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jennifer Leigh Blakeman, Esquire
Department of Business
and Professional Regulation
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

For Respondent: Cara S. Cacioppo, pro se
5756 West Costa Mesa Lane
Beverly Hills, Florida 34465

STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondent acted as a real estate agent/sales associate without being the holder of a valid and current real estate license in violation of Section

475.42(1)(a), Florida Statutes, and therefore, in violation of Section 455.228, Florida Statutes; and, if so, (b) what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation (Petitioner), issued a four-count Administrative Complaint, dated July 27, 2009, against Cara S. Cacioppo (Respondent). In each count, the complaint alleged that Respondent was guilty of having operated as a real estate broker/sales associate without being the holder of a valid and current license as a real estate broker or sale associate.

In an Election of Rights form dated September 11, 2009, Respondent requested an administrative hearing to challenge the allegations in the complaint. Petitioner referred the matter to the Division of Administrative Hearings on January 26, 2010.

On February 2, 2010, Petitioner filed a Motion to Consolidate the instant case with a related case, DOAH Case No. 10-0388PL. The undersigned issued an Order of Consolidation dated February 12, 2010.

A Notice of Hearing dated February 12, 2010, scheduled the hearing for April 6, 2010. However, after several continuances, the case was rescheduled for hearing on July 22, 2010.

On July 16, 2010, Petitioner filed a Motion to Relinquish Jurisdiction in DOAH Case No. 10-0388PL. On July 21, 2010, the

undersigned issued an Order Relinquishing Jurisdiction and Closing File in DOAH Case No. 10-0388PL.

During the hearing, Petitioner presented the testimony of four witnesses. Petitioner offered eight exhibits, P2-P9, which were admitted as evidence.

Respondent testified on her own behalf and presented the testimony of two additional witnesses. Respondent offered five exhibits, R1-R5, which were accepted as evidence.

Petitioner filed a Proposed Recommended Order on August 13, 2010. The Transcript was filed on August 16, 2010. Respondent filed a proposed order on August 26, 2010.

Hereinafter, all references shall be to Florida Statutes (2005), except as otherwise noted.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the responsibility of regulating the real estate industry pursuant to Chapters 455 and 475, Florida Statutes. As such, Petitioner is authorized to prosecute cases against persons who operate as real estate agents/sales associates without a real estate license.

2. At all times material, Respondent was not a licensed Florida real estate agent/sales associate or broker. From January 2005 to June 2007, Respondent worked as a secretary/administrative assistant to Gail Gee, licensed Florida

real estate agent and broker affiliated with Tradewinds of Mandalay, Inc., trading as Tradewinds Realty, a brokerage corporation located in or near Crystal River, Florida.

Respondent was not the only secretary in the office.

3. In 2005, Ms. Gee had three real estate sales offices. The offices were located in Beverly Hills, Ozello, and Crystal River, Florida. Respondent began working at Ms. Gee's main office in Ozello, Florida. Ms. Gee was at that office seven days a week in 2005.

4. Ms. Gee paid Respondent hourly wages. Respondent's duties included the following pursuant to Ms. Gee's instructions: (a) answering the phone and taking messages; (b) faxing documents and e-mail listings; (c) placing advertisements; (d) drafting contracts; and (e) researching public property records.

5. Ms. Gee took Respondent to a convention so they could participate in a class where the need for an agent to have a policy and procedure manual was discussed. Ms. Gee bought a computer disc of the proposed manual and subsequently used it to create one of her own.

6. Ms. Gee had all of her associate agents and employees sign the manual. The manual advised the employees, including Respondent, what they could and could not do.

7. Sometime before February 2005, Bruce Sculthorpe of Ann Arbor, Michigan, found some property in Citrus County, Florida, listed for sale on the internet. One property was located at 9844 North Burr Oak Terrace, in the Crystal Manor area of Crystal River, Florida. The other property consisted of two lots, Lots 206 and 207, in Waterman Subdivision, in Citrus County, Florida. Mr. Sculthorpe then contacted Ms. Gee to make further inquiries about the properties.

8. On or about February 7, 2005, Bruce and Julie Sculthorpe brought the property located at 9844 North Burr Oak Terrace from Mary Lynn Netzel, for \$25,063.50. As a result of this transaction, Ms. Gee received a commission in the amount of \$2,500. The Sculthorpes bought the property without seeing it.

9. On or about February 8, 2005, the Sculthorpes listed their property located at 9844 North Burr Oak Terrace, Crystal River, Florida, with Ms. Gee. The exclusive listing agreement indicates that the sale price for the property was \$75,000 and that the Sculthorpes agreed to pay Ms. Gee a 10 percent commission.

10. Later in February 2005, Mr. Sculthorpe learned that Respondent worked for Ms. Gee. Neither Ms. Gee nor Respondent ever represented to the Sculthorpes that Respondent was a licensed real estate agent.

11. In March or April of 2005, Julie Sculthorpe came to Florida to see the property located at 9844 North Burr Oak Terrace for the first and only time. Ms. Sculthorpe made the trip with two female friends. Ms. Sculthorpe was over an hour late to her appointment with Ms. Gee who had another appointment pending. Ms. Gee understood that Ms. Sculthorpe just wanted to see her property and was not interested in purchasing property or doing any business.

12. Ms. Gee introduced Ms. Sculthorpe to Respondent as her secretary/assistant. Ms. Gee asked Respondent to use Ms. Gee's van to take Ms. Sculthorpe and her friends to see the Sculthorpes' property and the surrounding properties because they were unfamiliar with the area.

13. Respondent did not "show" Ms. Sculthorpe other properties with the intent to interest the Sculthorpes in future purchases. The trip consisted of going to 9844 North Burr Oak Terrace and back without stopping anywhere else to look at property.

14. During the trip to 9844 North Burr Oak Terrace, Ms. Sculthorpe was not impressed with the surrounding property. She indicated that she and her husband would not be interested in property that looked like "Sanford and Son," with "trailers and license plates in their decorative stuff all over the front of their yards and stuff."

15. Respondent did not advise Ms. Sculthorpe to lower the price on the property located at 9844 North Burr Oak Terrace in order to sell it quickly. Ms. Gee eventually made that suggestion to the Sculthorpes.

16. The record is silent regarding the circumstances of the Sculthorpes' purchase of property in the Waterman subdivision. On or about June 28, 2005, the Sculthorpes listed their properties, Lots 206 and 207, in the Waterman Subdivision, Crystal River, Florida, with Ms. Gee. The listing price for each lot was \$175,000. The Sculthorpes agreed to pay Ms. Gee a commission in the amount of 8 percent on each lot.

17. On or about August 1, 2005, Gustavo Roperto and Nathalie Roperto of West Palm Beach, Florida, bought property located at 9844 North Burr Oak Terrace, Crystal River, Florida, from the Sculthorpes for the contract sales price of \$70,000. As a result of this transaction, Tradewinds Realty and Exit Realty, of Naples, Florida, each received \$2,800 in commission. The Sculthorpes made about \$40,000 in profit in about six-months time.

18. Ms. Gee negotiated the sale price of the property located at 9844 North Burr Oak Terrace. Respondent's only involvement in the sale was in facilitating communication between the Sculthorpes and Ms. Gee. Respondent did not locate the buyers, Mr. and Mrs. Roperto, or make any decision or make

any statement about the property to the Sculthorpes, other than as instructed by Ms. Gee.

19. On September 3, 2005, Julie Sculthorpe's son died. Mr. Sculthrope had subsequent conversations with Respondent regarding the need to find a home for the deceased son's dogs. Later, Mr. Sculthorpe talked to Respondent about other personal matters, like finding a Christmas gift for his wife, Julie Sculthorpe.

20. On or about September 21, 2005, the Sculthorpes signed a contract to purchase property located at 1106 South Ozello Trail in Citrus County, Florida, from Willard Radcliffs of Brooksville, Florida. The property is also described as Lots 9 and 10, St. Martians Esturary Retreats, Unit 1, in Citrus County, Florida. The Sculthorpes agreed to pay Mr. Radcliffs \$285,000.00 for the property. The sales contract indicated that Tradewinds Realty would receive commissions as the selling and listing real estate agent.

21. The sale of the property located at 1106 South Ozello Trail closed on October 27, 2005, giving the Sculthorpes title to the property. Tradewinds Realty received a commission in the amount of \$17,000 for the sale of the property.

22. On or about October 7, 2005, the St. Lucie Development Corporation, located in Vero Beach, Florida, bought property described as Lot 206, Waterman Subdivision in Crystal River,

Florida, from the Sculthorpes for the contract sales price of \$160,000. As a result of this transaction, Tradewinds Realty and Kevin S. Hawkins each received commissions in the amount of \$6,400.

23. On or about October 7, 2005, Orion Property and Sales, Inc., located in Ft. Pierce, Florida, bought property described as Lot 207, Waterman Subdivision in Crystal River, Florida, from the Sculthorpes for the contract sales price of \$160,000. As a result of this transaction, Tradewinds Realty and Kevin S. Hawkins each received commissions in the amount of \$6,400.

24. Lots 206 and 207, located in the Waterman Subdivision in Crystal River, Florida, are sometimes referred to in the record as the Hunt Point Lots. There is no persuasive evidence that Respondent had any involvement in the sale of the Hunt Point property to St. Lucie Development Corporation and to Orion Property and Sales, Inc., other than as instructed by Ms. Gee.

25. On or about November 15, 2005, the Sculthorpes listed the property located at 1106 Ozello Trail (Lots 9 and 10 in St. Martians Estuary Retreats) for sale with Ms. Gee. The Sculthorpes signed on exclusive listing agreement to sell Lot 9 for \$249,000. They signed another exclusive listing agreement to sell Lot 10 for \$249,000. In both agreements, the

Sculthorpes agreed to pay Ms. Gee a commission in the amount of 8 percent.

26. Ms. Gee subsequently advertised Lot 9 in St. Martians Estuary Retreats as for sale for \$214,000. At the time of the hearing, the Sculthorpes still owned the property located at 1106 Ozello Trail (Lots 9 and 10 in St. Martins Esturary Retreats).

27. When the Sculthorpes purchased the property at 1106 Ozello Trail, there was a stilt house on one lot and a screened enclosure with a fireplace on the other lot. The Sculthorpes paid to have both structures removed before listing the lots for sale. Respondent was not involved in finding someone to remove the structures for Bruce and Julie Sculthorpe.

28. Respondent began working part-time for another real estate broker/developer, John Holdsworth, sometime toward the end of 2005. Mr. Holdsworth owned a restaurant across the street from Ms. Gee's office. Mr. Holdsworth hired Respondent to manage the restaurant because of her prior experience owning and operating a pizzeria.

29. Ms. Gee and Mr. Holdsworth paid Respondent by the hour for time spent in each respective business. Ms. Gee hired another secretary around December 2005, to do the work Respondent no longer had time to do.

30. During his business relationship with Ms. Gee, Mr. Sculthorpe would call her, repeatedly asking, "What's next?" He also called Respondent repeatedly, wanting information about his properties or just to discuss his personal life. Mr. Sculthorpe used e-mail and Instant Messaging so much that, on one occasion, Ms. Gee instructed Respondent to turn off the computer so she could get other work done.

31. Ms. Gee and Respondent were not the only people in the office answering Mr. Sculthorpe's calls. Other secretaries in the office answered some of the calls. On some occasions, the office staff would look at each other and ask who wanted to take the call. On other occasions, Respondent placed Mr. Sculthorpe's call on speakerphone. Mr. Sculthorpe "would talk and talk and talk and talk" while Respondent continued to do her work.

32. At some point in time, Mr. Sculthorpe advised Respondent that he did not like paying commissions to Ms. Gee. Respondent then recommended that Mr. Sculthorpe take the same real estate licensure course that she was taking. Respondent gave Mr. Sculthorpe the web site for the real estate school.

33. At some point in time, Mr. Sculthorpe's sister-in-law, Linda Wilkinson went to Crystal River. Ms. Wilkinson was a real estate agent in another state. Ms. Gee showed Ms. Wilkinson

some property located in an area known as Bimini Bay. Respondent never met with or talked to Ms. Wilkinson.

34. During the hearing, Mr. Sculthorpe testified that Respondent encouraged him to buy another piece of property. According to Mr. Sculthorpe, Respondent asked him to refer her to another buyer after he refused to buy the property. Mr. Sculthorpe's testimony in this regard is not persuasive.

35. Toward the end of the Sculthorpes' relationship with Ms. Gee, Respondent was still working only part-time with Ms. Gee. After Mr. Holdsworth closed the restaurant, Respondent continued to work for Ms. Gee.

36. In June 2006, Ms. Gee moved Respondent from the Ozello office to a new office that became Ms. Gee's primary office. In June 2007, Respondent quit working for Ms. Gee because she could no longer afford to pay Respondent a salary.

37. At \$33 per hour for an investigator's time, Petitioner spent \$412.50 investigating this case.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2010).

39. Petitioner has the burden of proving, by clear and convincing evidence that Respondent operated as an unlicensed

real estate agent/sales associate. See Department of Banking and Finance v. Osborn Stern and Company, 670 So. 2d 932 (Fla. 1996), and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

40. Section 475.42(1)(a), Florida Statutes, prohibits any person from acting as a real estate broker or sales associate in Florida without a valid license. This statute warns that a violation of this law is a felony.

41. Section 475.01(3), Florida Statutes, provides that a person operates as a real estate broker or sales person if he or she commits one or more of the acts described in Chapter 475, Florida Statutes, as constituting or defining a broker, broker-sales associate, or sales associate. The statute states that "[a] single such act is sufficient to bring a person within the meaning of this chapter, and each act, if prohibited herein, constitutes a separate offense."

42. Section 475.01(1)(a), Florida Statutes, provides as follows in relevant part:

"Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral

rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists.

43. In this case, the evidence is not persuasive that Respondent acted as anything but a secretary/assistant to Ms. Gee. Respondent did not discuss and/or negotiate pricing, show properties, attempt to convince the Sculthorpes to purchase properties or to reduce the price of property, or operate as a real estate agent/sales associate. Evidence to the contrary is not credible.

44. Respondent performed secretarial duties as instructed by Ms. Gee. She answered the phone, took phone and computer messages, faxed documents and e-mail listings, placed advertisements, drafted contracts, and researched public property records. Neither Respondent nor Ms. Gee ever

represented to the Sculthorpes, or any other person, that Respondent was a licensed sales associate.

45. Respondent had to spend an inordinate amount of time listening to Mr. Sculthorpe on the phone. A lot of those conversations related only to Mr. Sculthorpe's personal life.

46. Respondent also spent time facilitating communication between Mr. Sculthorpe and Ms. Gee using a computer. However, Respondent was not the only one in the office to use the computer at Respondent's workstation. In any event, the most persuasive evidence indicates that Respondent did not use the computer to engage in extensive discussions with Mr. Sculthorpe regarding properties.

47. Petitioner has not met its burden of proof in this case. The evidence is not clear and convincing that Respondent violated Section 475.42(1)(a), Florida Statutes.

RECOMMENDATION

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

Recommended:

That Petitioner enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 29th day of September, 2010, in
Tallahassee, Leon County, Florida.

Suzanne F. Hood

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 29th day of September, 2010.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.