

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE,

Petitioner,

vs.

Case No. 17-0476

RICHARD L. SOVICH,

Respondent.

_____ /

RECOMMENDED ORDER

On March 16, 2017, an administrative hearing was held in this case in Orlando, Florida, before Lynne A. Quimby-Pennock, Administrative Law Judge, Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Neal James Lawson, Esquire
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

Allison Carmine McDonald, Esquire
Department of Business & Professional
Regulation/OGC/DRE
400 West Robinson Street, Suite N801
Orlando, Florida 32801-1757

For Respondent: Nancy Pico Campiglia, Esquire
Your Towne Law, P.A.
Suite 302
1720 South Orange Avenue
Orlando, Florida 32806

STATEMENT OF THE ISSUES

Whether Respondent acted as a real estate agent without being licensed in violation of section 475.42(1)(a), Florida Statutes, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On August 13, 2015, Petitioner, Department of Business and Professional Regulation, Division of Real Estate, filed an Administrative Complaint (complaint) against Respondent, Richard L. Sovich (Respondent or Mr. Sovich). The complaint alleges Respondent violated section 475.42(1)(a):

- a. By renting out Complainant's property in exchange for receiving valuable consideration.
[and]
- b. By not having a valid and current broker's or sales agent's license at the time.

On August 31, 2015, Respondent disputed the allegations via an "Answer to Administrative Complaint and Election of Rights, and Affirmative Defenses."^{1/} Respondent requested a hearing pursuant to sections 120.569(2)(a) and 120.57(1), Florida Statutes. On January 20, 2017,^{2/} the case was referred to the Division for the assignment of an administrative law judge. Following the timely receipt of a joint response to the Initial Order, an Amended Notice of Hearing was issued scheduling the matter for hearing to be conducted on March 16, 2017.

On March 2, 2017, Petitioner filed a Motion to Relinquish Jurisdiction. Respondent opposed the motion. Also, on March 2,

Respondent filed a "Unilateral Pre-Hearing Stipulation," and on March 3, Petitioner filed a "Unilateral Pre-Hearing Stipulation."^{3/} On March 10, 2017, the undersigned issued an Order Denying the Motion to Relinquish Jurisdiction.

On March 10, 2017, Petitioner filed a Supplemental Response to the Unilateral Pre-hearing Stipulation Regarding Proposed Exhibits (supplemental response) and a Motion for Court to Take Judicial Notice (judicial motion) of section 455.228. The supplemental response was offered to clarify "the exhibits from the Investigative Report that it intend(ed) to introduce and use at the hearing." Section 455.228 provides the parameters for the "[u]nlicensed practice of a profession, cease and desist notice, civil penalty, enforcement, citations, [and] allocation of moneys collected." Within this judicial motion, Petitioner averred that Respondent did not object to it, and the judicial motion was granted on March 13, 2017.

On March 15, 2017, Respondent filed a Motion in Limine seeking to "preclude the admissibility of Petitioner's Exhibit, whether as a single document as set forth in the Pre-hearing Stipulation, or in strategic parts as Petitioner proposes in its Supplemental Response." Petitioner's Response to the Motion in Limine was filed later that same day. Based on the late filing of the Motion in Limine (the day before the hearing), the parties were afforded the opportunity to present further argument at the

hearing. Following the opportunity for further argument, the Motion in Limine was denied.

Petitioner presented the testimony of Petitioner's Unlicensed Activity Investigative Supervisor Brian McAvoy, and the Complainant Elijah Manning.^{4/} Petitioner's Exhibits 1 through 3, 10, and 11 were admitted in evidence.

Respondent testified on his own behalf, and presented the testimony of Jacqueline Woltmann. Respondent's Exhibits A and E were admitted in evidence.

The Transcript of the proceedings was filed with the Division on April 12, 2017. A Notice of Filing Transcript was issued on April 12, 2017, confirming the date for the submissions of any proposed recommended orders (PROs). Both parties timely filed a PRO, and each has been considered in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2016), which reflects the statutes in effect during the relevant conduct of Respondent. Section 475.42 has not had any statutory changes since 2012. All references to rules are to the Florida Administrative Code.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the administrative hearing, the following findings of facts are made:

COMPLAINT

1. This complaint was instituted when Mr. Manning became aware of a \$250.00 payment to a Keller Williams real estate agent (KW agent). Upon inquiring, Mr. Manning was told the fee was to pay the KW agent for securing the third tenant of his rental property located at 12522 Belcroft Drive, Riverview, Florida (property). Mr. Manning was not informed that this process would be engaged, and he was caught off guard when the payment came to light. Mr. Manning was also concerned that he was not receiving consistent payments for the rental of his property.

PARTIES

2. Petitioner is the state agency charged with the responsibility of regulating the real estate industry pursuant to chapters 455 and 475. Petitioner is authorized to prosecute cases against persons who operate as real estate agents or sales associates without a real estate license.

3. At all times material, Respondent was not a licensed real estate broker, sales associate or agent. Respondent is a co-owner of J & D Associates, a property management company that he owns with his wife, Ms. Woltmann. Additionally, J & D Associates was not licensed as a real estate broker, sales associate or agent.

PARTICULARS

4. In 2012, Mr. Manning was serving in the U.S. Air Force, and was stationed in the Tampa Bay area of Florida. At some point, Mr. Manning received military orders to report to Texas for additional cross-training.

5. Mr. Manning wanted to sell his property, and he was referred to Ms. Woltmann, a Florida licensed real estate agent. Mr. Manning and Ms. Woltmann met and discussed the possibility of selling Mr. Manning's property.

6. Ms. Woltmann performed a market analysis and determined that Mr. Manning would have to "bring money" to a closing in order to sell his property. Mr. Manning made the decision that he would rent his property. Thereafter, Ms. Woltmann introduced Mr. Manning to Respondent.

7. Mr. Manning assumed that Respondent was a licensed real estate agent. If he had known that Respondent was not a licensed real estate agent, Mr. Manning would not have hired Respondent.

8. On or about April 26, 2012, Respondent executed a "Management Agreement"^{5/} (Agreement) with Mr. Manning, regarding his property. The Agreement provided in pertinent part the following:

EMPLOYMENT & AUTHORITY OF AGENT

1. The OWNER [Mr. Manning] hereby appoints J & D Associates as its sole and exclusive AGENT to rent, manage and operate the PREMISES [12522 Belcroft Drive, Riverview, Florida].

2. The AGENT is empowered to institute legal action or other proceedings on the OWNER'S behalf to collect the rents and other sums due, and to dispossess tenants and other persons from the PREMISES for cause.

* * *

RESPONSIBILITIES OF THE AGENT:

In addition to the forgoing authorizations, the AGENT will perform the following functions on the OWNER'S behalf.

1. Collect all rents due form [sic] the tenants. Deduct from said rent all funds needed for proper disbursements of expenses against the PROPERTY and payable by the OWNER, including the AGENT'S compensation.

2. Collect a security deposit received from a tenant of the PROPERTY and place it into an escrow account as required by the laws of the State of Florida.

COMPENSATION OF THE AGENT:

In consideration of the services rendered by the AGENT, the OWNER agrees to pay the AGENT a fee equal to FIFTY PERCENT (50%) OF THE FIRST MONTH'S RENT AND ten percent (10%) per month of the monthly rent thereafter during the term of the tenancy as management fees for the PROPERTY. In the case of holding over the lease beyond the terms of the lease by the same tenant, the Fifty (50%) up front [sic] fee shall also be waived and only the TEN PERCENT (10%) per month fee shall apply.

The Fifty (50%) fee shall apply to new tenants only. In the case of a tenant moving out within the first three months of the tenancy, then the fee for obtaining a new tenant and new lease shall be only FIFTEEN PERCENT (15%) of the first month's rent from the new tenant and TEN PERCENT (10%) of the monthly rent thereafter. (Emphasis added via underline.)

9. At various times, Respondent provided Mr. Manning a list of eligible tenants. Also, Respondent would provide his opinion as to who would be the best candidate to rent the property. Mr. Manning would, "nine times out of ten," go with Respondent's recommendation for the rental tenant.

10. In June 2012, "Richard L. Sovich J & D Associates, Agent For Elijah Manning," executed a "Residential Lease for Single Family Home and Duplex" with a tenant. On the signatory page, the following printed form language is found on the upper half of the page:

This Lease has been executed by the parties on
the date indicated below:

Respondent's signature is over the "Landlord's Signature line,
"As" "Agent."

11. On the lower half of the signatory page, the following printed form language is found; the handwritten information is found in italics:

This form was completed with the assistance of
Name *Richard Sovich*
Address *1925 Inverness Greens Drive*
Sun City Center, Fl 33573-7219
Telephone No. *813/784-8159*

12. Ms. Woltmann testified that she had a listing agreement for each time she listed Mr. Manning's property for rent. With each listing agreement, Ms. Woltmann was able to list the property in the multiple-listing system (MLS)^{6/} while she was associated with the Century 21, Shaw Realty Group. The three

listings, as found in Respondent's composite Exhibit E, included (along with other information) the list date, a picture of the property taken by Ms. Woltmann, and the dates the property would be available: May 5, 2012, for the rental beginning on June 1, 2012, at \$1,550.00 per month; November 1, 2012, for the rental beginning on December 1, 2012, at \$1,550.00 per month; and March 14, 2014, for rental beginning on May 1, 2014, at \$1,600.00 per month.

13. Each time the property was rented, Ms. Woltmann changed the MLS listing to reflect the actual lease dates: June 16, 2012; December 13, 2012; and May 19, 2014, and each was rented at the monthly rental price listed.

14. Ms. Woltmann claimed that the rental price had to be lowered for the second rental. However, the documentation that she confirmed she inputted into the MLS at the time the property was rented, reflects the rental price was not lowered during the second rental period.^{7/} The rental price was actually raised for the third rental period.

15. Ms. Woltmann also claimed she procured the first two tenants for Mr. Manning's property and waived (with the consent of her broker agent) her lease fee each time.

16. Three years ago (2014) during the Manning lease periods, Ms. Woltmann "left abruptly" the real estate company she was working for and that company "is now closed." Yet, she testified

that those listing agreements "should be there" if she went back to her broker and asked for them. Based on inconsistencies in her testimony, Ms. Woltmann's testimony is not credible.

17. Mr. Manning received payments from Respondent for approximately three years totaling "about \$45,000." Mr. Manning paid Respondent "maybe four or five thousand dollars. Maybe a little bit less" for his service.

18. Respondent admitted he received compensation from the rental of Mr. Manning's property for approximately three years, but denied that he procured any tenants for the property.

19. It is determined that the testimony of Respondent and his wife Ms. Woltmann, is not credible and persuasive. Neither can be considered "disinterested." The testimony of Mr. Manning is more credible.

20. As the investigator supervisor, Mr. McAvoy is knowledgeable about the purpose of conducting unlicensed activity investigations. Its purpose is "to investigate matters surrounding unlicensed activity within the real estate profession . . . so to protect the public from possible harm surrounding those transactions." Each investigator is required to record the amount of time spent in an investigation. An investigation was undertaken regarding Mr. Manning's complaint. Petitioner incurred \$49.50 in investigative costs during this case.

CONCLUSIONS OF LAW

21. The Division has jurisdiction over the parties and subject matter and parties to this action, pursuant to section 120.57(1).

22. Petitioner is the state agency, created by section 20.165, Florida Statutes, that is charged with regulating the real estate industry pursuant to chapters 455 and 475. Pursuant to section 455.228, Petitioner is authorized to prosecute cases against persons who operate as real estate agents or sales associates without a real estate license.

23. Petitioner has the burden of proving, by clear and convincing evidence, that Respondent operated as an unlicensed real estate agent/sales associate. Dep't of Banking & Fin. v. Osborn Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

24. The Supreme Court has stated:

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)).

25. The complaint alleges that Respondent violated section 475.42(1) (a) in the following ways:

- a. By renting out Complainant's property in exchange for receiving valuable consideration.
- b. By not having a valid and current broker's or sales agent's license at the time.

26. Section 475.42(1) (a) provides the following:

A person may not operate as a broker or sales associate without being the holder of a valid and current active license therefor.

This statute warns that a violation of this law is a felony.

27. Section 475.01 provides in pertinent part the following:

As used in this part:

(a) "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.

* * *

(j) "Sales associate" means a person who performs any act specified in the definition of "broker," but who performs such act under the direction, control, or management of another person. A sales associate renders a professional service and is a professional within the meaning of s. 95.11(4)(a).

28. Petitioner established by clear and convincing evidence that Respondent rented out Mr. Manning's property on at least one occasion, and did so while Respondent did not have a valid and current broker's or sales agent's license. Specifically, for the

third rental period, the evidence supports that a real estate agent secured the third tenant.

PENALTY

29. Finally, the undersigned must determine the appropriate penalty to impose against Respondent.

30. In the complaint, Petitioner put Respondent on notice that it was seeking a final order that imposed "one or more of the following penalties: imposition of an administrative fine not to exceed \$5,000 per incident; assessment of costs associated with the investigation and prosecution (excluding costs associate with an attorney's time); and/or any other relief the Department is authorized to impose pursuant to chapters 455 and 475, Florida Statutes, and/or the rules promulgated thereunder."

31. Petitioner's Proposed Recommended Order requested that Respondent be found guilty of violating section 475.42(1)(a), a penalty of \$3,000 (the fine authorized by section 455.228) and \$49.50 for the recovery of its investigative expenses within 30 days from the effective date of the final order.

32. Section 455.2273(5) provides the following:

(5) The administrative law judge, in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based.

33. Florida Administrative Code Rule 61-5.007 sets forth the recommended range of penalties for unlicensed activity. In pertinent part, rule 61-5.007 provides the following:

(1) In imposing disciplinary penalties upon unlicensed persons, the Department of Business and Professional Regulation (hereinafter "Department") shall act in accordance with the following disciplinary guidelines and shall impose a penalty consistent herewith absent the application of aggravating or mitigating circumstances and subject to the provisions of Sections 455.227 & 489.13, F.S.

* * *

(3) All penalties established herein are for each count or separate violation found.

* * *

(6) For practicing a profession without holding the requisite license to do so, the following penalties shall apply:

(a) First violation - \$3000 administrative fine;

(b) Second violation - \$4000 administrative fine; and,

(c) Third and subsequent violations - \$5000 administrative fine.

* * *

(8) Circumstances which may be considered for the purposes of mitigation or aggravation of the foregoing penalties shall include the following:

(a) Monetary or other damage to the unlicensed person's customer and/or other persons, in any way associated with the violation, which damage the unlicensed person

has not relieved as of the time the penalty is to be assessed.

- (b) The severity of the offense.
- (c) The danger to the public.
- (d) The number of repetitions of offenses.
- (e) The number of complaints filed against the unlicensed person.
- (f) The length of time the unlicensed person has been engaging in unlicensed activity.
- (g) The actual damage, physical or otherwise, to the unlicensed person's customer.
- (h) The deterrent effect of the penalty imposed.
- (i) The effect of the penalty upon the unlicensed person's livelihood.
- (j) Any efforts at rehabilitation.
- (k) The unlicensed person's use of an altered license or impersonation of a licensee.

34. Aggravating or mitigating circumstances may be considered in arriving at an appropriate penalty, including deviation from the guidelines in imposing or recommending discipline. The undersigned declines to recommend the maximum fine as significant time has elapsed, over 500 days since the violation, which is directly attributable to Petitioner's decision to wait to forward Respondent's request for hearing to the Division. Under the circumstances, a fine of \$500 and imposition of the costs (\$49.50) is a fair and appropriate penalty.

RECOMMENDATION

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Florida Real Estate Commission finding Richard Sovich in violation of section 475.42(1)(a), Florida Statutes, as charged in the Administrative Complaint; and imposing an administrative fine of \$500, and \$49.50 as reasonable costs.

DONE AND ENTERED this 5th day of May, 2017, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of May, 2017.

ENDNOTES

^{1/} Respondent asserted that Petitioner's notice to cease and desist (notice), issued on November 13, 2014, "resolved the matter between the parties and bars further administrative action as to the same transaction and occurrence except as agreed to therein." The notice did not.

The notice was issued on November 13, 2014, and cited "Chapter 475, Florida Statutes," and provided that:

Probable cause is based on the following facts:

On, June 16, 2014 at 1925 Inverness Greens Dr. in the City of Sun City Center, Hillsborough County, Florida, you:
Renting or Leasing or attempts to rent or lease real property of another for compensation. (Emphasis supplied; grammatical errors have not been revised.).

Section 455.228, Florida Statutes, provides the standards by which Petitioner may issue a cease and desist notice. In pertinent part, section 455.228 provides the following:

(1) When the department has probable cause to believe that any person not licensed by the department, or the appropriate regulatory board within the department, has violated any provision of this chapter or any statute that relates to the practice of a profession regulated by the department, or any rule adopted pursuant thereto, the department may issue and deliver to such person a notice to cease and desist from such violation. . . . In addition to the foregoing remedies, the department may impose an administrative penalty not to exceed \$5,000 per incident pursuant to the provisions of chapter 120 or may issue a citation pursuant to the provisions of subsection (3).

Respondent was charged with a specific violation of section 475.42(1) (a) .

^{2/} Over 500 days elapsed between the time Respondent requested a hearing and when the matter was transferred to the Division. No explanation was provided for the lengthy delay.

^{3/} Each side filed a unilateral statement as to their respective position.

^{4/} Prior to the hearing, Petitioner filed a motion seeking to allow Mr. Manning to appear via telephone. Respondent did not object, and the motion was granted. The Notary Public who

administered the oath to Mr. Manning completed and filed the Statement of Person Administering Oath with the Division.

^{5/} The Agreement was executed on or about April 26, 2012, however, in the initial paragraph, the Agreement reflects that the Agreement was "made this 23rd day of February 2012." The discrepancy in the dates was never addressed.

^{6/} The MLS allows other realtors to view the multiple listings of various properties. The realtors then share that information with potential buyers or renters.

^{7/} When answering a question about what was depicted in Respondent's Exhibit E (a composite exhibit which contained the three MLS listings), Ms. Woltmann testified:

These depict--depict the listings as put them in each time for lease and I had explained to you earlier, it depends on the market what you're going to agree to lease it at and we did have the second time where we had lowered it . . . we were--went down \$50 to try to secure a quick tenant, which we did.

COPIES FURNISHED:

Nancy Pico Campiglia, Esquire
Your Towne Law, P.A.
Suite 302
1720 South Orange Avenue
Orlando, Florida 32806
(eServed)

Neal James Lawson, Esquire
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399
(eServed)

Daniel Allen David, Esquire
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399
(eServed)

Allison Carmine McDonald, Esquire
Department of Business & Professional
Regulation/OGC/DRE
400 West Robinson Street, Suite N801
Orlando, Florida 32801-1757
(eServed)

Juana Watkins, Director
Division of Real Estate
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N801
Orlando, Florida 32801-1757
(eServed)

Paige Shoemaker, Deputy General Counsel
Office of the General Counsel
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

Jason Maine, General Counsel
Department of Business and
Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

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.