

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 11-4528PL
)
MONIQUE H. MORGAN,)
)
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 October 27, 2011, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Susan Leigh Matchett, Esquire
Patrick J. Cunningham, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Joseph W. Gibson, Jr., Esquire
Joseph W. Gibson, P.A.
19 West Flagler Street, Suite 620
Miami, Florida 33130

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint in the manner specified therein and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about June 21, 2011, Petitioner issued a three-count Administrative Complaint against Respondent. Count One alleges that "Respondent violated [s]ection 475.25(1)(e), Florida Statutes, by violating [r]ule 61J2-10.038, F.A.C., when she failed to notify [Petitioner] in writing within 10 days of changing her [mailing and license] addresses." Count Two alleges that "Respondent violated [s]ection 475.5015, Florida Statutes, [and thereby section 475.25(1)(e)], by failing to make . . . requested records [concerning the aborted purchase and sale of real property in Lauderhill, Florida, owned by Jason and Jennifer Van Buskirk] available to [the requesting] Department investigator." Count Three alleges that "Respondent violated [s]ection 455.227(1)(j), and thereby [section] 475.25(1)(e), Florida Statutes," by "aiding [an] unlicensed company[,] Bright Star Realty Investments Inc.[,] in broker activities"; "preparing a sale and purchase contract as the broker of Bright Star"; and "accepting deposits from [a] [buyer] . . . on behalf of Bright Star." Petitioner

subsequently referred the matter to DOAH for a "formal proceeding pursuant § 120.569 and § 120.57(1), Florida Statutes."

On September 12, 2011, Petitioner filed a Motion to Amend Administrative Complaint, seeking to amend the Administrative Complaint by correcting the license number of the license allegedly held by Respondent. The motion was granted by Order issued September 22, 2011.

As noted above, the hearing in the instant case was held on October 27, 2011. Petitioner presented the testimony of two witnesses: Jennifer Van Buskirk and Felix Mizioznikov. It also offered 11 exhibits (Petitioner's Exhibits 1 through 11), all of which were received into evidence. Respondent presented no evidence in her defense.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced, on the record, that the deadline for the filing of proposed recommended orders would be ten days from the date of the filing of the hearing transcript with DOAH.

The hearing Transcript (consisting of one volume) was filed with DOAH on December 19, 2011. On December 20, 2011, the undersigned issued a Notice of Filing Transcript, in which he advised the parties that proposed recommended orders had to be filed with DOAH no later than December 29, 2011. On

December 21, 2011, Petitioner filed a motion requesting that the deadline for the filing of proposed recommended orders be extended to January 6, 2012. The deadline was extended, as requested by Petitioner, by Order issued December 21, 2011. On January 5, 2012, Respondent filed an opposed motion seeking a further extension, until January 16, 2012, of the proposed recommended order filing deadline. By Order issued January 6, 2012, the deadline was extended a second time, but only until January 9, 2012.

Petitioner's Proposed Recommended Order was timely filed on January 9, 2012, and it was considered by the undersigned prior to his making the findings of fact, conclusions of law, and recommendation set forth in this Recommended Order.

Respondent's Proposed Recommended Order, on the other hand, was filed on January 19, 2012, ten days after the expiration of the proposed recommended order filing deadline established by the January 6, 2012, Order. At the time it was filed, the undersigned had already completed the findings of fact, conclusions of law, and recommendation sections of this Recommended Order. Having subsequently read Respondent's Proposed Recommended Order, the undersigned finds that he would have made the very same findings of fact, conclusions of law, and recommendation even if this Proposed Recommended Order had been timely filed.

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 at all times material to the instant case, a Florida-licensed real estate broker, holding license number BK-475943.

2. At no time during the time Respondent has held this license has any disciplinary action been taken against her.

3. Respondent was at all times material to the instant case, the sole officer and director of Bright Star Realty and Investments, Inc. (Bright Star), a Florida corporation.

4. At no time material to the instant case was Bright Star a Florida-registered brokerage corporation.^{2/}

5. In October 2008, Milton Gibbons entered into a contract (Purchase Contract) to purchase from Jason and Jennifer Van Buskirk property located at 8510 Northwest 46th Street, Lauderhill, Florida (Purchase Transaction). The Purchase Contract was drawn on a pre-printed "'As Is' Contract for Sale and Purchase" form approved by the Florida Association of Realtors and The Florida Bar.

6. Respondent, acting on behalf of her unlicensed brokerage corporation, Bright Star, represented to Mr. Gibbons in the Purchase Transaction. Bright Star was listed in the Purchase Contract as a "[c]ooperating [b]roker" and the "only

broker[] entitled to compensation in connection with this Contract." No other broker, including a listing broker, was mentioned in the Purchase Contract, notwithstanding that AmeriStar Properties of South Florida, Inc., had listed the property pursuant to an "Exclusive Right of Sale Agreement" it had with the Van Buskirks which was still in effect at the time Mr. Gibbons and the Van Buskirks entered into the Purchase Contract.

7. Under the terms of the Purchase Contract, Mr. Gibbons was required to make a deposit totaling \$9,600.00 to be "held in escrow by Bright Star," which was designated in the Purchase Contract as the "Escrow Agent."

8. The Purchase Transaction never closed, and a dispute arose concerning the appropriate distribution of the \$9,600.00 that had been deposited by Mr. Gibbons and was being held in escrow in accordance with the Purchase Contract.

9. Pursuant to section 475.25(1)(d)1., Florida Statutes, and Florida Administrative Code Rule 61J2-10.032, Respondent, on behalf of the "Escrow Agent," Bright Star, notified Petitioner of the dispute in writing, using a form developed for that purpose. On the completed form that Respondent submitted, which was signed by her and dated May 11, 2009, she indicated that she was the "broker" and Bright Star was the "brokerage firm" involved in the real estate transaction in question; that her

address was "520 NW 165 St. Rd. Suite 112, Miami Fl 33169"; and that the "amount in dispute" was \$9,600.00.

10. The Van Buskirks subsequently filed a complaint against Respondent with Petitioner.

11. The complaint was investigated by one of Petitioner's investigators, Felix Mizioznikov. His investigation began in September 2009, and concluded in August 2010.

12. On or about May 3, 2010, Mr. Mizioznikov sent to Respondent, by certified United States Mail, two packages containing the complaint and other materials. One package was sent to what Petitioner's computerized records reflected was Respondent's "license location"--12865 West Dixie Highway, #201, North Miami, Florida 33161. The other package was sent to what those same records reflected was Respondent's "mailing address"--520 Northwest 165th Street, #112, Miami, Florida 33159. Both packages were returned to Mr. Mizioznikov by the United States Postal Service. The returned package that had been sent to the 12865 West Dixie Highway address was stamped "MOVED LEFT NO ADDRESS." The returned package that had been sent to the 520 Northwest 165th Street address was stamped "UNCLAIMED."

13. In June 2010, Mr. Mizioznikov visited both the 12865 West Dixie Highway address (where, he discovered, a law firm was located) and the 520 Northwest 165th Street address. There was

no indication that Respondent had a business presence at either location.

14. On June 21, 2010, Mr. Mizioznikov sent to Respondent's attorney, Joseph Gibson, Esquire, by facsimile transmission, an Office Inspection & Escrow/Trust Account Audit Form (signed by Mr. Mizioznikov), requesting that Respondent, within five days "provide [her] Broker business records and monthly reconciliation escrow statements for dates 5-2008-Current." Mr. Mizioznikov later contacted Respondent herself and requested her to produce these records. As of the date of the hearing, Respondent had not produced the requested records.

CONCLUSIONS OF LAW

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

16. The Florida Real Estate Commission (Commission) is statutorily empowered to take disciplinary action against Florida-licensed real estate brokers based upon any of the grounds enumerated in section 475.25(1),^{3/} including "[having] violated any provision of s. 455.227(1)" (as described in section 475.25(1)(a)), and "[having] violated any of the provisions of [chapter 475] or any lawful order or rule made or issued under the provisions of [chapter 475] or chapter 455" (as described in section 475.25(1)(e)).

17. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension not exceeding ten years; imposition of an administrative fine not to exceed \$5,000.00 for each count or separate offense; issuance of a reprimand; and placement of the licensee on probation. § 475.25(1). In addition, the Commission "may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time." § 455.227(3)(a).

18. The Commission 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).

19. 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).

20. 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); Walker v. Fla. Dep't of Bus. & Prof'l Reg., 705 So. 2d 652, 655

(Fla. 5th DCA 1998)("The Department had the burden of proving fraud, misrepresentation or concealment by clear and convincing evidence, in order to justify revocation of Walker's license."); 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").

21. 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).

22. 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."); Dep't of Rev. v. Vanjaria Enters., 675 So. 2d 252, 254 (Fla. 5th DCA 1996)("[T]he issue must be treated as though it had been raised in the pleadings because the parties tried the issue by consent."); and Delk v. Dep't of Prof'l Reg., 595

So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

23. If there is any reasonable doubt concerning the proper interpretation of the statute or rule alleged in the charging instrument to have been violated, 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).

24. In those cases where the proof is sufficient to establish that the licensee committed the violation(s) alleged in the charging instrument and that therefore disciplinary action is warranted, it is necessary, in determining what disciplinary action should be taken against the licensee, to consult Petitioner's "penalty guidelines," which impose restrictions and limitations on the exercise of Petitioner's disciplinary authority. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules.").

25. The Commission's "disciplinary guidelines" are set forth in Florida Administrative Code Rule 61J2-24.001. At all times material to the instant case prior to July 21, 2010, when rule 61J2-24.001 was most recently amended, it provided, in pertinent part, as follows:

(1) Pursuant to Section 455.2273, F.S., the Commission sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon licensees guilty of violating Chapter 455 or 475, F.S. The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties which normally will be imposed for each count during a formal or an informal hearing. For purposes of this rule, the order of penalties, ranging from lowest to highest, is: reprimand, fine, probation, suspension, and revocation or denial. Pursuant to Section 475.25(1), F.S., combinations of these penalties are permissible by law. Nothing in this rule shall preclude any discipline imposed upon a licensee pursuant to a stipulation or settlement agreement, nor shall the range of penalties set forth in this rule preclude the Probable Cause Panel from issuing a letter of guidance.

(2) As provided in Section 475.25(1), F.S., the Commission may, in addition to other disciplinary penalties, place a licensee on probation. The placement of the licensee on probation shall be for such a period of time and subject to such conditions as the Commission may specify. Standard probationary conditions may include, but are not limited to, requiring the licensee: to attend pre-licensure courses; to satisfactorily complete a pre-licensure course; to attend post-licensure courses; to satisfactorily complete a post-licensure course; to attend continuing education

courses; to submit to and successfully complete the state-administered examination; to be subject to periodic inspections and interviews by a DBPR investigator;

(3) The penalties are as listed unless aggravating or mitigating circumstances apply pursuant to subsection (4). The verbal identification of offenses is descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included.

* * *

(f) VIOLATION[:] Section 475.25(1)(e), F.S.- Violated any rule or order or provision under Chapters 475 and 455, F.S.[^{4/}]

RECOMMENDED RANGE OF PENALTY: The usual action of the Commission shall be to impose a penalty from an 8 year suspension to revocation and an administrative fine of \$1,000.

* * *

(4)(a) When either the Petitioner or Respondent is able to demonstrate aggravating or mitigating circumstances . . . to a Division of Administrative Hearings [administrative law judge] in a Section 120.57(1), F.S., hearing by clear and convincing evidence, the . . . [administrative law judge] shall be entitled to deviate from the above guidelines in . . . recommending discipline . . . upon a licensee. . . .

(b) Aggravating or mitigating circumstances may include, but are not limited to, the following:

1. The degree of harm to the consumer or public.

2. The number of counts in the Administrative Complaint.
3. The disciplinary history of the licensee.
4. The status of the licensee at the time the offense was committed.
5. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.
6. Violation of the provision of Chapter 475, F.S., wherein a letter of guidance as provided in Section 455.225(3), F.S., previously has been issued to the licensee.

The current version of rule 61J2-24.001, which took effect July 21, 2010, is identical to its immediate predecessor in all material respects except that it provides that, for a "first violation" of section 475.25(1)(e), the "penalty range" is a "\$250 to \$1,000 administrative fine and suspension to revocation," and, for a "second and subsequent violations," the "penalty range" is a "\$1,000 to \$5,000 administrative fine and suspension to revocation."

26. The Administrative Complaint issued in the instant case contains three counts. Count One alleges that "Respondent violated [s]ection 475.25(1)(e), Florida Statutes, by violating [r]ule 61J2-10.038, F.A.C., when she failed to notify [Petitioner] in writing within 10 days of changing her [mailing and license] addresses." Count Two alleges that "Respondent

violated [s]ection 475.5015, Florida Statutes, [and thereby section 475.25(1)(e)] by failing to make . . . requested records available to [the requesting] Department investigator." Count Three alleges that "Respondent violated [s]ection 455.227(1)(j), and thereby [section] 475.25(1)(e), Florida Statutes," by "aiding [an] unlicensed company[,] Bright Star Realty Investments Inc.[,] in broker activities"; "preparing a sale and purchase contract as the broker of Bright Star"; and "accepting deposits from [a] [buyer] . . . on behalf of Bright Star."

27. At all times material to the instant case, section 475.25(1)(e) has authorized the Commission to take disciplinary action against a Florida-licensed real estate broker who "[h]as violated any of the provisions of this chapter or any . . . rule made or issued under the provisions of this chapter or chapter 455."

28. Among the statutory and rule provisions, violation of which subjects a Florida-licensed real estate broker to disciplinary action pursuant to section 475.25(1)(e), are sections 455.227(1)(j) and 475.5015, Florida Statutes, and Florida Administrative Code Rule 61J2-10.038, which have, at all times material to the instant case, provided as follows:

Section 455.227(1)(j)

The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

Aiding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to this chapter, the chapter regulating the profession, or the rules of the department or the board.[^{5/}]

Section 475.5015

Each broker shall keep and make available to the department such books, accounts, and records as will enable the department to determine whether such broker is in compliance with the provisions of this chapter. Each broker shall preserve at least one legible copy of all books, accounts, and records pertaining to her or his real estate brokerage business for at least 5 years from the date of receipt of any money, fund, deposit, check, or draft entrusted to the broker or, in the event no funds are entrusted to the broker, for at least 5 years from the date of execution by any party of any listing agreement, offer to purchase, rental property management agreement, rental or lease agreement, or any other written or verbal agreement which engages the services of the broker. If any brokerage record has been the subject of or has served as evidence for litigation, relevant books, accounts, and records must be retained for at least 2 years after the conclusion of the civil action or the conclusion of any appellate proceeding, whichever is later, but in no case less than a total of 5 years as set above. Disclosure documents required under ss. 475.2755 and 475.278 shall be retained by the real estate licensee in all transactions that result in a written contract to purchase and sell real property.

Florida Administrative Code Rule 61J2-10.038

(1) Pursuant to Section 455.275(1), Florida Statutes,[^{6/} the Commission defines "current

mailing address" as the current residential address which is used by a licensee or permit holder to receive mail through the United States Postal Service.

(2) Each licensee and permit holder is required to notify the BPR in writing of the current mailing address and any change in the current mailing address within 10 days after the change.

29. Because of their penal nature, the foregoing statutory and rule provisions must be strictly construed, with any reasonable doubts as to their meaning being resolved in favor of the licensee. See Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002) ("Statutes such as those at issue authorizing the imposition of discipline upon licensed contractors are in the nature of penal statutes, which should be strictly construed."); Munch v. Dep't of Prof'l Reg., 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992) ("It is clear that [s]ection 475.25(1)(b) is penal in nature. As such, it must be construed strictly, in favor of the one against whom the penalty would be imposed."); and McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any

ambiguities included, they must be construed in favor of the licensee.").

30. Evaluating Petitioner's evidentiary presentation at hearing in light of the foregoing, the undersigned finds that Petitioner failed to meet its burden of proving Respondent's guilt of the violation of Florida Administrative Code Rule 61J2-10.038 (and, derivatively, section 475.25(1)(e)) alleged in Count One of the Administrative Complaint, in that the record evidence does not clearly and convincingly establish that, at any material time, the mailing address that Petitioner had on record for Respondent was not Respondent's actual mailing address.^{7/}

31. The record evidence, however, clearly and convincingly establishes that Respondent violated section 475.015 (and, derivatively, section 475.25(1)(e)) by failing to make available to Petitioner records concerning the Purchase Transaction (which were among "the Broker business records and monthly reconciliation escrow statements" Mr. Mizioznikov had requested her to produce during his investigation),^{8/} as alleged in Count Two of the Administrative Complaint, and that she also violated section 455.227(1)(j), (and, derivatively, section 475.25(1)(e)^{9/}) by aiding Bright Star, an "unlicensed . . . entity," to act as a broker in connection with the Purchase

Transaction, as alleged in Count Three of the Administrative Complaint.

32. Having considered the facts of the instant case in light of the pertinent and applicable provisions of Florida Administrative Code Rule 61J2-24.001 set forth above, it is the view of the undersigned that, as punishment for having committed the violations alleged in Counts Two and Three of the Administrative Complaint, Respondent should be fined a total of \$2,000.00, her license should be suspended for a period of one year, and she should be placed on probation for a period of two years, commencing immediately, with the condition, among others, that she make available to Petitioner upon request, within five business days, the records (referred to above) that Mr. Mizioznikov had requested of her as part of his investigation, as well as any other "books, accounts, and records" described in section 475.5015.

RECOMMENDATION

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

RECOMMENDED that the Commission issue a Final Order (1) dismissing Count One of the Administrative Complaint; and (2) finding Respondent guilty of Counts Two and Three of the Administrative Complaint and disciplining her therefor as described above.

DONE AND ENTERED this 20th day of January, 2012, in
Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of January, 2012.

ENDNOTES

^{1/} Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to that version of Florida Statutes in effect at the time of the occurrence of the particular event or action being discussed.

^{2/} Section 475.15, Florida Statutes, requires any corporation that "acts as a broker" to register with the Florida Real Estate Commission. See Meteor Motors, Inc. v. Thompson Halbach and Assocs., 914 So. 2d 479, 482 (Fla. 4th DCA 2005).

^{3/} "Broker," as that term is used in section 475.25(1) and elsewhere in chapter 475, part I, is defined in section 475.01 as follows:

"Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys,

rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists. A broker renders a professional service and is a professional within the meaning of s. 95.11(4)(a). Where the term "appraise" or "appraising" appears in the definition of the term "broker," it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser, and those appraisal services which may be performed by a registered trainee appraiser as defined in part II. The term "broker" also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term "broker" also includes any person or entity who undertakes to list or sell one or more timeshare periods per year in one or

more timeshare plans on behalf of any number of persons, except as provided in ss. 475.011 and 721.20.

^{4/} In this rule provision, which has the effect of law and is not subject to invalidation in this section 120.57 substantial interest proceeding, the Commission has interpreted section 475.25(1)(e) as including, within its reach, violations of section 455. The undersigned must accept this interpretation, notwithstanding that he may disagree with the Commission's interpretation. See State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("We note that agency rules and regulations, duly promulgated under the authority of law, have the effect of law."); City of Palm Bay v. Dep't of Transp., 588 So. 2d 624, 628 (Fla. 1st DCA 1991)("The same principle applies to duly promulgated agency rules, which will be treated as presumptively valid until invalidated in a section 120.56 rule challenge."); and Graham v. Swift, 480 So. 2d 124, 125 (Fla. 3d DCA 1985)("[A] valid rule or regulation of an administrative agency has the force and effect of law.").

^{5/} An "unlicensed . . . entity," as that term is used in section 455.227(1)(j) includes a corporation not registered with the Commission pursuant to section 475.15. Cf. Fla. Bd. of Massage v. Thrall, 164 So. 2d 20, 22 (Fla. 3d DCA 1964)("Section 480.02, Fla. Stat., F.S.A., specifically provides that it is unlawful for any person to engage in the practice of massage without a certificate of registration issued pursuant to the provisions of Chapter 480. This section also provides that it shall be unlawful for any person to practice any branch of massage as defined by law without first being a registered masseur or masseuse under the provisions of Chapter 480. The reference is specifically to a registered individual and when the terminology of § 480.11 (the basis of Count 3, which prohibits the employing, allowing or permitting any unlicensed person to perform any work in [the registrant's] establishment or massage school) is so considered, we must conclude that the legislature intended the term 'licensed person' to be the equivalent of 'registered person.'").

^{6/} Section 455.275(1) has, at all times material to the instant case, provided as follows:

Each licensee of the department is solely responsible for notifying the department in writing of the licensee's current mailing

address and place of practice, as defined by rule of the board or the department when there is no board. A licensee's failure to notify the department of a change of address constitutes a violation of this section, and the licensee may be disciplined by the board or the department when there is no board.

As can be seen, section 455.275(1) addresses both a licensee's "mailing address" and "place of practice." Respondent, however, was charged with violating, not section 455.275(1), but rather Florida Administrative Code Rule 61J2-10.038, which requires a licensee to give notification of a change in "mailing address," not of a change in "place of practice" (or, as Petitioner alternatively refers to it as, "license location" or "license address").

^{7/} That the complaint package Mr. Mizioznikov mailed to Respondent at 520 Northwest 165th Street, #112, Miami, Florida 33159 on or about May 3, 2010, was returned unclaimed and that his visit to that address the following month revealed that (in Mr. Mizioznikov's words) "there was no business there" do not, individually or collectively, establish, by any standard of proof, much less clear and convincing evidence, that this 520 Northwest 165th Street address was not Respondent's actual address when these events occurred.

^{8/} As of the time of the hearing, Petitioner had yet to make these records available to Petitioner, thus making this a continuing violation.

^{9/} Violations of section 455.227(1)(j) are also disciplinable pursuant to section 475.25(1)(a); however, subsection (1)(e) is the only subsection of section 475.25 that Respondent is alleged to have violated in Count Three of the Administrative Complaint.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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