

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case Nos. 12-1537PL
)	12-1538PL
RICHARD PATRICK TRUHAN,)	12-1539PL
)	12-1541PL
Respondent.)	
_____)	

RECOMMENDED ORDER

On July 25, 2012, a final administrative hearing was held in these cases by video teleconference in Tallahassee and Orlando, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Christina Ann Arzillo, Esquire
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For Respondent: Thomas D. Sommerville, Esquire
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STATEMENT OF THE ISSUES

The issues are essentially whether Respondent failed to use reasonable diligence on four appraisals of residential condominiums in Orlando done in 2007, and whether he failed to register his appraisal business with Petitioner; and, if so, how he should be disciplined.

PRELIMINARY STATEMENT

In 2009, Petitioner, the Department of Business and Professional Regulation, Division of Real Estate (DBPR), filed an Administrative Complaint as to each of the four appraisals at issue. Amended administrative complaints were filed in 2012, and Respondent requested administrative hearings to dispute the alleged facts. The requests were referred to DOAH, where they were given case numbers, consolidated into one proceeding, and scheduled for hearing. Leave was granted to file a second amended complaint in each case. A Joint Pre-hearing Stipulation was filed.

At the final hearing, DBPR called two witnesses (Diana Woods, a DBPR investigator; and Dennis Cooper, an appraiser) and had its Exhibits 1 through 18 admitted into evidence. Respondent testified and had his Exhibits 2 and 3 admitted into evidence.

A Transcript of the final hearing was filed, and the parties filed proposed recommended orders, which have been considered.

FINDINGS OF FACT

1. Respondent is a certified Florida real estate appraiser, holding DBPR license 5422. In 2007, Respondent was appraising through Rush Realty Appraisal Services, LLC (Rush Realty), which he owned and operated. Rush Realty was registered with the Florida Department of State as a limited liability company, but it was not registered with DBPR.

The Appraisals

2. In 2007, Rush Realty, through Respondent and a trainee he supervised, appraised four condominium units in a residential complex in Orlando called the Residences at Millenia (Millenia). Three of the appraisals were done in January and the other in June. In January, Rush Realty appraised two of the condos at \$279,500 and appraised the third at \$258,500; in June, it appraised the fourth condo at \$279,500. Respondent is responsible for these appraisals.

3. One January appraisal was based on five comparables, three of which were sales of Millenia condos; one of those three was a pending sale. The other two January appraisals were based on four comparables, two of which were sales of Millenia condos, both of which were pending sales.

4. One of the pending Millenia sales used for the January appraisals was for \$290,000 (\$282 per square foot, abbreviated psf). The other Millenia pending sale used for the January

appraisals was for \$279,500 (\$272 psf). The closed sales used in the January appraisals included one at Millenia for \$209,800 (\$204 psf), another at Millenia for \$207,400 (\$202 psf), two at nearby Sunset Lake Condos for \$275,900 (\$265 psf), one at Sunset Lake for \$259,900 (\$251 psf), and one at Sunset Lake for \$254,900 (\$256 psf).

5. According to the January appraisal reports, the sources of the comparables used by Respondent were the public records and the Multiple Listing Service (MLS) for the closed sales and the Millenia sales office for the pending sales.

6. The June appraisal was based on two Millenia condo sales. These were the two sales that were pending at the time of the January appraisals. According to the June appraisal, those sales closed in March 2007, one at \$280,000 and the other at \$279,900.

7. The June appraisal listed only the Millenia sales office as the source of the data on the two Millenia closed sales used as comparables for that appraisal.

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9. Respondent's January appraisal reports stated that the price range of properties similar to the subject property sold within the year prior to the appraisal report was from \$100,000

to \$400,000. In fact, according to MLS, the range was \$25,000 to \$313,000. Only seven of the 186 comparable sales were over \$250,000.

10. Respondent's June appraisal report also stated that the price range of properties similar to the subject property sold within the year prior to the appraisal report was from \$100,000 to \$400,000. In fact, according to MLS, the range was \$102,000 to \$313,900. Only four of the 88 comparable sales were over \$250,000.

Whether Respondent Used Reasonable Diligence

11. The information provided by the Millenia sales office for the pending sales used as comparables for the January appraisals was unverifiable at the time.

12. It was inappropriate for Respondent to use the Millenia sales office as the source of comparables for the January appraisals (or to use it to verify other sources) because Millenia was interested in the transaction for which the appraisals were done.

13. Respondent testified that he and his trainee used a research tool called Microbase to obtain public records information on comparable sales for the appraisals. He testified that the information from the public records used for the January appraisals, and from the Millenia sales office for the June appraisal, was verified by the MLS, HUD-1 closing statements, and

contracts. The use of MLS for verification for the closed sales in the January appraisals is indicated by the inclusion of MLS in the part of those appraisal report forms used to indicate data source(s). Although the data and verification sources other than the Millenia sales office and MLS were not indicated on the report forms for the January appraisals, and no source other than the Millenia sales office was indicated on the report form for the June appraisal, Respondent testified that his work files document the use of all of these sources for the closed sales used as comparables in the four appraisals.

14. DBPR questions the veracity of Respondent's testimony regarding his work files and the use of these data and verification sources based on his failure to replicate his work files when asked to do by Petitioner's investigator. DBPR points to no requirement for Respondent to replicate his work files upon request. It appears from the evidence that Respondent understood he was being asked to produce the files, not to replicate (i.e., recreate) them. His response was in the negative based on his explanation that the files had been confiscated by and remained in the possession of the Federal Bureau of Investigation.

15. The FBI has not returned Respondent's work files. Neither party attempted to subpoena the work files in this case, and the work files were not placed in evidence.

16. DBPR also questions the veracity of Respondent's testimony regarding his work files and the use of these data and verification sources based on his failure to use any of the numerous other comparable sales that were available from those sources, most of which were sold for considerably less money than the comparables used by Respondent. For example, for the January appraisals, there were 37 comparable sales in the preceding six months available through MLS that ranged from \$39,000 to \$235,000; and, for the June appraisal, there were 16 comparable sales in the preceding six months available through MLS that ranged from \$134,900 to \$190,000. DBPR's expert utilized these comparables in MLS and reached value conclusions that were approximately \$90,000 lower than Respondent's.

17. According to MLS, other closed sales at Millenia between July 27, 2006, and January 27, 2007, ranged from \$180,000 (\$184.82 psf) to \$205,000 (\$207.49 psf), with an average of \$198,472 (\$196.96 psf) and a median of \$205,000 (\$199.42 psf). Comparable sales of condos within a mile from Millenia that closed between July 27, 2006, and January 27, 2007, ranged from \$39,000 (\$38.24 psf) to \$306,000 (\$275.93 psf), with an average of \$187,279 (\$183.82 psf) and a median of \$188,500 (\$189.95 psf). Comparable sales of condos within a mile from Millenia that closed between January 27, 2006, and January 27, 2007, ranged from \$25,000 (\$30.56 psf) to \$317,900 (\$256.28 psf), with an

average of \$168,468 (\$152.69 psf) and a median of \$169,650 (\$159.49 psf).

18. Respondent testified that he rejected the comparables he did not use based on the properties' relative poor condition, effective age, and lack of amenities. He also testified that, in some cases, the sellers appeared to be in financial distress and extremely motivated to sell, even at lower than market value; or, in other cases, the sellers did not raise their prices as the market rose.

19. Taking all the evidence into account, DBPR did not prove that Respondent did not use any data and verification sources other than the Millenia sales office for the closed sales used as comparables in the four appraisals; however, Respondent inappropriately used pending sales instead of the available comparables and did not diligently review the available comparables before choosing the comparables he used. Instead, he quickly focused on sales at Millennia and Sunset Lakes that were significantly higher than the predominant prices of other comparable sales available to him through MLS and other sources. Respondent failed to exercise reasonable diligence in developing the appraisals and preparing the appraisal reports.

20. If pending sales had not been used as comparables in the January appraisals, or if other available comparables had been used, the appraised values would have been significantly

lower. The June appraisal would have been lower if other available comparables had been used.

Other Errors in Appraisal Reports

21. For two of the closed sales, in the part of the appraisal report form for describing sales and financing concessions, Respondent mistakenly entered MLS, with an official public records book and page number. This labeling error could have been confusing, but there was no evidence that anyone was misled by the error.

22. The report forms used by Respondent included an addendum indicating that closed sales were used for comparables. This language was inconsistent with the indications elsewhere in the January appraisal reports that pending sales were used for that purpose. While potentially confusing, there was no evidence that anyone actually was misled by the addendum language.

23. The addendum language also stated that all comparables were given equal consideration. Actually, in one of the January appraisals, the higher comparables were given greater weight. In that report, the property appraised for approximately \$30,000 more than it would have if all comparables had been given equal consideration. This language was misleading in that computations would have been required to determine that it was in error.

USPAP

24. Rule 1-1(a) of the 2006 Uniform Standards of Professional Appraisal Practice (USPAP) requires a real property appraiser to be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal. Respondent violated this rule.

25. Rule 1-1(b) prohibits substantial errors of omission or commission that significantly affect an appraisal. Respondent violated this rule.

26. Rule 1-1(c) of USPAP prohibits rendering appraisal services in a careless or negligent manner, including making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of the results. Respondent violated this rule.

27. Rule 1-4(a) of USPAP requires that, when a comparable sales approach is necessary for a credible result, an appraiser must analyze such comparable sales data as are available. Respondent violated this rule.

28. Rule 2-1(a) of USPAP requires that written and oral appraisal reports be set forth in a manner that is clear and accurate and not misleading. Respondent violated this rule.

Aggravating and Mitigating Circumstances

29. Respondent had not been disciplined and had not received a letter of guidance prior to the four appraisal reports at issue in this case. His license was in good standing at the time.

30. When an appraiser does not exercise reasonable diligence in doing an appraisal and preparing the appraisal report and the result is an unreasonably high value conclusion, as happened in the four appraisal reports at issue in this case, and a lender relies and acts on the appraisal report, the lender is harmed ipso facto, and the borrower and public may also be harmed, notwithstanding that many residential loans defaulted after 2007 besides the loans made based on these four appraisals. There was no evidence as to the specific extent of the actual harm to this lender.

31. Although DBPR filed a separate administrative complaint for each of the four appraisals, the conduct complained of in each administrative complaint was similar. Each administrative complaint has three counts: one for not using reasonable diligence in doing the appraisal and preparing the appraisal report; another for not registering Rush Realty; and a third for violating USPAP provisions.

32. Respondent testified without contradiction that revocation or suspension of his appraisal license, and even a

substantial fine, would be a devastating financial hardship to him and his family.

CONCLUSIONS OF LAW

33. Section 475.624(4), Florida Statutes (2006),^{1/} subjects a licensed real estate appraiser to discipline for violating chapter 475 or any lawful order or rule made or issued under chapter 455 or 475.

34. Section 475.624(15) subjects a licensed real estate appraiser to discipline for failing or refusing to exercise reasonable diligence in developing an appraisal or preparing an appraisal report.

35. Section 475.623 requires licensed real estate appraisers to furnish DBPR, in writing, each firm or business name and address operated by the licensee to perform appraisal services.

36. Florida Administrative Code Rule 61J1-9.001^{2/} requires licensed real estate appraisers to comply with USPAP.

37. Because it seeks to impose license discipline, DBPR has the burden to prove its allegations by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This "entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion;

and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." In re Davey, 645 So. 2d 398, 404 (Fla. 1994). See also Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "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, 988 (Fla. 1st DCA 1991).

38. DBPR proved by clear and convincing evidence that Respondent is subject to discipline under sections 475.624(4) (through violations of USPAP and rule 61J1-9.001), 475.624(15), and 475.623. Each appraisal report constituted separate violations.

39. Under Florida Administrative Code Rule 61J1-8.002,^{3/} the range of discipline for the first violation of section 475.624(15) is from a five-year suspension to revocation and a \$1,000 fine; and the range of discipline for the first violation of section 475.624(4), which applies to the violations of section 475.623 and rule 61J1-9.001, is up to revocation^{4/} and a fine of up to \$5,000.

40. Rule 61J1-8.002(4)^{5/} authorizes a deviation from the disciplinary guidelines under certain circumstances. Aggravating or mitigating circumstances may include, but are not limited to: 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; the degree of financial hardship incurred by the licensee as a result of the imposition of a fine or suspension of the licensee; and violation of a provision of a previous letter of guidance.

41. Under the facts and circumstances of this case, a downward deviation from the discipline guidelines is warranted. It is appropriate, in sum, to fine Respondent \$2,000 and suspend his appraisal license for three months, subject to probation upon reinstatement for such a period of time and subject to such conditions as the Florida Real Estate Appraisal Board (Board) may specify. See Fla. Admin. Code R. 61J1-8.002(2).

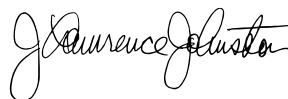
42. Section 455.227(3)(a) provides that, in addition to the disciplinary penalty against Respondent, DBPR may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time. DBPR requests that Respondent be required to pay its costs in the amount of \$1,996. However, there was no evidence as to DBPR's costs.

RECOMMENDATION

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

RECOMMENDED that DBPR enter a final order finding Respondent subject to discipline under sections 475.624(4) (through violations of section 475.623, USPAP, and rule 61J-9.001) and 475.624(15); suspending his license for three months, subject to probation upon reinstatement for such a period of time and subject to such conditions as the Board may specify; fining him \$2,000; and assessing costs related to the investigation and prosecution of the cases in accordance with section 455.227(3)(a).

DONE AND ENTERED this 26th day of October, 2012, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 2012.

ENDNOTES

^{1/} All statutory references are to the Florida Statutes (2006).

^{2/} This is the version of the rule that was in effect since August 29, 2006.

^{3/} The version of this rule that was in effect in 2006 was cited in DBPR's Proposed Recommended Order but was not presented in evidence at the final hearing. In the current version, subsections (3)(g) and (r) are the applicable citations.

^{4/} Rule 61J1-8.002(3)(g) actually states that the recommended penalty is revocation, but clearly up to revocation was intended, as reflected in DBPR's Proposed Recommended Order.

^{5/} See Endnote 3, supra.

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.