

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-5607PL
)
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 three counts, alleges violations of various statutes 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.

During final hearing, Petitioner presented the testimony of one witness and introduced Exhibits 1, 2, 3, 4, and 5. 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 1850 North Congress Avenue, F103, West Palm Beach, Florida, that Respondent and Harvey Diaz allegedly completed on June 5, 2007.

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 1850 North Congress Avenue property.

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 1850 North Congress Avenue 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 1850 North Congress Avenue property was located.

8. During the final hearing, Respondent credibly testified that she had no knowledge of, or involvement with, the appraisal under investigation. 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.

9. The undersigned concludes, as an ultimate finding of fact, that Respondent was not aware of, and had no involvement with, the appraisal of 1850 North Congress Avenue.

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

CONCLUSIONS OF LAW

A. Jurisdiction

11. 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

12. 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 & 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).

13. 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

14. 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.

15. 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.

16. Petitioner contends that Respondent violated the foregoing statutory provision by failing to provide the work file associated with the appraisal of 1850 North Congress Avenue.

17. The undersigned concludes, however, that Petitioner failed to demonstrate by clear and convincing evidence that Respondent participated in, or had any knowledge of, the appraisal of 1850 North Congress Avenue. 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 never possessed in the first instance.

D. Count Two

18. 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 appraisal of 1850 North Congress Avenue. Section 475.629, Florida Statutes, 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.

19. 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 1850 North Congress Avenue appraisal, Respondent cannot be found guilty of failing to maintain or make available a work file associated with that property.

E. Count Three

20. In Count Three of the Administrative Complaint, Petitioner alleges that Respondent violated section 475.6222, Florida Statutes, by failing to provide direct supervision to Harvey Diaz, her registered trainee.

21. It appears that Petitioner has abandoned this count, as Respondent's alleged failure to supervise Harvey Diaz is not

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:

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).

22. Even assuming Count Three has not been abandoned, the undersigned concludes that Petitioner failed to prove the violation 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 22nd day of December, 2010, in
Tallahassee, Leon County, Florida.



EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd 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).

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.