STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,	)	
Petitioner,	)	
vs.	)	Case No. 11-1340PL
FERNANDO LARACUENTE,	)	
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 August 3, 2011, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: C. Erica White, Esquire
Kathleen Brown-Blake, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Christopher L. Hixson, Esquire
Lynch & Robbins, P.A.
2639 Dr. Martin Luther King, Jr. Boulevard North
St. Petersburg, Florida 32804

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Amended Administrative Complaint and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On or about August 16, 2010, Petitioner issued a three-count Administrative Complaint against Respondent, a Florida-licensed community association manager, alleging that he "violated [s]ection 468.436(2)(b)5, Florida Statutes, when he improperly conducted elections of the [North Bay Villas Condominium] Association Board of Directors and released documents [specifically, minutes of a July 1, 2009, Board of Directors meeting] without Board approval" (Count I); "violated [s]ection 468.436(2)(b)2, Florida Statutes, through a violation of Rule 61E14-2.001(2), Florida Administrative Code, when he falsely stated [during a telephone interview with one of Petitioner's investigators] that he was one of three owners of North Bay Property Management, Inc." (Count II); and "violated [s]ection 468.436(2)(b)2, Florida Statutes, through a violation of Rule 61E14-2.001(2), Florida Administrative Code, when [in response to a February 16, 2010, records request made by a unit owner, Adriana Vasquez Caraballo, through her attorney] he refused access to [A]ssociation records [for photocopying]" (Count III).[2] Respondent "dispute[d] the allegations of fact

contained in the Administrative Complaint" and requested a hearing before a DOAH administrative law judge. The matter was referred to DOAH on March 16, 2011, for the assignment of an administrative law judge to conduct the hearing Respondent had requested.

As noted above, the final hearing in this case was held before the undersigned on August 3, 2011.[3] Six witnesses testified at the hearing: Beatriz Caldera, Adriana Vasquez Caraballo, Abraham Bravo, Cheryl Montgomery Barker, Maria Guzman, and Respondent. In addition to the testimony of these six witnesses, the following exhibits were offered and received into evidence: Petitioner's Exhibits 1A, 8, 9, 11, 12, L1, and L9, and Respondent's Exhibits 2 and 3.

In an ore tenus motion made at the final hearing, and in a follow-up post-hearing written motion filed on August 8, 2011, Petitioner requested permission to amend Count III of the Administrative Complaint, which then read as follows:

> 19. Section 468.436(2)(b)2, Florida Statutes, states "violation of any lawful order or rule rendered or adopted by the department or the council constitutes grounds for which disciplinary action may be taken."
>
> 20. Rule 61E14-2.001(2), Florida Administrative Code, states "a licensee or registrant shall exercise due professional care in the performance of community association management services."[4]

> 21. Based on the facts set forth above,[5] Respondent violated Section 468.436(2)(b)2, Florida Statutes, through a violation of Rule 6lEl4-2.00l(2), Florida Administrative Code, in one or more of the following ways:
>
> a) By making records inaccessible for photocopying to association unit owners.
>
> * * *
>
> 21. [sic] Based on the foregoing, Respondent violated Section 468.436(2)(b)2, Florida Statutes, through a violation of Rule 61E14-2.001(2), Florida Administrative Code, when he refused access to association records . . . .

More specifically, Petitioner sought permission to amend the last three paragraphs of Count III to read as follows:

> 20. Rule 61E14-2.001(6)(b), Florida Administrative Code, states "[a] licensee shall not deny access to association records, for the purpose of inspecting or photocopying the same, to a person entitled to such by law, to the extent and under the procedures set forth in the applicable law."
>
> 21. Based on the facts set forth above, Respondent violated Section 468.436(2)(b)2, Florida Statutes, through a violation of Rule 6lEl4-2.00l(6)(b), Florida Administrative Code, in one or more of the following ways:
>
> a) By making records inaccessible for photocopying to association unit owners.
>
> 22. Based on the foregoing, Respondent violated Section 468.436(2)(b)2, Florida Statutes, through a violation of Rule 61E14-2.001(6)(b), Florida Administrative Code, when he refused access to association records.

On August 9, 2011, Respondent filed an Objection to Motion to Amend, arguing that the motion should be denied. On August 10, 2011, the undersigned issued an Order Granting Motion to Amend Administrative Complaint, in which he gave the following explanation for his ruling:

> Allowing Petitioner, even at this late date, to amend the Administrative Complaint to allege that, "[b]y making records inaccessible for photocopying to association unit owners," Respondent violated subsection (6)(b) of Florida Administrative Code Rule 61E14-2.001, not subsection (2) (or (4)) of that rule, would in no way prejudice Respondent. Accordingly, Petitioner is granted the leave it has requested to amend the Administrative Complaint to make that correction. See El Toro Exterminator of Fla., Inc. v. Cernada, 953 So. 2d 616, 618 (Fla. 3d DCA 2007)("There is no question that the conduct and occurrences complained of in the case remained unchanged post-amendment. Additionally, the causes of action that were the gravamen of the complaint were not altered. Although El Toro asserts various technical deficiencies with the original pleadings, none of these are sufficient to defeat the court's proper granting of leave to amend. Despite these technicalities, El Toro was aware of the conduct over which the suit was brought, and the events leading to the litigation. Hence, there is no basis for El Toro to assert that it was in any way prejudiced by the court's allowance of the amendment."); Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc., 808 So. 2d 243, 256 (Fla. 1st DCA 2002)("A party is not precluded from amending its petition during the hearing if there is no showing of prejudice to the opposing party."); Optiplan, Inc. v. Sch. Bd. of Broward Cnty., 710 So. 2d 569, 572 (Fla. 4th DCA 1998)("The hearing officer's

> denial of the motion to amend, in the absence of any alleged prejudice to the appellees, was an abuse of discretion."); Florida E. Coast R. R. Co. v. Shulman, 481 So. 2d 965, 967 (Fla. 3d DCA 1986)("Leave to amend shall be freely given, particularly where the amendment is based upon the same conduct, transaction and occurrence which is the basis of the plaintiff's original pleading."); Key Biscayne Council v. Dep't of Nat. Res., 579 So. 2d 293, 295 (Fla. 3d DCA 1991)("Because the proposed amendment raised a critical issue and because the Hotel had not demonstrated how it would have been prejudiced by the amendment or a continuance, we conclude that denial of the motion to amend constituted an abuse of discretion."); and Wackenhut Protective Sys., Inc. v. Key Biscayne Commodore Club Condo. I, Inc., 350 So. 2d 1150, 1151 (Fla. 3d DCA 1977)("Florida case law applies a test of prejudice to the defendant as the primary consideration in determining whether the plaintiff's motion to amend should be granted or denied.").

The Transcript of the final hearing (consisting of two volumes) was filed with DOAH on August 23, 2011. Accordingly, in accordance with the deadline established and announced by the undersigned at the final hearing, proposed recommended orders were due to be filed on September 22, 2011.

Petitioner and Respondent filed their Proposed Recommended Orders (at 4:48 p.m.) on September 22, 2011, and (at 8:00 a.m.) on September 23, 2011, 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 since 2007, a Florida-licensed community association manager. At the time of his initial licensure, Respondent's legal name was Ferdinand A. Resto, Jr. In or some time before July 2009, he legally changed his name to Fernando A. Laracuente.[6]

2. Respondent is the owner of a residential unit at the North Bay Villas Condominium complex (Condominium).

3. The governing body of the Condominium is the North Bay Villas Condominium Association. On and off since 2007, Respondent has held various offices on the Association's Board of Directors (Board), including that of secretary.

4. At all times material to the instant case, Respondent was the sole owner and officer of North Bay Property Management, Inc. (Management), a duly registered Florida corporation.[7] Management is a Florida-licensed community association management firm. Respondent is its "qualifier."

5. At all times material to the instant case, Management provided community association management services to the Association. It did so through hired licensed community association managers, other than Respondent, who were present on the premises of the Condominium (working out of the property management office[8]) 40 hours a week. These licensed community association managers employed by Management were hand-picked by,

and responsible for acting in accordance with the directions of, the Board.

6. The property management office out of which these licensed community association managers worked had a computer the managers were to use in carrying out their duties. The computer was set up so that e-mail correspondence sent from the office (using the e-mail application installed on the computer) would reflect that it was from "Fernando Resto (northbayproperty @gmail.com)."

7. On July 1, 2009, there was a meeting of the Board. Respondent was not, at the time, a member of the Board.

8. It was the responsibility of the secretary of the Board to prepare the minutes of Board meetings. Management, through the licensed community association managers it hired, assisted the secretary in fulfilling this responsibility.

9. On Friday, July 10, 2009, at around 11:30 a.m., during the workday of the licensed community association manager then employed by Management, an e-mail was sent to unit owners from the computer in the Condominium's property management office. This e-mail read as follows:

> Dear Home Owners,
>
> Attached are the minutes of the previous board meeting held on 6/1/2009 [sic], per the request of many of you.
> If you have any questions, please do not hesitate to contact the office.

> Management
>
> Visit North Bay Villas Condo Association online at: http://www.northbaypropertymanagement.com/northbayvillas

Attached to the e-mail were what purported to be "minutes" of the July 1, 2009, Board meeting, written on Management letterhead. These "minutes" had not been approved by the Board for dissemination to unit owners.

10. The record evidence does not clearly and convincingly establish that this July 10, 2009, e-mail was personally sent by Respondent, or at his direction.

11. Respondent was the secretary of the Board for the first eight months of 2010. (A new secretary took office on or about August 28, 2010, following Board elections.)

12. By letter dated February 16, 2010, addressed to Respondent at the Condominium property management office address, Adam Steinberg, Esquire, an attorney acting on behalf of Adriana Vasquez Caraballo, a Condominium unit owner, made a "[r]equest for Condominium [r]ecords." The body of the letter read as follows:

> Pursuant to Florida Statute 718.111(12)(c), this correspondence is an official request to review and obtain copies of the records of North Bay Villas Condominium Association, Inc. Pursuant to the foregoing section, please find below Adriana M. Vazquez's (Unit 221) signature with a properly executed

notary page indicating that Ms. Vazquez has appointed Richard C. Muller, CAM, and me as her duly authorized representatives to secure copies of North Bay Villas Condominium Association, Inc.'s records.

Florida Statute 718.111(12)(a) designates the following as official records of the condominium and I hereby request a time, date (within 10 days of receipt of this request), and place to review and copy these records:

1. Minutes of board meetings for 2008, 2009, and 2010;

2. A current roster;

3. A copy of the current management agreement;

4. Accounting records for fiscal years 2008, 2009 and 2010 year to date;

a. Annual audits;

b. General ledger;

c. Bank statements;

d. Accounts receivable;

e. "A current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due." Florida Statute 718.111(12)(a)11.b;

5. If a general ledger is not available, "accurate, itemized, and detailed records of all receipts and expenditures," in accordance with Florida Statute 718.111(12)(a)11.a., will suffice; and

> 6. All voting records from the last annual election.
>
> At your earliest convenience, please contact me or Richard C. Muller.

13. Mr. Steinberg's February 16, 2010, letter was received in the property management office. The Management-hired licensed community association manager servicing the Association at the time was Cheryl Montgomery Barker. Ms. Barker contacted Respondent, who, as the secretary of the Board, was the custodian of the Association's records, and notified him of the contents of Mr. Steinberg's letter. Respondent, together with other members of the Board, sought and obtained the advice of counsel as to how to respond to the letter. Consistent with that advice, the following letter, on Management letterhead, was sent to Mr. Steinberg on February 23, 2010, on behalf of the Board:

> We are in receipt of your public records request dated February 16, 2010 and received by our offices on February 19, 2010.
>
> Pursuant to Florida Statute 718.111(12)(c),[9] we hereby notify you that an appointment has been set for Ms. Adirana [sic] M. Vazquez to inspect Association records for:
>
> Date: March 08th, 2010
> Place: Management Office, 1801 S. Treasure Drive, N Bay Village, Fl 33141
> Time: 4:00 p.m.
>
> Please also note that pursuant to [sic] Florida Statute 718.111(12), also stipulates

that the disclosures and copies are governed according to the Rules and Policies adopted by an Association.

It is the policy of the Association that your client or representatives adheres to the following when inspecting Association public records:

1. Your office staff will be granted access to available records. However, not all records may be immediately available. The Association will notify Ms. Caraballo, you or any other authorized representatives when the rest of the records would be available for inspection (if the records exist) and a new appointment for these records would be given.

2. Your client will not be allowed to make any copies on the spot, as some information may have to be redacted that may identify a homeowner or provide privileged information. However, your client may request to have certain copies made at the rate of $0.25 per page, after inspecting the records. It is highly suggested that your client brings [sic] post-it notes, so that she may mark those pages she wishes to have copies of. The Association will notify your client when such copies are available to pick up and the price per copy incurred. A cashier's check or money order must be given to the Association (North Bay Villas Condominium Association) for the first total number of copies and check must clear, prior to disbursement of any copies of the Association records.

3. The Association, its agent or authorized representatives will not engage in any discussion of such records and neither your client nor her authorized representatives should disrupt the normal day-to-day operations of the Association to carry out its duties to manage said property during the inspection period. Nor would the

> Association will [sic] provide the files in any particular order.
>
> 4. Any violation of these rules, disorderly conduct or disruption to the normal day-to-day operation of the Association will be caused [sic] to have the inspection session terminated.
>
> If there are any questions regarding this issue or anything further to that this Association must address, please direct all questions to:
>
> Ms. Cheryl Montgomery, LCAM
> Property Manager
> Agent for North Bay Villas Condominium Association, Inc.
> 1801 S. Treasure Drive, Management Office
> N Bay Village FL 33141
> Tel (305)867-8821
> Fax (305)397-0990
> Email: montgomery@northbayproperty management.com
>
> In and For the Board of Directors,
>
> *Cheryl Montgomery-Barker*
>
> Cheryl Montgomery-Barker, LCAM
> Property Manager
> Agent for North Bay Villas Condominium Association

14. Neither Ms. Caraballo, nor Mr. Steinberg, appeared at the property management office at the appointed date and time (March 8, 2010, at 4:00 p.m.) to inspect the Association's records.[10]

15. In April 2010, Ms. Caraballo renewed the records request her attorney had made a couple of months earlier, and was given a May 10, 2010, appointment by Ms. Barker to inspect the Association's records. Ms. Caraballo met with Ms. Barker on May 10, 2010, as scheduled, and viewed the Association's records. On May 14, 2010, Ms. Caraballo signed a Receipt for Condominium Documents, which read, in pertinent part, as follows:

> This public records requested [sic] dated on April 26th, 2010 and received by North Bay Villas Condominium Association on May 5th, 2010, has been completed [sic] provided by F.S. 718.111(12)(c).
>
> Homeowner acknowledges receipt of all files in accordance with the statutory [sic] and by receiving such documents holds harmless, North Bay Villas Condominium Association, Inc. and its duly appointed representatives of the Board of Directors. This request is deemed complete.

Ms. Barker's employment with Management was terminated 11 days later, on May 25, 2011.

16. As secretary of the Board, Respondent was involved in the running of the 2010 Board elections. Ms. Caraballo, in or around April 2010, filed a complaint concerning this election with the Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes

(FCTMH). William Smith, an FCTMH investigator, was assigned to investigate the complaint. On May 18, 2010, Mr. Smith wrote the following letter to the Board:

> Re: North Bay Villas Condominium Association
> Case No. 2010021485
>
> Dear Mr. Laracuente as Secretary, and other Members of the Board:
>
> As discussed with Mr. Laracuente during our May 17, 2010, telephone conversation, the Division of Florida Condominiums, Timeshares, and Mobile Homes has completed its investigation, and is addressing the allegations below by providing educational information pursuant to rule 61B-21.002, Florida Administrative Code.
>
> The Association failed to include all timely submitted names of eligible candidates on the ballot for the election scheduled June 4, 2010.
>
> Specifically, candidates were instructed to send notice of intent to:
>
> Fernando A. Laracuente-Secretary
> North Bay Villas Condominium Association, Inc.
> 15551 SW 14th St.
> Miami, FL 33194
>
> Three Candidates sent certified letters of intent in a timely manner (Andrea Gomez, Roxana Fracchi, and Natalia Guida-Pometti) to the [a]fore-mentioned address. The three certified letters sent by these individuals (as evidenced by USPS Track and Confirm documentation) were delivered and "REFUSED" on April 19, 2010. The letters were subsequently re-delivered and accepted on April 21, 2010, one day after the cut off date for timely notice.

During the course of the investigation a number of pertinent facts came to the forefront:

1. The Management office for North Bay Villas Condominium Association, Inc. is located at 1801 South Treasure Drive, North Bay Village, FL 33141.

2. The hours for the North Bay Village [sic] Management Office are 09:00 to 13:00 and 14:00 to 17:00 Monday through Friday.

3. The written request[s] to be a Candidate for the Board of Directors were dated April 14, 2010 for Roxanne Fracchia, April 15, 2010 for Natalie Guida-Pometti, and April 16, 2010 for Andrea Gomez.

4. Notice[s] from Fracchia, Guida-Pometti, and Gomez were received on April 19, 2010, at the address indicated in instructions. That address was Fernando A. Laracuente, Secretary, North Bay Villas Condominium, Association, Inc., 15551 SW 14th Street, Miami, FL 33194. However, Track & Confirm certification from the United States Postal Service indicates that although received 11:10 a.m. on April 19, 2010 mail items numbered 7009 3410 0002 1310 0881, 7009 3410 0002 1310 9211, and 7009 3410 0002 1310 9228 were refused to be accepted.

5. The cut off date for notice of intent to run as a candidate was April 20, 2010.

6. The aforementioned certified letters were delivered and accepted on April 21, 2010.

7. Fracchia, Guida-Pometti, and Gomez were denied the opportunity to be candidates for the Board.

8. The Association has an obligation to accept certified mail at the address it indicates in the first mailing.

Whereas the Association instructed unit holders to send their intent of Candidacy to a specific address, and given that the Association has an obligation to accept said notice during normal business hours a violation has occurred which requires corrective action. The candidates are eligible.

61B-23.0021(9) of the Florida [A]dministrative Code states:

"The failure of the written ballot to indicate the name of each eligible person shall require the association to mail, transmit, or deliver an amended second notice, which shall explain the need for the amended notice and include a revised ballot with the names of all eligible persons within the time required by this rule. If an amended second notice cannot be timely mailed, transmitted or delivered, then the association must re-notice and reschedule the election. If the election has already been held, under these circumstances the association shall conduct a new election."

There is corrective action required which is to redo the election process from the fourteen day notice forward with the three candidates in question on the ballot. This entire process must be completed by June 15, 2010.

By June 1, 2010 the following evidence is to be sent to the Division:

- Second notice of the new election;
- Affidavit of mailing the second notice of the new election;
- Candidate information sheets for the new election;
- Ballot for the new election;
- Outer envelope sample for the new election;
- Inner envelope sample for the new election.

Upon completion of the election by June 15, 2010 the following is to be sent to the Division:

- List of eligible voters for the new election;
- Tally sheets for the new election;
- Minutes of the annual meeting and election.

As discussed, rule 61B-21.002(4), Florida Administrative Code, provides that associations must provide a written response to a Warning Letter. Mr. Laracuente on behalf of the Board agreed to submit a response to this letter by May 28, 2010. The response must include confirmation of the violation, and the Association[']s agreement to comply in the future. Additionally, the Association must implement corrective action, which is a redo of the election from the fourteen day notice.

However, should the Association disagree with or want to challenge the Division's findings, the Association may request the Division enter a Notice to Show Cause. If such request is received or if the Association disputes the Division's findings, the Division may conduct further investigation into the Association's response, which may require the production of further documentation, and issue a Notice to Show Cause that will provide the Association an opportunity to dispute the Division's findings and ask for a hearing.

> Failure to reply, take corrective action as requested herein, or repeated violations of a similar nature within two years from the date the violation is resolved, may result in an enforcement action by the Division as well as civil penalties of up to $5,000 per violation.
>
> Your attention is directed to rule 61B-23.002(7)(b)1., Florida Administrative Code, which requires retention of this letter or a copy thereof among the official records of your Condominium Association for future reference.
>
> Please address your response to me at the address listed on our letterhead. If you have any questions about this matter, please contact me at 954.202.3983, extension 111, william.smith@dbpr.state.fl.us.

17. The Board decided not to challenge the findings made by Mr. Smith in his May 18, 2010, letter. Instead, it sent out an amended notice of election to unit owners which listed Ms. Fracchia, Ms. Guida-Pometti, and Ms. Gomez as eligible candidates who would be on the ballot for the June 2010 election. This amended notice of election, however, did not "explain the need for the amended notice," as required by Florida Administrative Code Rule 61B-23.0021(9). Mr. Smith telephoned Respondent to notify him, as the contact person for the Board, of this deficiency in the Board's response to the May 18, 2010, letter. Respondent took the matter to the other

members of the Board. The Board made the decision to cancel the June 2010 election. The election was rescheduled for, and ultimately held, in August 2010.

18. Around the time that Mr. Smith was conducting his investigation, Respondent had a conversation with one of Petitioner's investigators, Beatriz Caldera, who was investigating a complaint that had been filed with Petitioner against Respondent. During this conversation, Ms. Caldera questioned whether it was a conflict of interest for Respondent to serve on the Board and also be the owner of the community association management firm (Management) providing community association management services to the Association. In his response, Respondent told Ms. Caldera, among other things, that there were three owners of Management, which was not true inasmuch as he was Management's sole owner at the time.

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the subject matter of the instant proceeding and of the parties hereto pursuant to chapter 120.

20. Part VIII of chapter 468, Florida Statutes (Part VIII) establishes a statutory scheme regulating the activities of individuals and entities engaged in "community association management," which is defined therein as follows:

> "Community association management" means any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 10 units or have an annual budget or budgets in excess of $100,000: controlling or disbursing funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of community association meetings, and coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

§ 468.431(2). Among other things, Part VIII provides for the licensure, by Petitioner, of these individuals ("community association managers"[11]) and entities ("community association management firms"[12]). § 468.432. Licensed "community association management firms" may furnish "community association management" services only through licensed "community association managers." § 468.432(2)(g). An entity seeking a "community association management firm" license must "designate on its application a licensed community association manager who shall be required to respond to all inquiries from and investigations by [Petitioner]." § 468.432(2)(b). It may replace this designee with another licensed "community association manager," but it must notify Petitioner "within 30 days after [the] change." § 468.432(2)(c). "If the license of at least one individual active community association manager

member is not in force, the license of the community association management firm . . . is canceled automatically during that time." § 468.432(2)(f).

21. Part VIII delegates to Petitioner the authority not only to license, but also to discipline, "community association managers" and "community association management firms." See Gerecitano v. Barrwood Homeowners Ass'n, 882 So. 2d 424, 426 (Fla. 4th DCA 2004)("Pursuant to [section] 468.436, the Department may undertake disciplinary proceedings against those in violation of the statute."). The following are the acts for which, pursuant to section 468.436(2), "community association managers" and "community association management firms" may be disciplined by Petitioner:

> (a) Violation of any provision of s. 455.227(1).
>
> (b)1. Violation of any provision of this part.
>
> 2. Violation of any lawful order or rule rendered or adopted by the department or the council.[13]
>
> 3. Being convicted of or pleading nolo contendere to a felony in any court in the United States.
>
> 4. Obtaining a license or certification or any other order, ruling, or authorization by means of fraud, misrepresentation, or concealment of material facts.

> 5. Committing acts of gross misconduct or gross negligence in connection with the profession.
>
> 6. Contracting, on behalf of an association, with any entity in which the licensee has a financial interest that is not disclosed.

22. Subsection (3) of section 468.436 mandates that the Regulatory Council of Community Association Managers (Council), a body created by section 468.4315, "specify by rule the acts or omissions that constitute a violation of subsection (2)" of the statute. In an attempt to comply with this mandate, the Council has adopted Florida Administrative Code Rule 61E14-2.001, which prescribes "[s]tandards of [p]rofessional [c]onduct" and provides, in pertinent part, as follows:

> Licensees shall adhere to the following provisions, standards of professional conduct, and such provisions and standards shall be deemed automatically incorporated, as duties of all licensees, into any written or oral agreement for the rendition of community association management services, the violation of which shall constitute gross misconduct or gross negligence:
>
> (2) Honesty. During the performance of management services, a licensee shall not knowingly make an untrue statement of a material fact or knowingly fail to state a material fact.
>
> * * *
>
> (4) Due Professional Care.

(a) A licensee shall exercise due professional care in the performance of community association management services.

(b) A licensee shall not knowingly fail to comply with the requirements of the documents by which the association is created or operated so long as such documents comply with the requirements of law.

(5) Control of Others.[14] A licensee shall not permit others under his or the management firm's control to commit on his or the firm's behalf, acts or omissions which, if made by either licensee, would place that licensee in violation of Chapter 455, 468, Part VIII, F.S., or Chapter 61-20, F.A.C. or other applicable statutes or rules. A licensee shall be deemed responsible by the department for the actions of all persons who perform community association management related functions under his or its supervision or control.[15]

(6) Records.

* * *

(b) A licensee shall not deny access to association records, for the purpose of inspecting or photocopying the same, to a person entitled to such by law, to the extent and under the procedures set forth in the applicable law.

(c) A licensee shall not create false records or alter records of a community association or of the licensee except in such cases where an alteration is permitted by law (e.g., the correction of minutes per direction given at a meeting at which the minutes are submitted for approval).

23. Petitioner may impose one or more of the following penalties on licensed "community association managers" and

"community association management firms" found "guilty of any of the grounds set forth in subsection (2) [of section 468.436]":

> (a) Denial of an application for licensure.
>
> (b) Revocation or suspension of a license.
>
> (c) Imposition of an administrative fine not to exceed $5,000 for each count or separate offense.
>
> (d) Issuance of a reprimand.
>
> (e) Placement of the community association manager on probation for a period of time and subject to such conditions as the department specifies.
>
> (f) Restriction of the authorized scope of practice by the community association manager.

§ 468.436(4).

24. Petitioner 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. See § 120.60(5).

25. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. See Hollis v. Dep't of Bus. & Prof'l Reg., 982 So. 2d 1237, 1239 (Fla. 5th DCA 2008); and §§ 120.569(1) and 120.57(1).

26. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct alleged in the charging instrument. Proof greater than a mere preponderance of the

evidence must be presented. Clear and convincing evidence is required. See Dep't of Banking & Fin,, Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); and § 120.57(1)(j) ("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 . . . .").

27. 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), quoting, with approval, from 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 Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

28. 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 an agency from taking penal action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000)("Marcelin first contends that the administrative law judge found that he had committed three violations which were not alleged in the administrative complaint. This point is well taken. . . . We strike these violations because they are outside the administrative

complaint."); and Dep't of Rev. v. Vanjaria Enters., 675 So. 2d 252, 254 (Fla. 5th DCA 1996)("[T]the issue must be treated as though it had been raised in the pleadings because the parties tried the issue by consent.").

29. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992). 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. Dep't of Bus. & Prof'l Reg., Div. of Real Estate, 875 So. 2d 693, 695 (Fla. 4th DCA 2004); Elmariah v. Dep't of Prof'l Reg., Bd. of Med., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Dep't of Prof'l & Occupational Regs., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

30. The charging instrument in the instant case (the Amended Administrative Complaint) contains three counts.

31. Count I of the Amended Administrative Complaint alleges that Respondent "violated [s]ection 468.436(2)(b)5, Florida Statutes [that is, "[c]ommitt[ed] acts of gross misconduct or gross negligence in connection with the profession"], when he improperly conducted elections of the [North Bay Villas Condominium] Association Board of Directors

and released documents [specifically, minutes of a July 1, 2009, Board meeting] without Board approval." While Respondent was involved in the 2010 Board elections, it was not as a community association manager. Rather, he was acting in his capacity as secretary of the Board. Moreover, the record evidence is insufficient to establish that Respondent did anything regarding the election that, even if it had been done "in connection with the [community association management] profession," would amount to "gross misconduct or gross negligence" within the meaning of section 468.436(2)(b)5 (which requires a showing of an applicable standard of conduct or care and a "gross" departure or deviation therefrom). Cf. K. M. T. v. Dep't of HRS, 608 So. 2d 865, 873 (Fla. 1st DCA 1992)("The purely subjective standard the hearing officer created and applied in this case does not constitute a sufficient standard for determining whether an individual's acts or omissions constitute neglect within the meaning of the Act. Rather, the acts or omissions must be judged against an objective standard, which may be defined by rule or by proof of general acceptance within the nursing home industry. Of course, HRS has the burden of proving that the alleged perpetrator's conduct fell below that standard."); McDonald v. Dep't of Prof'l Reg., 582 So. 2d 660, 670 (Fla. 1st DCA 1991)(Zehmer, J., specially concurring)("[W]here the agency charges negligent violation of general standards of professional

conduct, i.e., the negligent failure to exercise the degree of care reasonably expected of a professional, the agency must present expert testimony that proves the required professional conduct as well as the deviation therefrom."); and Purvis v. Dep't of Prof'l Reg., 461 So. 2d 134, 136 (Fla. 1st DCA 1984)("Section 474.214(1)(q), Florida Statutes, sets forth 'negligence, incompetency or misconduct, in the practice of veterinary medicine' as a ground for disciplinary action. The parties to this appeal have treated 'negligence' and 'incompetency' as meaning a failure to comply with the minimum standard of care or treatment required of a veterinarian under the circumstances. We accept that construction of this penal statute. Unlike a charge of violating a statute or rule under section 474.214(1)(g), which requires no proof of a standard of care, the charge against Dr. Purvis necessarily required evidentiary proof of some standard of professional conduct as well as deviation therefrom. . . . [T]he Board never introduced any evidence at the administrative hearing to show the appropriate standard of care which it contends Dr. Purvis failed to meet. The Board introduced no expert testimony, no statute, no rule, nor any other type of evidence to establish the appropriate standard of care or that Dr. Purvis fell below that standard."). With respect to the allegation concerning the "release[] [of] documents without Board approval," Petitioner

failed to present clear and convincing evidence that it was Respondent who was the one responsible for the "release[] [of these] documents." For these reasons, Count I of the Amended Administrative Complaint must be dismissed in its entirety.

32. Count II of the Amended Administrative Complaint alleges that Respondent "violated [s]ection 468.436(2)(b)2, Florida Statutes, through a violation of Rule 61E14-2.001(2), Florida Administrative Code, when he falsely stated that he was one of three owners of North Bay Property Management, Inc." The record evidence does clearly and convincingly establish that Respondent made this false statement; however, the statement was made during a telephone conversation Respondent had with one of Petitioner's investigators and not "[d]uring the performance of management services." The making of this statement therefore did not constitute a violation of Florida Administrative Code Rule 61E14-2.001(2). Accordingly, Count II of the Amended Administrative Complaint must be dismissed.

33. Count III of the Amended Administrative Complaint alleges that Respondent "violated Section 468.436(2)(b)2, Florida Statutes, through a violation of Rule 6lEl4-2.00l(6)(b), Florida Administrative Code, . . . [b]y making records inaccessible for photocopying to association unit owners," specifically, Ms. Caraballo, in response to her attorney's February 16, 2010, records request. The record evidence fails

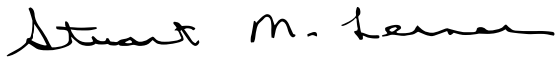
to clearly and convincingly establish that any Association records to which Ms. Caraballo was entitled were made "inaccessible [to her] for photocopying" or that Respondent participated in the Association's response to her attorney's letter in any role other than as the secretary of the Board. Count III of the Amended Administrative Complaint therefore must be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation issue a Final Order dismissing the Amended Administrative Complaint in its entirety.

DONE AND ENTERED this 26th day of September, 2011, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of September, 2011.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2010).

[2] Petitioner had further alleged in this final count of the original Administrative Complaint that Respondent "violated Section 468.436(2)(b)2, Florida Statutes, through a violation of Rule 61E14-2.001(2), Florida Administrative Code, when he . . . [through a July 21, 2010, letter from his attorney] threatened unit owners with unlawful litigation"; however, at the final hearing, Petitioner withdrew this allegation.

[3] The hearing was originally scheduled for May 20, 2011, but was continued twice at Respondent's request.

[4] Florida Administrative Code Rule 61E14-2.001(2) actually provides as follows:

> Honesty. During the performance of management services, a licensee shall not knowingly make an untrue statement of a material fact or knowingly fail to state a material fact.

It is Florida Administrative Code Rule 61E14-2.001(4) that "states 'a licensee . . . shall exercise due professional care in the performance of community association management services.'"

[5] These facts included the following:

> 5. At all times material to this complaint, Respondent was the sole owner, and officer for North Bay Property Management, Inc. (Management).
>
> * * *
>
> 9. On February 16, 2010, Complainant Adriana Maria Caraballo, a resident of Association, submitted a public records request to Respondent through her attorney.
>
> 10. Management did not make all of the requested records available to Complainant.

11. Management refused to provide for copies to the Complainant.

[6] The case style of the instant case has been amended to reflect that Respondent's legal first name is now "Fernando," not "Ferdinand."

[7] The parties so stipulated in paragraph (7)(b) of their Pre-Hearing Stipulation.

[8] Respondent had access to, but hardly spent any time in, the Condominium's property management office.

[9] Section 718.111(12)(c) provides as follows:

> The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply. Minimum damages are $50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written request. The failure to permit inspection entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records. Any person who knowingly or intentionally defaces or destroys accounting records that are required by this chapter to be maintained

during the period for which such records are required to be maintained, or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or maintained, with the intent of causing harm to the association or one or more of its members, is personally subject to a civil penalty pursuant to s. 718.501(1)(d). The association shall maintain an adequate number of copies of the declaration, articles of incorporation, bylaws, and rules, and all amendments to each of the foregoing, as well as the question and answer sheet as described in s. 718.504 and year-end financial information required under this section, on the condominium property to ensure their availability to unit owners and prospective purchasers, and may charge its actual costs for preparing and furnishing these documents to those requesting the documents. Notwithstanding this paragraph, the following records are not accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including a record prepared by an association attorney or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.

3. Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health, and insurance records. For purposes of this subparagraph, the term "personnel records" does not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee.

4. Medical records of unit owners.

5. Social security numbers, driver's license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, addresses of a unit owner other than as provided to fulfill the association's notice requirements, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, property address, and any address, e-mail address, or facsimile number provided to the association to fulfill the association's notice requirements. However, an owner may consent in writing to the disclosure of protected information described in this subparagraph. The association is not liable for the inadvertent disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

6. Electronic security measures that are used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allow the manipulation of data, even if the owner owns a copy of the same software used by the

> association. The data is part of the official records of the association.
>
> (d) The association shall prepare a question and answer sheet as described in s. 718.504, and shall update it annually.
>
> (e)1. The association or its authorized agent is not required to provide a prospective purchaser or lienholder with information about the condominium or the association other than information or documents required by this chapter to be made available or disclosed. The association or its authorized agent may charge a reasonable fee to the prospective purchaser, lienholder, or the current unit owner for providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other than that required by law, if the fee does not exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.
>
> 2. An association and its authorized agent are not liable for providing such information in good faith pursuant to a written request if the person providing the information includes a written statement in substantially the following form: "The responses herein are made in good faith and to the best of my ability as to their accuracy."

[10] Ms. Caraballo was out of the country on March 8, 2010.

[11] A "community association manager" is defined in section 468.431(4) as "a natural person who is licensed pursuant to this part to perform community association management services."

[12] A "community association management firm" is defined in section 468.431(3) as "a corporation, limited liability company, partnership, trust, association, sole proprietorship, or other similar organization engaging in the business of community

association management for the purpose of providing any of the services described in subsection (2) [of section 468.431]."

[13] The "council" referred to in this statutory provision is the "Regulatory Council of Community Association Managers." § 468.431(5).

[14] At the final hearing, Petitioner advised, through counsel, that it was "not at all" relying on this "Control of Others" provision of the rule, but rather was basing its prosecution "on actions that Respondent took in his capacity as a licensed CAM."

[15] This second sentence of subsection (5), which makes licensees vicariously liable for the acts of others even in the absence of personal culpability, was declared an invalid exercise of delegated legislative authority in Blanco v. Dep't of Bus. & Prof'l Reg., Case No. 10-2905RX, 2010 Fla. Div. Adm. Hear. LEXIS 110 (Fla. DOAH Sept. 21, 2010), and it therefore became void and ineffective "when the time for filing an appeal [of the Final Order in that case] expire[d]." § 120.56(3).

COPIES FURNISHED:

C. Erica White, Esquire
Kathleen Brown-Blake, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

Christopher L. Hixson, Esquire
Lynch & Robbins, P.A.
2639 Dr. Martin Luther King, Jr. Street North
St. Petersburg, Florida 33704

Anthony B. Spivey, Executive Director
Regulatory Council of Community Association Managers
1940 North Monroe Street
Tallahassee, Florida 32399

Layne Smith, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.