

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case Nos. 11-3007PL
)	11-3008PL
HUGH D. RHEA,)	11-3009PL
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

On October 26, 2011, a duly-noticed hearing was held by video teleconference with sites in Gainesville and Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jennifer Leigh Blakeman, Esquire
Paul N. Rendleman, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N801
Orlando, Florida 32801

For Respondent: Nancy Pico Campiglia, Esquire
Keating and Schlitt, P.A.
250 East Colonial Drive, Suite 300
Orlando, Florida 32801

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent committed the violations alleged in the Amended Administrative Complaints and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On March 7, 2011, the Department of Business and Professional Regulation, Division of Real Estate ("Petitioner" or "the Department") filed three Administrative Complaints against Respondent, Hugh Rhea ("Respondent" or "Mr. Rhea"). DBPR Case No. 2010023985 (docketed as DOAH Case No. 11-3007) is a five-count Administrative Complaint alleging deficiencies with respect to the appraisal of a property at 3009 NE 11th Terrace in Gainesville, Florida. Count One charges Respondent with violating section 475.624(15), Florida Statutes (2009) (failing to exercise reasonable diligence in developing and preparing an appraisal report). Count Two charges a violation of section 475.624(2) (committing dishonest conduct or breach of trust in any business transaction). Count Three charges a violation of section 475.624(4) (violating any provisions of chapter 475, Part II or any lawful order or rule issued under this part or chapter 455) by virtue of violating section 455.227(1)(m) (employing a trick or scheme in or related to the practice of a profession). Count Four alleges a violation of section 475.624(4) by violating section 475.611 (the definition of an

appraisal assignment). Finally, Count Five charges a violation of section 475.624(4) by violation of section 475.623 (failing to register his business name with the Department).

DBPR Case No. 2010023993 (docketed as DOAH Case No. 11-3008) is a three-count Administrative Complaint which alleges deficiencies with respect to the appraisal performed for the property located at 12017 NW 164th Terrace, Alachua, Florida. Count One charges Respondent with violating section 475.624(15); Count Two with violating section 475.624(2); and Count Three with violating section 475.624(4) by virtue of violating section 475.611.

Finally, DBPR Case No. 2010023991 (docketed as DOAH Case No. 11-3009) charged Respondent with alleged deficiencies with respect to an appraisal performed for the property located at 2923 NE 11th Terrace, Gainesville, Florida. Count One charges a violation of section 475.624(15); Count Two charges a violation of 475.624(2); and Count Three charges a violation of section 475.624(4) by violation of section 475.611.

Respondent disputed the allegations in the three Administrative Complaints and requested a hearing pursuant to section 120.57(1), Florida Statutes. On June 16, 2011, all three cases were referred to the Division of Administrative Hearings for the assignment of an administrative law judge, and on June 23, 2011, Petitioner filed a Motion to Consolidate the

three cases for hearing. The cases were consolidated by Order issued June 28, 2011, and on June 29, 2011, a Notice of Hearing was issued scheduling the matter for hearing to be conducted August 24, 2011.

On August 9, 2011, Petitioner filed a Motion to Amend Three Administrative Complaints in order to add a charge of violating Florida Administrative Code Rule 61J1-4.010(2)(b). The next day, the parties jointly moved to continue the hearing. The Motion to Continue was granted and the hearing rescheduled for September 29, 2011, and the Motion to Amend Administrative Complaints was granted by Order dated August 25, 2011.

On September 27, 2011, Respondent moved for a continuance based upon the late filing and disclosure of certain exhibits by Petitioner. Petitioner opposed the continuance. After a telephone conference on the Motion, the case was continued and rescheduled for October 26, 2011, and proceeded as scheduled. At hearing, official recognition was given to chapters 120, 455 and 475, Florida Statutes; Florida Administrative Code Chapter 61J1; and Uniform Standards for Professional Appraisal Practice (2010-2011 ed.). Petitioner presented the testimony of James Courchaine, Cory Bullard, and Michael Adnot, and Petitioner's Exhibits 1-15 were admitted.^{1/} Respondent presented no witnesses, but Respondent's Exhibits 2-5 were admitted into evidence.

The Transcript of the proceedings was filed with the Division on November 16, 2011. At the request of the parties, the deadline for proposed recommended orders was set for November 30, 2011. A Joint Motion for Enlargement of Time for the Proposed Recommended Order was filed, requesting that the deadline be extended to December 14, 2011. Both parties filed post-hearing pleadings by that date. On December 15, 2011, Respondent filed an Amended Proposed Recommended Order, apparently to correct some clerical issues, which Petitioner moved to strike. Petitioner's Motion to Strike is denied, and both parties' submissions have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of real estate appraisers in the State of Florida pursuant to section 20.165 and chapters 455 and 475, part II, Florida Statutes.

2. At all times material to the allegations in the Amended Administrative Complaints, Respondent has been a certified residential real estate appraiser, and has been issued license number RD 1226. Respondent has been licensed since 1991 and has no history of disciplinary action taken against his license. He trades as Rhea Appraisals, Inc., located in Gainesville, Florida.

3. For the period from October 23, 2009, through May 12, 2010, Respondent was the supervising appraiser for registered trainee appraiser Leslie Corey Bullard. From October 8, 2009, through at least July 2011, he also supervised registered trainee appraiser Beverly Sanders Archer.

4. Respondent was Mr. Bullard's first supervising appraiser.

The Program

5. Alachua County elected to participate in the federally-funded Neighborhood Stabilization Program ("NSP"), which is administered on the state level by the Department of Community Affairs. To that end, Alachua County contracted with Meridian Community Services Group ("Meridian") to assist in the implementation of the program.

6. In a nutshell, the NSP is a program by which the Department of Housing and Urban Development provides funding for local governments to acquire properties in order to rehabilitate them and re-sell them to low-to-moderate-income households, or to rent them to very low-income households.

7. As explained at hearing, properties that are acquired through the program cannot be sold for more than the costs of acquisition, rehabilitation, and "soft costs." As a result, the local government can only purchase the property at one percent or below the appraised value.

8. In 2010, Alachua County solicited bids for appraisers to appraise properties that it considered buying through the NSP. Rhea Appraisals, Inc., obtained a contract to appraise 20 of the properties for the program. Corey Bullard was involved in the procurement of the contract to perform the appraisals.

9. The listing price for the properties was generally the price listed in the multiple listing service ("MLS"). Alachua County had instructed that the offer for the properties considered for purchase was to be at the listing price. Once the appraisal was performed, if it appraisal did not come in at within one percent of the listing price, then the offer is amended to reflect one percent below the appraisal. If the seller does not agree to the change, that property is not purchased.

10. Rhea Appraisals, Inc., was to be paid \$225.00 for each property appraised. Payment for the appraisal was not dependant on the results of the appraisal.

11. At issue in these cases are the appraisals for three properties. For each of these properties, two appraisals were actually performed.

The Initial Appraisals

12. An appraisal was communicated by Rhea Appraisals, Inc., for a property located at 3009 NE 11th Terrace, Gainesville, Florida (Property 1, related to Case No. 11-3007),

on April 8, 2010 (Petitioner's Exhibit 13). The appraisal report is signed by Cory Bullard and by Respondent as his supervisor, and the front summary sheet lists Corey Bullard as the appraiser. The appraisal indicates that the inspection of the property and of the comparable sales took place on April 2, 2010, which is listed as the effective date of the report, and the appraisal is signed by both Mr. Bullard and Respondent on April 8, 2010.

13. The appraisal report provides an opinion of value of \$52,000. The list price for the property, and thus the offer made by the County, was \$65,000.

14. The Comments on Appraisal and Report Identification state that "Corey Bullard provided assistance in the gathering of data, photographing and entering data into this report."

15. Included in the appraisal's certification are the following statements:

18. My employment and/or compensation for performing this appraisal or any future or anticipated appraisals was not conditioned on any agreement or understanding, written or otherwise, that I would report or present analysis supporting a predetermined specific value, a predetermined minimum value, a range or direction in value, a value that favors the cause of any party, or the attainment of a specific result or occurrence of a specific subsequent event (such as approval of a pending mortgage loan application).

19. I personally prepared all conclusions and opinions about the real estate that were set forth in this appraisal report. If I relied on significant real property appraisal assistance from any individuals in the performance of this appraisal or the preparation of this appraisal report, I have named such individual(s) and disclosed the specific tasks performed in this appraisal report. I certify that any individual so named is qualified to perform the tasks. I have not authorized anyone to make a change to any item in this appraisal report; therefore any change made to this appraisal is unauthorized and I will take no responsibility for it.

16. An appraisal report for a property located at 12017 NW 164th Terrace, Alachua, Florida (Property 2) was communicated on April 6, 2010 (Petitioner's Exhibit 5, related to Case No. 11-3008). The appraisal report is signed by Corey Bullard and by Respondent as his supervisor, and the front summary sheet lists Mr. Bullard as the appraiser. The appraisal indicates that the inspection of the property and of the comparable sales took place on April 2, 2010, which is listed as the effective date of the appraisal, and the appraisal is signed by both Respondent and Mr. Bullard on April 6, 2010.

17. This appraisal report provides an opinion of value of \$75,000. The list price for the property, and thus the offer made by the County, was \$105,000.

18. The Comments on Appraisal and Report Identification state that "Corey Bullard provided assistance in the gathering of data, photographing and entering data into this report. Appraiser won the bid for 20 properties from Meridian Community Services for \$225 each."

19. Like the report for Property 1, the appraisal certification contained the statements identified in finding of fact 15.

20. Rhea Appraisals, Inc., also issued an appraisal report for property located at 2923 NE 11th Terrace, Gainesville, Florida (Property 3, related to Case No. 11-3009), signed by Respondent on April 8, 2010 (Petitioner's Exhibit 10). The report indicates that the date of the inspection of the property and of the comparable sales, and effective date of the report, is April 5, 2010.

21. This appraisal report provides an opinion of value of \$54,000. The list price for the property, and thus the offer made by the County, was \$69,900.

22. The Comments on Appraisal and Report Identification state that "Beverly Archer, state registered trainee appraiser #RT2255 provided assistance in the gathering of data, measuring and photographing the subject dwelling, and drafting information into the URAR."

23. Like the report for Properties 1 and 2, the appraisal certification contained the statements identified in finding of fact 15.

The Second Appraisals

24. Subsequently, a second appraisal was developed by Rhea Appraisals, Inc., for each of these properties.

Property 1 (11-3007)

25. A second report developed for Property 1 (Petitioner's Exhibit 14), has an invoice attached to the front, and the summary sheet lists Hugh Rhea as the appraiser. The appraisal gives an opinion of value of \$66,000, compared to the County's offer of \$65,000. The second appraisal lists the effective date of the appraisal as April 2, 2010, and the date of the signature and report as April 8, 2010. These dates are the same as those listed on the appraisal with value of \$52,000. There are no notations in the Comments on Appraisal and Report Identification section of the report, and while the appraiser's certification includes the same statement quoted as paragraph 19 in finding of fact 15, the first statement, although similar, states:

6. I was not required to report a predetermined value or direction in value that favors the cause of the client or any related party, the amount of the value estimate, the attainment of a specific result, or the occurrence of a subsequent event in order to receive my compensation and/or employment for performing the appraisal. I did not base the appraisal

report on a requested minimum valuation, a specific valuation, or the need to approve a specific mortgage loan.

26. No explanation is given as to why the second report was generated. However, the second report contains the following additional differences:

a. On page one of the report, in response to the question, "[a]re there any physical deficiencies or adverse conditions that affect the livability, soundness, or structural integrity of the property?", the statement "[s]ubject is not functional in the current state as of inspection date" has been deleted in the second appraisal.

b. In the first report, the condition of comparable sale 1 is listed as "superior." In the second report, it is listed as "inferior."

c. In the first report, the condition for comparable sale 2 is listed as "average." In the second report, it is listed as "inferior."

d. In the first report, the condition of comparable sale 4 is listed as "superior." In the second report, it is listed as "average."

e. In the first report, the condition of what was described as comparable sale 6 is listed as "average." In the second report, the original comparable sale 5 is deleted and

comparable sale 6 is listed as comparable 5. Its condition is described as "inferior."

27. Respondent's work papers do not provide an explanation for the changes made from the first report to the second report for this property.

Property 2 (No. 11-3008)

28. The second appraisal for Property 2 has an invoice for \$225 attached to the front, and the summary sheet lists Hugh Rhea as the appraiser, as opposed to Corey Bullard. The opinion of value is \$105,000, which matches the initial offer by the County. The report contains two different effective dates: on page 2 the report states that the effective date is April 2, 2010, while the signature block on page 6 indicates that the effective date is April 6, 2010. The date of the signature and report is April 14, 2010. The Comments on Appraisal and Report Identification are the same as those listed in the initial report, and the appraiser's certification includes the same statements quoted in paragraph 15.

29. No explanation is given as to why the second report was generated. However, the second report contains the following differences:

a. In the first report, the estimated cost to cure the stated deficiencies was listed as \$20,000.00. In the second report, this amount is reduced to \$15,000.00.

b. In the first report, the condition adjustment for comparable sale 1 is -\$27,389.00, for a gross adjustment of 41 percent. In the second report, the condition adjustment was -\$6,389, for a gross adjustment of 23.2 percent.

c. The location adjustment for comparable sale 1 is changed from -\$10,000 in the first report to no adjustment at all in the second report.

d. The condition adjustment in the first report for comparable sale 2 is -\$40,000.00. In the second report, it is listed as -\$25,000.00.

e. The location description for comparable sale 2 is listed in the first report as "urban/sup." In the second report, it is listed as "suburban/sup."

f. The location adjustment for comparable sale 2 is listed in the first report, as -\$20,000.00. In the second report, it is listed as -\$10,000.00.

g. The condition for comparable sale 3 is changed from "superior" in the first report to "average" in the second report.

h. The condition adjustment for comparable sale 3 is listed in the first report as -\$20,000.00. It is changed in the second report to no adjustment.

i. The room adjustment for comparable sale 3 is listed in the first report as -\$4,000.00. It is changed in the second report to -\$2,000.

j. The location description for comparable sale 4 is listed in the first report as "suburban/sup" and changed in the second report to "suburban."

k. The location adjustment for comparable sale 4 is listed as -\$10,000.00. It is changed in the second report to no adjustment.

l. The room adjustment for comparable sale 4 is listed in the first report as +\$4,000.00. It is changed in the second report to +\$2,000.00.

m. The basement adjustment for comparable sale 4 is listed as -\$10,000.00 in the first report, and as -\$5,000.00 in the second report.

n. The condition adjustment for comparable sale 5 is listed in the first report as -\$20,000.00. It is changed in the second report to -\$15,000.00.

o. The location adjustment for comparable sale 5 is listed in the first report as -\$20,000.00. It is changed in the second report to -\$10,000.00.

p. The condition of comparable sale 6 is listed in the first report as "superior." It is changed in the second report to "average."

q. The condition adjustment for comparable sale 6 is listed in the first report as -\$20,000.00. It is changed in the second report to no adjustment.

30. Respondent's work papers for Property 2 do not provide any explanation for the changes noted above.

31. The second report for Property 3 (Petitioner's Exhibit 11) also has an invoice attached, which states "summary complete." The summary sheet lists Hugh Rhea as the appraiser. The appraisal gives an opinion of value of \$71,000, compared to the County's offer of \$69,900. The second appraisal lists the effective date of the appraisal as April 5, 2010, and the date of the signature and report as April 8, 2010. These dates are the same as those listed on the appraisal with value of \$54,000. The Comments on Appraisal and Report Identification are the same as those listed in the initial report, and the appraiser's certification includes the same statements quoted in paragraph 15.

32. No explanation is given as to why the second report was generated. However, the second report contains the following differences:

a. The first report contains six comparable sales. The second contains only four, and of those four, only two (those with the highest value) from the first report were included in the second report.

b. The property located at 2610 NE 12th Street was listed as comparable sale 4 in the first report and as comparable sale 2 in the second report. The gross living adjustment for this property was listed as -\$2,025.00, while in the second report it is listed as -\$1,620.00.

c. With respect to this same property, the carport adjustment listed in the first report is +\$1,500.00, and is listed as +\$2,000.00 in the second report.

d. The property located at 2703 NE 11th Street was listed as comparable sale 6 in the first report and as comparable sale 3 in the second report. The condition adjustment for this property is changed from no adjustment in the first report to +\$10,900.00 in the second report.

e. With respect to this comparable sale, the gross living adjustment listed in the first report is -\$7,125.00 while it is listed as -\$2,340.00 in the second report.

f. In the first report, as part of the cost approach to estimating value, the remaining estimated life for Property 3 is listed as 17 years, while in the second report it is listed as 32 years. Similarly, the depreciation figure listed in the first report is \$94,524.00, while in the second report it is listed as \$76,797.00.

33. Respondent's work papers for Property 3 provide no explanations for the changes listed above.

The Explanations

34. All three of the initial appraisals, as well as all three of the second appraisals, state that the price of the property was to be determined by the appraisals, and that the appraiser had requested a copy of the contract and was told they would be forwarded at a later time.

35. After submission of the first appraisals, Corey Bullard testified that he received a telephone call from Esrone McDaniels from Meridian regarding the opinions of value, indicating that the opinions were too low. Mr. McDaniels does not recall such a conversation. What is clear, however, is that at some point Mr. McDaniels spoke to Mr. Rhea regarding the program to explain the mechanics of the process for the NSP.

36. On April 13, 2010, Mr. McDaniels sent an e-mail to Mr. Rhea with the title "Alachua County Properties." The e-mail contained a table listing nine properties, including Properties 1-3. The table contained columns listing the property addresses; the initial offer amount; the final acquisition amount (if the sale was completed); and the appraised value. The appraised values listed in the chart for Properties 1-3 were the opinions of value listed in the first reports described, i.e., the lower values.

37. Along with the chart was the following message:

Mr. Rhea - - per our conversation, please find the information requested. Should you have any questions, please give me a call. As stated, per the program requirements, our properties must be purchased at or below 99% of the appraised value. For example, since HUD won't adjust the purchase price, the initial offer should be a minimum 99% of the appraised value. Therefore, the appraisal should represent 1% above the initial offer price above.

Let me know if you have any questions.
Thanks.

38. Mr. Bullard was aware of the preparation of the second reports and was not comfortable with them being developed. He made excuses not to return to work, pass protected his electronic signature and filed a complaint against Respondent with the Department.

39. Mr. Bullard also testified that Respondent's electronic signature was not pass-protected, and that all of the office staff had access to it. No evidence was presented to refute this statement. However, there is also no evidence that Mr. Bullard ever used Respondent's electronic signature without his consent, or that he failed to supervise Bullard's work. To the contrary, Mr. Bullard testified that for the two appraisals with which he was involved, Respondent provided supervision and approved the appraisals before they were communicated to the client.

40. While the second appraisal reports for two of the three properties indicate that the date of the signature predated the e-mail from Esrone McDaniels, the only appraisal values listed in the e-mail are for the original, lower values. From the totality of the evidence, it is found that the only plausible explanation is that the appraisals were backdated to reflect an earlier effective date.

41. Mr. McDaniel vehemently denied that he ever told Respondent to "hit a certain value with an appraisal, saying "Absolutely not. I don't have the authority to do that and I would never do that." He believed that the underlined sentence in his e-mail was part of his attempt to "explain the program, period," and was one example to drive across the one-percent federal requirement.

42. Mr. Rhea, on the other hand, in his response to the Department's complaint, stated the following:

Let's start with the orders or bids, Alachua County was allotted 3 to 4 million dollars to buy property across all of Alachua County but they had to be foreclosed, bank owned or short sales. . . . The properties in questioned [sic] are HUD or Fannie Mae owned properties. When Fannie Mae has a property listed before it goes on the market, they have 3 BPO's done plus an appraisal, then they set an asking price. Our assignment was to inspect the properties, check the repairs needed and then value the property "as is" knowing the property is contracted at the asking price. With 3 BPO's and appraisal to back it up the Realtor's

contracted the house knowing this plus they also knew the county was mandated to purchase at that price. . . . What Mr. Bullard did not understand and still doesn't, the assignment for the 20 appraisals scope of work was to concur with the work and valuation that already had been done.

The first appraisal done did not come in at \$50,000 and then I change the value. Mr. Bullard said the property is \$50,000 and I told him he was wrong and that did not set well with him. . . .

* * *

About the conversation with Mr. Esrone McDaniel's, [sic] we talk about what the Alachua County Board of County Commissioners was mandated to do with the money. The properties have been contracted and he asked me whether I could come within 1% of the value. I told him I have a range of value of 5% so I said I thought I could. This is when I knew that Mr. Bullard did not get a handle on what the assignment was all about. The e-mail that Mr. Bullard was referring to, stated the program requirements, which is what Esrone and I talked about and Mr. Bullard took it out of context stating that I would help him out. Mr. Bullard told me at the start that he knew what the county wanted and come to find out, he did not have a clue.

43. Although Respondent indicated in his letter that the scope of the project was "to concur with the work and valuation" that had already been performed, this scope is not reflected in the description contained in any of the six appraisals. To the contrary, the appraisals on their face indicate that no predetermined value is at issue.

44. From the totality of the evidence, it is found that Respondent issued the second appraisals in each case for the purpose of confirming a predetermined value, i.e., the list price for each of the properties, as communicated to him in Esrone McDaniels' e-mail of April 13, 2010.

The Applicable Standards

45. Property appraisers are required to adhere to the Uniform Standards of Professional Appraisal Practice (USPAP), which are developed by the Appraisal Standards Board of the Appraisal Foundation.

46. The USPAP Ethics Rule is divided into four sections: conduct, management, confidentiality, and recordkeeping. The conduct section provides in pertinent part:

Conduct:

An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.

An appraiser:

- must not perform an assignment with bias;
- must not advocate the cause or interest of any party or issue;
- must not accept an assignment that includes the reporting of predetermined opinions and conclusions; . . .

47. The management section of USPAP provides in pertinent part:

Management:

An appraiser must not accept an assignment, or have a compensation arrangement for an assignment, that is contingent on any of the following:

1. the reporting of a predetermined result (e.g., opinion of value);
2. a direction in assignment results that favors the cause of the client;
3. the amount of a value opinion;
4. the attainment of a stipulated result (e.g., that the loan closes, or taxes are reduced); or
5. the occurrence of a subsequent event directly related to the appraiser's opinions and specific to the assignment's purpose.

48. According to Michael Adnot, the Department's expert witness, these USPAP standards require an appraiser to be independent, impartial, and objective, and an appraiser cannot advocate the cause of a client or pre-determine a value. Moreover, concurrence with a prior appraisal cannot be a condition of an assignment. If an appraiser feels pressure to reach a certain result, he or she should not take the assignment. Mr. Adnot's testimony is credited.

49. Based upon the evidence presented, it is found that Respondent developed and communicated the second reports for all three properties with the intent of providing appraisal reports

that came within one percent of the selling price, i.e., a predetermined value.

50. The investigative costs for these three cases were as follows: for Case No. 11-3007, costs are \$1,303.50; for Case No. 11-3008, costs of investigation are \$1,501.50 and for Case No. 11-3009, costs total \$1,336.50.

CONCLUSIONS OF LAW

51. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2011).

52. This is a proceeding to take disciplinary action against Respondent's license to practice as a real estate property appraiser. Because of the penal nature of these proceedings, the Department has the burden of proving the allegations in the Amended Administrative Complaints by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

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 Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

Case No. 11-3007

53. Count One of the Amended Administrative Complaint in Case No. 11-3007 charges Respondent with violating section 475.624(15), which states in pertinent part:

475.624 Discipline.--The board may deny an application for registration or certification; 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:

* * *

(15) Has failed or refused to exercise reasonable diligence in developing an appraisal or preparing an appraisal report.

54. The Department proved this violation by clear and convincing evidence. The Department equates the failure to remain impartial with the failure to exercise due diligence. However, the expert testimony presented did not make that

connection, and no opinion was elicited from Mr. Adnot as to whether Respondent failed to exercise due diligence. However, Respondent's work papers provide no support for the condition adjustments or descriptions made in the second report for comparable sales 1, 2, 4, and 5, as alleged in the Amended Administrative Complaint. This type of adjustment is clearly required to be supported by work papers. Therefore, Respondent is guilty of Count I of the Amended Administrative Complaint.

55. Count Two of the Amended Administrative Complaint charges Respondent with violating section 475.624(2), which makes it a violation where a licensee,

(2) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a contract, whether written, oral, express, or implied, in an appraisal assignment; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the registered trainee, licensee, or certificateholder that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the

registered trainee, licensee, or certificateholder, or was an identified member of the general public.

56. The Department proved that Respondent violated this subsection by clear and convincing evidence. By submitting the second report in an effort to advocate the interests of Alachua County and by seeking to concur with valuations that had been reached previously as opposed to reaching his own opinion, Respondent committed dishonest conduct and violated the breach of trust placed on all licensed property appraisers to communicate reports that are independent, impartial, and objective. He also violated a duty imposed upon him by the USPAP standards governing all appraisals.

57. Count Three of the Amended Administrative Complaint charges Respondent with violating section 475.624(4), which makes it a basis for discipline when a licensee "[h]as violated any of the provisions of this part or any lawful order or rule issued under the provisions of this part or chapter 455." The Department contends that Respondent has violated this section by violating section 455.227(1)(m), Florida Statutes (2009), by employing a trick or scheme in or related to the practice of the profession. However, section 475.624(4) does not provide a basis for discipline based upon a violation of section 455.227.

It only authorizes discipline for violating rules or orders issued under the provisions of chapter 455.^{2/} Accordingly, Count Three should be dismissed.

58. Count Four of the Amended Administrative Complaint states the following:

29. Section 475.624(4), Florida Statutes, subjects a real estate appraiser licensee to discipline for violating any of the provisions of Chapter 475 or any lawful order or rule made or issued under the provisions of Chapter 455 or 475.

30. Section 475.611 defines an appraisal assignment as "an engagement for which a person is employed or retained to act, or could be perceived by third parties or the public as acting, as an agent or a disinterested third party in rendering an unbiased analysis, opinion, review, or conclusion relating to the nature, quality, value, or utility of specified interests in, or aspects of, identified real property."

31. Respondent failed to follow the definition of an appraisal assignment in one or more of the following ways:

a. By failing to act as a disinterested party in developing and communicating Report 2.

b. By failing to render an unbiased analysis, opinion, review or conclusion with regards to Report 2.

32. Based on the foregoing, Respondent violated Section 475.611 and, therefore, Section 475.624(4), by failing to follow the definition of an appraisal assignment.

59. Part II of chapter 475 is filled with provisions that impose obligations or contain prohibitions applicable to the

conduct of applicants, licensees, registrants, and certificateholders regulated pursuant to this chapter. See, for example, section 475.612 (restricting who may use the title "certified real estate appraiser," and similar titles and limiting who may receive direct compensation for providing valuation services); section 475.615 (setting qualifications for registration or certification); section 475.616 (setting examination requirements an applicant must meet); section 475.617 (providing for education and experience requirements for licensure or registration); section 475.622 (requirement to display and disclose licensure); section 475.6221 (requirements related to registered trainees); section 475.6222 (supervision requirements for trainees); section 475.623 (requirement that firms or business names and locations be registered); section 475.626 (criminal violations and penalties); and section 475.628 (requiring compliance with USPAP). Section 475.611 contains no such obligation or prohibition.

60. By its terms, section 475.611 provides definitions for terms used throughout part II of chapter 475. While these definitions are essential for interpreting other provisions within the chapter, such as the prohibitions in subsections 475.624(11), (14), (15), (16), and (17), they do not, standing alone, providing notice to a licensee of a basis for discipline. Moreover, in disciplinary proceedings, the statutes and rules

for which a violation is alleged must be strictly construed in favor of Respondent. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Given this well-settled requirement of statutory construction, the undersigned cannot conclude that Respondent may be found guilty of violating a definition. Count Four of the Amended Administrative Complaint should be dismissed.

61. Count Five of the Amended Administrative Complaint charges Respondent with violating section 475.624(4) by violating section 475.623, which requires each appraiser to furnish in writing each firm or business name and address from which she or he operates in the performance of appraisal services. The Department's certification of licensure for Respondent (Petitioner's Exhibit 1) indicates that "from November 28, 1991 through the present [Respondent] is an active State Certified Real Estate Appraiser trading as Rhea Appraisals, Inc.," Petitioner did not prove the allegations in Count Five by clear and convincing evidence.

62. Finally, with respect to this Amended Administrative Complaint, Count Six alleges that Respondent violated the provisions of section 475.624(4), by violating Florida Administrative Code Rule 61J1-4.010(2)(b), which states:

- (2) The supervising appraiser shall be responsible for the training and direct supervision of the appraiser trainee by:
- (a) Accepting responsibility for the appraisal report by signing and certifying the report is in compliance with the Uniform Standards of Professional Appraisal Practice, as defined in Section 475.611(1) (o), F.S.;
 - (b) Reviewing the appraiser trainee appraisal reports;

63. While the failure to supervise Mr. Bullard would present a plausible explanation for issuing the second report, the evidence presented does not support this theory. The only evidence presented regarding the supervision provided is that of Mr. Bullard, who testified that supervision was in fact provided. Count Six was not proven by clear and convincing evidence.

Case No. 11-3008

64. Count One of the Amended Administrative Complaint charges Respondent with failing to exercise reasonable diligence in violation of section 475.624(15). Consistent with the reasons described with respect to Count One in Case No. 11-3007, the Department has proven this count by clear and convincing evidence.

65. Similarly, Count Two charges Respondent with violating section 475.624(2), by committing dishonest conduct or breach of trust in any business transaction. Consistent with the reasoning stated with respect to Count Two in Case No. 11-3007,

the Department has proven a violation of this count by clear and convincing evidence.

66. Count Three charges Respondent with violating section 475.624(4), by failing to follow the definition provided for an appraisal assignment contained in section 475.611. As discussed above, the undersigned does not believe that a definitional section of the statute imposes an obligation or prohibits conduct, or provides notice of conduct with which a Respondent can be charged. Count Three is therefore not proven by clear and convincing evidence.

67. Count Four charges a violation of section 475.624(4) by violating rule 61J1-4.010(2)(b). However, the only evidence regarding the supervision provided was the testimony of Corey Bullard, who testified that appropriate supervision was given. Count Four is not proven by clear and convincing evidence.

Case No. 11-3009

68. Count One of the Amended Administrative Complaint in Case No. 11-3009 charges Respondent with violating section 475.624(15), by failing or refusing to exercise reasonable diligence in developing an appraisal or preparing an appraisal report. As with the prior properties, Petitioner's expert witness did not directly testify that Respondent failed to exercise due diligence. However, Respondent's work papers do not explain the need for the second report or the adjustments

made in the second report to arrive at a different opinion on value. This failure reflects a lack of due diligence, supporting a finding that Count One is proven by competent substantial evidence.

69. Count Two charges Respondent with violating section 475.624(2) by committing dishonest conduct or breach of trust in a business transaction. For the reasons discussed with respect to the same charge in Case No. 11-3007, the Department has proven this count by clear and convincing evidence.

70. Count Three charges a violation of section 475.624(4) by failing to follow the definition of appraisal assignment as provided in section 475.611. For the reasons discussed in Case No. 11-3007 with respect to the same charge, this Count has not been proven by clear and convincing evidence.

71. Finally, Count Four charges Respondent with violating section 475.624(4) by failing to review appraiser trainee appraisal reports, in violation of rule 61J1-4.010. However, no evidence was presented regarding the amount of supervision provided to Ms. Archer, who assisted with this appraisal. Therefore, Count Four has not been proven by clear and convincing evidence.

72. In summary, the Department has proven violations of section 475.624(2) and (15), with respect to all three Amended Administrative Complaints. All other counts in the Amended

Administrative Complaints have not been demonstrated by clear and convincing evidence and should be dismissed.

73. The Florida Real Estate Appraisal Board has adopted disciplinary guidelines establishing penalties to be imposed for violations of chapter 475. Florida Administrative Code Rule 61J1-8.002, as it existed when these violations were committed, provides that the appropriate penalty for breach of trust pursuant to section 475.624(2) is from a \$1,000 fine to a one-year suspension. For "dishonest dealing" under the same subsection, the recommended penalty is revocation. For failing or refusing to exercise reasonable diligence in developing or preparing an appraisal report, the usual penalty is a five-year suspension to revocation and an administrative fine of \$1,000.

74. Rule 61J1-8.002(4)(b) provides that the Board may consider the following aggravating or mitigating circumstances should it choose to deviate from the guideline ranges: the degree of harm to the consumer or public; the number of counts in the administrative complaint; the disciplinary history of the licensee; the status of the licensee at the time the offense was committed; and the degree of financial hardship incurred by a licensee as a result of a fine or suspension of the license. In this case, the Department did not prove any harm to the consumer or public. There are two counts proven with respect to each Amended Administrative Complaint: however with respect to each

case, the counts proven are based upon the same set of facts. Respondent has no prior disciplinary history and has been licensed over twenty years.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED that the Florida Real Estate Appraisal Board enter a Final Order finding that Respondent violated section 475.624(2) and (15) as alleged in Case Nos. 11-3007, 11-3008, and 11-3009; suspending his license to practice as a certified residential real estate appraiser for a period of 3 years, followed by 5 years of probation; imposing a \$6,000 fine and imposing costs in the amounts identified in finding of fact number 49, for a total of \$4,141.50 in costs.

DONE AND ENTERED this 17th day of February, 2012, in Tallahassee, Leon County, Florida.



Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of February, 2012.

ENDNOTES

^{1/} Some of the Department's exhibits, notably the appraisal reports, had been reduced for copying and clearly copied multiple times. As a result, portions of these exhibits (especially Petitioner's Exhibit 5) could only be read with the aid of a magnifying glass and even then, with difficulty. The undersigned has endeavored to glean from these exhibits the information required for this Recommended Order. In the future, however, it would be helpful to have full-sized exhibits for the purpose of hearing.

^{2/} Compare section 475.624(1), which authorizes discipline for conduct that violates "any provisions of this part or s. 455.227(1). . . ." However, the Department did not charge this provision.

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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.