

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-5606PL
)
GAYLE GOTTFRIED,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Edward T. Bauer, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing on October 21, 2010, by video teleconference at sites in Tallahassee and Miami, Florida.

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

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On May 17, 2010, Petitioner Department of Business and Professional Regulation, Division of Real Estate ("the Division"), filed an Administrative Complaint against Respondent, Gayle Gottfried. The Administrative Complaint, which consists of six counts, alleges violations of various statutes and rules governing Florida certified residential real estate appraisers.

Respondent timely filed a request for a formal administrative hearing, which was then forwarded to the Division of Administrative Hearings ("DOAH") on July 15, 2010. This cause was initially assigned to Administrative Law Judge John G. Van Laningham, who scheduled a final hearing for September 21, 2010. At Petitioner's request, and without objection from Respondent, the final hearing was subsequently continued to October 21, 2010. Prior to the final hearing, this cause was transferred to the undersigned.

At the outset of the final hearing, Petitioner announced that it was abandoning Counts 4 and 5 of the Administrative Complaint. During final hearing, Petitioner presented the

testimony of one witness and introduced Exhibits 1, 2, 3, 4, 5, 6, and 13 into evidence. Respondent testified on her own behalf, presented the testimony of an additional witness, and introduced Exhibits 1 and 2 into evidence.

Following the final hearing, and with the undersigned's consent, both parties filed additional exhibits. Petitioner submitted a supplemental exhibit, identified as Petitioner's Exhibit S-1, which has been admitted into evidence.¹ The undersigned also received Respondent's Exhibit 3, which was been admitted.

The parties advised the undersigned that a transcript would be ordered of the final hearing. At the parties' request, twenty days were afforded to submit proposed recommended orders following the filing of the transcript. The transcript was filed on November 10, 2010. Petitioner filed its Proposed Recommended Order on November 23, 2010. Respondent also submitted a Proposed Recommended Order, which was filed on November 29, 2010. Both submissions were given due consideration in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2010 Florida Statutes.

FINDINGS OF FACT

1. Petitioner Department of Business and Professional Regulation, Division of Real Estate, is the state agency charged

with the licensing and regulation of property appraisers in the state of Florida, pursuant to section 20.165 and chapters 455 and 475, Florida Statutes.

2. At all times material to this action, Respondent was a State of Florida certified residential real estate appraiser, holding license number RD-5554.

3. From January 23, 2006, through September 20, 2006, and again from February 8, 2007, through December 3, 2007, Respondent was responsible for supervising Harvey Diaz, a registered trainee appraiser.

4. During 2008, Brian Piper, who is employed by Petitioner as an investigations manager, received a complaint package from a lender. The complaint involved an appraisal of a residential property located at 1337 Northwest 26th Street, Miami, Florida, that Respondent and Harvey Diaz allegedly completed on August 18, 2006.

5. On October 20, 2008, Investigator Piper visited Respondent's registered business location in an effort to investigate the complaint. During this initial visit, Investigator Piper spoke with Respondent's husband, Carlos Garcia, and requested a copy of the entire working file associated with the 1337 Northwest 26th Street property. Investigator Piper also asked for copies of appraisal logs for trainee Harvey Diaz, which certified appraisers are required to

maintain in connection with the supervision of trainee appraisers.

6. Several days later, Investigator Piper returned to Respondent's place of business. At that time, Respondent advised Investigator Piper that she had no record associated with the 1337 Northwest 26th Street address, and had not been involved with the preparation of an appraisal for that property.

7. During this second visit, Respondent produced numerous boxes for Investigator Piper's inspection. No work file related to the 1337 Northwest 26th Street property was located.

8. At no point did Respondent provide Investigator Piper with the requested appraisal logs. However, Respondent ultimately submitted the logs to Petitioner some eighteen months later, after the Administrative Complaint was filed.

9. During the final hearing, Respondent credibly testified that she no had knowledge of, or involvement with, the appraisal of 1337 Northwest 26th Street. Respondent offered further testimony (which was corroborated by two exhibits) that she discovered in 2007 that her electronic signature had been stolen. The theft was reported to the appropriate law enforcement agency, as well as the Department of Business and Professional Regulation, Division of Real Estate.

10. When asked on cross-examination why she did not provide the appraisal logs until after the filing of the

Administrative Complaint, Respondent testified that the delay resulted from the crashing of her computer's hard drive, as well as the relocation of her business.

11. The undersigned concludes, as an ultimate finding of fact, that Respondent was not aware of, and had no involvement with, the appraisal of 1337 Northwest 26th Street.

12. As an additional ultimate finding, the undersigned concludes that Respondent did not hinder or obstruct Investigator Piper's investigation.

CONCLUSIONS OF LAW

A. Jurisdiction

13. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. Burden of Proof

14. This is a disciplinary proceeding against Respondent's license. Accordingly, Petitioner must prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking and Fin., Div. of Secs. & Investor Protect. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

15. Clear and convincing evidence:

requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly

remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

C. Count One

16. Section 475.624, Florida Statutes, reads, in relevant part:

475.624 Discipline.--The board . . . 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:

* * *

(4) Has violated any of the provisions of this part or any lawful order or rule issued under the provisions of this part or Chapter 455.

17. In Count One of the Administrative Complaint, Petitioner alleges that Respondent is subject to discipline based upon a violation of section 475.626(1)(f), Florida Statutes, which provides:

(f) No person shall obstruct or hinder in any manner the enforcement of this section or the performance of any lawful duty by any person acting under the authority of this section, or interfere with, intimidate, or offer any bribe to any member of the board or any of its employees or any person who is, or is expected to be, a witness in any investigation or proceeding relating to a violation of this section.

18. Petitioner contends that Respondent violated the foregoing statutory provision by: (1) failing to provide the work file associated with the appraisal of 1337 Northwest 26th Street; or (2) turning over her appraisal logs belatedly.

19. With respect to its first theory of guilt, Petitioner failed to demonstrate by clear and convincing evidence that Respondent participated in, or had any knowledge of, the appraisal of 1337 Northwest 26th Street. Petitioner presented no witness with first-hand knowledge establishing any involvement by Respondent in the appraisal, and Petitioner's relevant exhibits (photocopies of the appraisal and an invoice) consist entirely of hearsay with no applicable hearsay exception.² It is well-settled that while hearsay is admissible in an administrative proceeding to supplement or explain other evidence, a finding of fact cannot be based on hearsay alone unless it would be admissible over objection in a civil proceeding. See Dieguez v. Fla. Dep't of Law Enforcement, Criminal Justice Standards & Training Comm'n, 947 So. 2d 591,

594 (Fla. 3d DCA 2007) ("Under [section 120.57(1)(c)], the evidence which can support a factual finding includes evidence which is not hearsay, and evidence which is admissible under a hearsay objection"). Further, the undersigned has credited Respondent's testimony that she had no knowledge of the appraisal. Accordingly, Respondent cannot be guilty of failing to provide a work file that she had no reason to possess.

20. In the alternative, Petitioner contends that Respondent "hindered" the investigation within the meaning of section 475.626(1)(f) by failing to turn over the appraisal logs until after the Administrative Complaint was filed. In particular, Petitioner argues that the appraisal logs "would have been helpful to its investigators to determine whether Respondent performed" the 1337 Northwest 26th Street appraisal, and therefore Respondent hindered the investigation through her tardy submission of the logs. See Pet. PRO, ¶ 27.

21. Petitioner cites no cases interpreting the language of section 475.626(1)(f), and instead refers the undersigned's attention to Merriam-Webster's definition of hinder: "to make slow or difficult the progress of; told hold back."

22. The undersigned is not persuaded that "hinder" should be afforded the broad interpretation suggested by Petitioner. First, it is apparent that section 475.626(1)(f) is designed to punish serious misconduct, as the terms "bribe," "intimidate,"

and "obstruct" appear in the statute along with "hinder." Also notable is that a violation of section 475.626(1)(f) is punishable as a second degree misdemeanor,³ and must therefore be strictly construed in favor of Respondent. See Quinn v. State, 662 So. 2d 947, 955 (Fla. 5th DCA 1995) ("We must start with the proposition that all criminal statutes . . . must be strictly construed in favor of the defendant."). For these reasons, the undersigned concludes that section 475.626(1)(f) requires proof of a deliberate act on the part of a licensee, and that a failure to provide requested documents as quickly as Petitioner would like, without more, is insufficient to constitute a violation of the statute.

23. The undersigned's determination that a mere failure to timely provide documents does not constitute a violation of section 475.626(1)(f) is supported by Department of Business and Professional Regulation, Division of Real Estate v. Iverson, Case NO. 10-2690 (Fla. DOAH Sept. 27, 2010). In Iverson, the Department alleged that a real estate broker failed to turn over requested documents, and therefore hindered or obstructed its investigation, contrary to section 475.42(1)(i). Significantly, section 475.42(1)(i) is virtually identical to section 475.626(1)(f), and provides:

- (i) A person may not obstruct or hinder in any manner the enforcement of this chapter or the performance of any lawful duty by any

person acting under the authority of this chapter or interfere with, intimidate, or offer any bribe to any member of the commission or any of its employees or any person who is, or is expected to be, a witness in any investigation or proceeding relating to a violation of this chapter.

In concluding that the licensee in Iverson did not hinder or obstruct the investigation, the Administrative Law Judge reasoned:

The Division cited no cases in support of its contention that the failure of a real estate broker to provide documents to the Division, without more, constitutes a violation of section 475.42(1)(i), Florida Statutes. Indeed, the entirety of the description of the violation encompassed by Section 475.42(1), Florida Statutes, as well as the fact that a violation of any provision of section 475.42(1), Florida Statutes, is a second-degree misdemeanor, makes it clear that something more than the failure to provide documents to the Division is required for a violation of Section 475.42(1)(i), Florida Statutes.

Id.

24. Applying the foregoing reasoning to the facts of this case, there is an absence of clear and convincing evidence that Respondent's delay in providing the logs "hindered" Petitioner's investigation, or otherwise violated section 475.626(1)(f). Petitioner merely demonstrated that Respondent failed to provide the requested appraisal logs until after the Administrative Complaint was filed. Not only was no evidence adduced to suggest that Respondent deliberately failed to produce the logs,

but Respondent presented credible, un rebutted testimony that the relocation of her business and the crash of her computer's hard drive contributed to the delay. Accordingly, Respondent is not guilty of Count One.

D. Count Two

25. In Count Two of the Administrative Complaint, Petitioner alleges that Respondent violated section 475.629, Florida Statutes, by failing to retain the work file associated with the 1337 Northwest 26th Street appraisal, or by failing to make the work file available for copying. Section 475.629 provides:

An appraiser registered, licensed, or certified under this part shall retain, for at least 5 years, original or true copies of any contracts engaging the appraiser's services, appraisal reports, and supporting data assembled and formulated by the appraiser in preparing appraisal reports. The period for retention of the records applicable to each engagement of the services of the appraiser runs from the date of the submission of the appraisal report to the client. These records must be made available by the appraiser for inspection and copying by the department on reasonable notice to the appraiser. If an appraisal has been the subject of or has served as evidence for litigation, reports and records must be retained for at least 2 years after the trial.

26. Based on the findings of fact herein, Petitioner failed to demonstrate a violation of section 475.629 by clear and convincing evidence. Simply put, as Petitioner was unable

to prove that Respondent prepared or had knowledge of the 1337 Northwest 26th Street appraisal, Respondent cannot be found guilty of failing to maintain or make available a work file associated with that property.

E. Remaining Counts

27. As noted previously, Petitioner announced at the outset of the final hearing that it no longer wished to pursue Counts Four and Five of the Administrative Complaint. As such, Counts Four and Five must be dismissed.

28. Petitioner has also abandoned Counts Three and Six of the Administrative Complaint, as neither is referenced anywhere in the findings of fact or conclusions of law portions of its Proposed Recommended Order. Indeed, at the conclusion of Petitioner's Proposed Recommended Order, it requests that the undersigned find Respondent guilty of Counts 1 and 2 only:

Based on the foregoing Findings of Fact and Conclusions of Law, and the evidence on the record, including the exhibits received into evidence, Petitioner recommends that the Administrative Law Judge:

1. Issue an order recommending that the Florida Real Estate Appraisal Board enter a Final Order declaring Respondent guilty on Count 1 and Count 2 of the Administrative Complaint; and
2. Issue an Order, requiring Respondent to pay an administrative fine in the amount of \$750, requiring that Respondent pay costs in the amount of \$330, and requiring that

Respondent complete fifteen (15) hours of education, in addition to the education required for licensure maintenance, in the areas of the Uniform Standards of Professional Appraisal Practice and work file retention/documentation.

(Emphasis added).

29. Even assuming Petitioner has not abandoned Counts Three and Six, the undersigned concludes that neither charge was proven by clear and convincing evidence.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that Petitioner enter a final order dismissing the Administrative Complaint against Respondent.

DONE AND ENTERED this 21st day of December, 2010, in Tallahassee, Leon County, Florida.



EDWARD T. BAUER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of December, 2010.

ENDNOTES

¹ Petitioner also submitted Supplemental Exhibit S-2, which the undersigned concludes is inadmissible. As Respondent correctly noted during the final hearing, the records were not properly authenticated. See Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 901.7, p. 1040-1041 (2010 ed.) (explaining the various ways to authenticate public records).

² The business record exception to the hearsay rule does not apply, as Petitioner did not lay the proper foundation. See Twilegar v. State, 42 So. 3d 177, 198-199 (Fla. 2010) (discussing method for establishing foundation for business record exception); Dreyer v. State, 46 So. 3d 613 (Fla. 2d DCA 2010). The fact that photocopies of the appraisal and corresponding invoice wound up in Petitioner's investigative file does not compel a different conclusion. See Doran v. Dep't of Health & Rehabilitative Servs., 558 So. 2d 87, 88 (Fla. 1st DCA 1990) (holding that in administrative proceeding, testimony of HRS employee concerning bank records in her possession was hearsay because "the documents were not offered through the testimony of the bank's records custodian or other qualified witness"); Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 803.6c, p. 897-898 (2010 ed.) ("In a series of opinions, the First District has apparently determined that the files will be admissible under section 90.803(6) if the employee's testimony demonstrates that the files are those of the state agency and that an agency employee had personal knowledge of the facts contained in each document in the file. For example, while the agency employee could testify to matters within her knowledge and her agency files, she could not lay the foundation for an affidavit from a private employer contained in the file because she would have no personal knowledge of the facts contained in the affidavit") (emphasis added).

³ See § 475.626(2), Fla. Stat. (Providing that any person who violates any of the provisions of section 475.626(1), Florida Statutes, is guilty of a misdemeanor of the second degree).

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 must be filed with the agency that will issue the final order in this case.