

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND 02920

FRANK THIBAULT,	:	
Complainant,	:	
	:	
v.	:	DBR No. 09-L-0065
	:	
AMY SHAW AND KENNETH SHAW	:	
d/b/a BARRINGTON ANTIQUE & AUCTION,	:	
Respondents.	:	

DECISION

Hearing Officer: Neena Sinha Savage, Esq.

Hearing Held: April 28, 2009

Respondents' Counsel: Suzanne Turcotte, Esq., 96 Alfred Drowne Road, Barrington, RI

Complainant: *Pro se*

I. INTRODUCTION

The above-entitled matter came before the Department of Business Regulation (“Department”) as the result of a complaint filed by Frank Thibault (“Complainant” or “Thibault”) on February 9, 2009 (“Complaint”) against Amy Shaw and Kenneth Shaw, owners and auctioneers¹ of Barrington Antique & Auction (“Respondents” collectively). Respondents are licensed and operating as an Auctioneer (Amy Shaw) and Apprentice Auctioneer (Kenneth Shaw), pursuant to R.I. Gen. Laws § 5-58-1 *et seq.*

The Complaint alleges that Respondents engaged in conduct that violated Commercial Licensing Regulation 2 (“CLR 2”) § 9(a)(5) issued pursuant to R.I. Gen. Laws § 5-58-6. R.I.

¹ Amy Shaw is a licensed Auctioneer, Rhode Island License Number 8700 and Kenneth Shaw is an Apprentice Auctioneer, Rhode Island Permit Number 2535.

Gen. Laws § 5-58-8 provides that the Department may suspend or revoke an Auctioneer's license, and/or impose other administrative penalties for conduct in violation of various rules promulgated by the Department. CLR 2 § 9(a)(5) prohibits Auctioneers from engaging in conduct that demonstrates "bad faith, dishonesty, incompetency, or untruthfulness" under penalty of suspension or revocation of license. Complainant alleges that the Respondents' conduct with regard to the consignment and auction of an autographed piece of sports memorabilia was improper and falls within the scope of conduct proscribed by the Department's regulation.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws §§ 5-58-1, *et seq.*, 42-14-1, *et seq.*, and 42-35-1, *et seq.*

III. ISSUES PRESENTED

A. Whether or not Respondents engaged in conduct that demonstrated bad faith, dishonesty, incompetency, or untruthfulness with respect to the licensed profession of auctioneering pursuant to CLR 2 § 9(a)(5) promulgated by the Department under the authority of R.I. Gen. Laws § 5-58-8.

B. Whether there was an agreement alleviating the responsibility of the Respondents to remit payment for the item sold to the Complainant consignor within thirty (30) days of the final disposition of the subject personalty as required by CLR 2 § 6(a).

C. If there is evidence of failure to comply with CLR 2 §§ 9(a)(5) and 6(a) what is the penalty for each Respondent.

IV. MATERIAL FACTS AND TESTIMONY

This matter came on for hearing on April 28, 2009. The Complaint, filed on February 2, 2009 involved the Complainant's consignment of a pair of boxing gloves believed to be autographed by the late Rocky Marciano (the "gloves") for auction to the Respondents' business. According to the Complaint, Complainant contacted Barrington Antique & Auction in late February 2008 after locating its listing in the phone book. Complainant spoke to Kenneth Shaw about a pair of autographed boxing gloves that he wanted to sell. After Respondents expressed interest in auctioning the gloves, Respondent Kenneth Shaw and Complainant met to enter into a consignment agreement. Complainant testified that he told Respondent Kenneth Shaw that another auctioneer told him that he could get \$2,200 for the gloves. The Complainant also asserts that Respondent Kenneth Shaw "...said he would try to sell them close to that [between \$2,000 and \$3,000] at his Auction in April." (Complainant's Exh. 1, page 8). The gloves are marked with a cardboard tag that states, "these gloves were given to Ron Tolin by Rocky Marciano Chicago Fight Champ." Complainant also informed Respondent Kenneth Shaw of a previous offer to purchase the gloves for \$600 that he had rejected. Based upon this meeting, the parties formalized their consignment agreement through the execution of the Consignment Control Agreement (Respondents' Exh. 2). At the bottom of this Consignment Control Agreement, the contractual language provides that the Respondents are "commissioned to sell the items listed above to the highest bidder by public auction." The Consignment Control Agreement is undated and does not indicate the term of the consignment. There is no mention of a reserve, or minimum price in the text. Upon signing the Consignment Control Agreement, Respondent left with the gloves with the intention of selling them at his April 5, 2008 auction. After questioning by the Hearing Officer, and giving several different responses to the question

of whether Respondent Kenneth Shaw explained the reserve process (minimum price) option to Complainant, Respondent finally admitted that he did not explain the reserve process to Complainant (even though the Complainant explained that he did not want the gloves to go for “nothing” and that he had rejected a \$600 offer previously). There are no written contemporaneous notes of any of the conversations or phone calls with Complainants. At various times during the hearing, Respondents stated that they understood Complainant did not want to sell the gloves for a low price.

At the April 5, 2008 auction, the opening bid for the gloves began at \$100 (and went down to \$25) and when there were no bids at that price or a lower price, the gloves were passed. The text of the Complaint and Complainant’s testimony indicates that Complainant was present to observe this auction. Complainant testified that if anyone were to bid on the gloves at \$100 or below, he would have “grabbed them” because he “knew they were worth more.” During a break in the auction, Complainant stated that he approached Respondent Kenneth Shaw and asked him why he let the bid go so low. Complainant testified that Respondent Shaw stated that he was doing a “spin around” bid but did not explain what a “spin around” bid was to Complainant. Respondents have stated in their written answer that they did not reference a “spin-around” bid, do not know what it is, and did not tell him of such a bid. (Amy Shaw testified that she understood that Complainant did not want to sell the gloves for a low price.) Additionally, in Respondents’ Exhibit 1 (their response to the Complaint), they state that at the April 5, 2008 auction when no one bid on the gloves at \$50, “we passed them, realizing that the consignor would not be happy with \$20 or \$30.”

Sometime after the first auction, Complainant testified that he called Respondent and was told by Respondent Kenneth Shaw that a buyer had offered \$1,200. Complainant told Kenneth

Shaw to sell the gloves for \$1,200. The Complainant was later told by Kenneth Shaw that the buyer did not follow through with the sale. According to Complainant, Respondents then discussed the next step in attempting to sell the gloves, which resulted in the Respondents retaining possession of the gloves.

According to Respondents' testimony as well as documentary evidence, during the next several weeks (after the April 5, 2008 auction), Respondents state that they had various collectors look at the gloves, but no offers were made on them. Due to the difficulty in arranging a suitable sale, Respondents state that they informed Complainant of their intention to return the gloves. This fact is disputed by the Complainant, who states that they did not tell him they were going to return the gloves but Complainant instead asserts that Respondent Kenneth Shaw told him there was a collector who offered Respondents \$1,200 for the gloves only to not return and complete the transaction for the outright sale once Complainant's permission had been obtained.

The Respondents provide two (2) different positions with respect to the offer of \$1,200 for the gloves. In Respondents' Exhibit 1, Respondents' answer to the Complaint (received by the Department on February 25, 2009), they state, "I do not know where Mr. Thibault came up with the figure of \$1,200. That figure was never discussed." In documents provided to the Hearing Officer by the Respondents after the close of hearing, Respondents state, in describing a telephone conversation with Complainant on April 21, 2008:

April 21 11:11am Mr. Thibault called cell phone of Kenneth Shaw At 11:26 am I returned his call:

A discussion of options for the selling or giving back of the boxing gloves. I told Mr. Thibault that we would be happy to return the gloves or we could try to sell them privately to a New Hampshire dealer who had shown interest from an ad he received prior to the auction. He had been unable to attend the auction. I told Mr. Thibault that he was willing to pay \$1,200 if the gloves were authentic. Mr. Thibault agreed, and I offered them to this New Hampshire dealer. He declined to buy them, stating that they were

not authentic. (Please keep in mind that this New Hampshire dealer traveled over 4 hours round trip to decline these gloves.) (Emphasis added via underlining).

After this point, the facts asserted by the parties diverge completely. The Complainant states that he instructed Respondents to travel to the home of the Complainant's brother to examine several other items for consignment and auction that had been discussed previously, and to return the gloves at that time. Respondents, however, state that Complainant asserted that he needed money and that he needed the gloves sold, and in response to this, the Complainant was told that the gloves could be placed in a local auction without any reserve price. Respondents assert that Complainant consented to this auction and that he understood the term "no reserve." Complainant, however, states that he did not consent to this local auction and that he had asked that the gloves be returned. Nevertheless, the gloves went to auction at Cornerstone Auction Gallery's August 18, 2008 sale (where Respondents had placed it), where they sold for \$25.

Complainant stated at hearing that he called Respondents on September 18th or 19th, 2008 to again instruct them to get his brother's items and return the gloves. It was at that time, that he first learned that the gloves had sold. Complainant stated that Respondent Kenneth Shaw did not know the price at which the gloves had sold. Complainant called Respondent Kenneth Shaw back the next day, and Respondent Kenneth Shaw indicated to Complainant that the gloves had sold for \$85 after several attempts to sell the gloves and he sold them at that price because Respondent Kenneth Shaw knew that Complainant needed the money. Complainant asserts that he did not consent to a sale at that low a price. Complainant has not cashed the check and, asserted that if he needed the money as much as Respondents' assert, he would have cashed the check. Complainant also asserts that he held onto the gloves for 27 years and had rejected offers much greater than the price at which the gloves sold. After the sale, several weeks elapsed

before payment was remitted to Complainant in the form of a check, dated October 10, 2008 in the amount of eighty-five dollars (\$85.00).² It is unclear why the check is written for \$85 when, according to Respondents' explanation in their post-hearing submission, "they actually sold for \$25." It is not clear when Cornerstone Auction Galleries informed Respondents that the gloves actually sold for \$25, not \$85. Respondents explain in their Exhibit 1, that they were mistakenly told by Cornerstone Auction Galleries that the gloves were sold for eighty five dollars (\$85) when they actually sold for \$25 dollars and the receipt provided by Cornerstone Auction Galleries indicates that the gloves were sold for \$25 and a twenty-five percent (25%) commission was charged which resulted in Respondents being paid \$18.75 for the sale of the gloves. In Respondents' Exhibit 1 (received by the Department on February 25, 2009), Respondents state that, "[w]e were paid \$18.75 for the gloves and that is exactly what we will be paying Mr. Thibault." This statement is inconsistent with the fact that four (4) months previously they had sent a check dated October 10, 2008 for eighty five dollars (\$85) payable to the Complainant. At hearing, Respondents stated that they would pay Complainant \$85 for the gloves because of the mistake regarding the price. Upon questioning from the Hearing Officer regarding whether they had looked into buying the gloves back from the person who purchased them at auction (because they willing to pay \$85 for the gloves that were sold for \$25), Respondents said they had not and it would be impossible to figure out where the gloves were. Additionally, both Respondents stated that they took no steps to try to retrieve the gloves after auction in response to the Complainant's outrage and distress at losing the gloves at auction.

Upon the sale of the gloves for, at the least, an amount much lower than that expected by Complainant or, at worst, at a sale not authorized by the Complainant, the Complainant filed a

² The check, a copy of which appears in the Department's record of this matter is marked "paid in full boxing gloves" and was written for \$85, the substantial overage of the sale amount resulting in a miscommunication between Cornerstone Auction Galleries and Respondents.

claim with the Better Business Bureau, who forwarded the claim to Respondents. Upon failure of the Better Business Bureau to resolve the matter, Complainant contacted the Department and filed the instant claim.

Respondent Kenneth Shaw testified that he spoke to a sports memorabilia specialist who examined the gloves and determined that the quality of the signature on the tag may not have been authentic. It is not clear if this information was conveyed to Complainant. Complainant testified that Respondent Kenneth Shaw assured him that he was not “going to let them go for a low price.” Complainant further testified that the last conversation that he had with Respondent Kenneth Shaw was a clear instruction to him to return the gloves and the gloves were sold after that conversation. Respondent Amy Shaw reiterated the facts asserted by Kenneth Shaw but indicated that the consultation with experts did not lead to any interest in the gloves. She said that the prices discussed were only if the gloves were deemed to be authentic. The signature was not clear and affected the value of the gloves. Amy Shaw said there was no reserve on the item. Amy Shaw testified that if they had agreed on a reserve (a minimum price), that amount would be on the agreement. However, Ms. Shaw testified that they usually do not like to operate with reserves because they want to be able to sell the consigned items for whatever the bidding will support. Mr. Shaw did all of the communicating with the Complainant and did convey the Complainant’s request for return of the gloves to Ms. Shaw. Ms. Shaw testified that she told Mr. Shaw to give the gloves back. This corroborates the Complainant’s understanding of the facts. Respondents also assert that they told Complainant the gloves were not selling because they did not seem to be authentic and he was not going to receive a lot of money for the gloves. However, in the post-hearing marketing materials which advertised the August 18, 2008

Cornerstone Auction Gallery auction at which the gloves sold, the gloves are described as “Rocky Marciano’s Autographed Boxing Gloves,” and “Rocky Marciano signed boxing gloves.”

Complainant vehemently disputes the Respondents assertion that they could not send the gloves back because Complainant was moving. In fact, Complainant stated that he did not mention the move to anyone until the written Complaint was filed and in rebuttal to the Respondents’ assertions. Additionally, the Complainant asserted that the \$85 check was mailed in October 2008 to his brothers’ address and submitted the envelope addressed to his brothers’ address as evidence.

V. STANDARD OF REVIEW FOR AN ADMINISTRATIVE HEARING

It is well settled that in formal or informal adjudications modeled on the federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 at 759 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* At 763-766; see also, *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases); *Parker v. Parker*, 238 A.2d 57, 60 (R.I. 1968) (“satisfaction by a ‘preponderance of the evidence’ [is] the recognized burden [of proof] in civil actions”). This means that for each element to be proven, the fact finder must believe that the facts asserted by the proponent are more probably true than false. See *Parker*, 238 A.2d at 60. When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 100 (R.I. 2006).

Here, the proponent of this action is the Complainant, Frank Thibault. As such, he bears the burden for establishing why it is more likely than not that Respondents conducted themselves

in a manner that violated the statutes under which their respective Auctioneer license and Apprentice Auctioneer Permit are based.

VI. DISCUSSION

R.I. Gen. Laws § 5-58-8 provides that the Department, after a due and proper hearing, may suspend or revoke a license, upon proof that the holder of the license has engaged in certain conduct enumerated in the statute or in the Department's regulations. R.I. Gen. Laws § 5-58-8 also provides that in addition to suspension or revocation of a license, the Department may assess an administrative penalty not exceeding \$1,000 for any violation under R.I. Gen. Laws § 5-58-1 *et seq.* or the rules and regulations pertaining to the licensure of the Auctioneering profession.

The facts as presented support violations of CLR 2 §§ 9(a)(5) and 6(a) issued pursuant to R.I. Gen. Laws § 5-58-8. Each is addressed below.

A. Commercial Licensing Regulation 2 § 9(a)(5)

CLR 2 § 9(a)(5) authorizes the Department to suspend or revoke a license upon proof of "bad faith, dishonesty, incompetency, or untruthfulness." CLR 2 does not contain examples of what constitutes bad faith, incompetency, or untruthfulness, so it is reasonable to assume that their general usage and meaning apply. As such, bad faith should be understood to include "dishonesty of belief or purpose."³ Dishonesty should be understood to mean dishonesty relative to the conduct of business as an auctioneer, applicable especially when a fiduciary relationship exists between a consignor and consignee. Incompetency should be understood to mean the state of being "unable or unqualified to do something."⁴ Untruthfulness should be understood to mean providing untrue information, evidencing deceit or fraud.

³See *Black's Law Dictionary*, Seventh Edition (West Publishing Co. 1999).

⁴*Id.*

The sensitive nature of the business of auctioneering wherein personal property is consigned to an auctioneer for sale at public auction, oftentimes when the consignor is not present to observe the resulting transaction of the items, represents a fiduciary relationship that must out of necessity be based upon truthful and complete disclosure. It is for this reason that the Commercial Licensing Regulation places a heavy burden of truthfulness and honesty upon licensees. Thus, determining whether a licensee has violated this section of the regulations should be determined by the totality of the circumstances as they pertain to the relationship and conduct of the parties.

The Complaint and the response purport to tell two very different versions of the events that transpired during the sale of the gloves in question. Complainant's version of the story is that when the gloves failed to sell at the first auction, and when a subsequent outright buyer failed to materialize, that he requested the gloves be returned, and instead the gloves were brought to another auction and sold without his knowledge for a price substantially below the offers he had been conveyed and the price he expected (based upon conversations with the Respondents and his own belief that the gloves were authentic). The Respondents' version of the facts alleges that the Complainant repeatedly informed the Respondents that he needed money and that the gloves needed to be sold. Respondents state that Complainant specifically authorized the gloves to be brought to the Cornerstone Galleries Auction where they eventually sold.

According to Respondents' version of the facts, Respondents explained the no reserve process to Complainant in preparation for the second auction on August 18, 2008 by Cornerstone Galleries. The Respondents state that Complainant indicated that he understood and accepted this. However, Respondent Kenneth Shaw testified that he did not actually explain the reserve

process to Complainant. Additionally, Respondent Amy Shaw stated that they did not like to use reserves, or minimum prices because it limits the auctioneer and she also testified that she told Respondent Kenneth Shaw to return the gloves.

1. Incompetency

The allegation by the Complainant that the consignment relationship continued to exist after consignor unilaterally terminated it demonstrates incompetency, dishonesty, and/or bad faith if proven to be true. Upon a request to terminate the relationship and return the gloves, Respondents should have returned the gloves as soon as practicable, and at that point should certainly not have sold them. Although proof of termination of the consignment relationship (other than oral testimony by the Complainant) was not presented at hearing, the balance of the evidence presented is sufficient to indicate incompetency on part of the Respondents.

The fact that there is uncertainty relating to the intent of the consignor for the subsequent disposition of the consigned property at the second auction represents a failure regarding the requisite competencies of the profession on the part of the Respondents. Both Respondents had a duty (since they understood that the Complainant did not want to sell the gloves for a price significantly less than the \$600 he had previously rejected) to return the gloves to Complainant. Respondent Amy Shaw stated that she instructed Kenneth Shaw to return the gloves. But, they did not return the gloves. Their explanations that he insisted on selling them is inconsistent with their own testimony and Ms. Shaw's statement that she instructed Kenneth Shaw to return the gloves. The fiduciary relationship that exists between the consignor and consignee necessitates that a full explanation and understanding be achieved as to the mode of attempted disposition of the consigned property. Respondents argue that they are protected by the Consignment Control Agreement as it evidences the intent of Complainant, however this defense is without merit as

there is insufficient information presented by the language of the Consignment Control Agreement so far as there is no mention of a reserve price system—and Respondent Kenneth Shaw was not clear about exactly what he explained to the Complainant with respect to the reserve price. Complainant was advised that his gloves were worth between \$2,000 and \$3,000; he was induced to consign them as he was assured that he would receive ample compensation when the gloves sold. As of August 18, 2008, the gloves were still being marketed as if they were authentically autographed sports memorabilia. Regardless of the best intentions of an Auctioneer relying on commissions from sales to earn their wage, it is incompetent to advise and assure a consignor of an item's high value, and to assure a high price if sold, only to then later mention a no reserve term in passing to an unsophisticated consignor who does not understand the intricacies of the auction system.

An auctioneer is not liable for an estimated value, as such is contrary to the elastic nature of the auction system, however when placing a high value on an item, if the item does not sell, and the sale format is subsequently stripped of a reserve price, there should be evidence that the consignor actually intended to proceed sans reserve. There is no such evidence in this case. In fact, Complainant's understanding and Respondents' assurances and omissions (of explaining the reserve pricing option) led to unnecessary confusion in this matter. Further, it is unreasonable and incompetent to assure a consumer that an item is worth between \$2,000 to \$3,000, know that a prior offer of \$600 had been rejected, and an offer of \$1,200 had recently been received, and then rationalize that a sale of that item for \$25 would be acceptable to that consumer (while confirming the consignees' understanding in writing that "consignor would not be happy with \$20 or \$30"). The Respondents repeatedly assured (according to Respondents'

testimony) the Complainant that the gloves would not be sold “for nothing” but their actions are inconsistent their own admitted assurances to Complainant.

Further, the confusion regarding the sale price of the gloves and the lack of confirming documentation regarding the consignment underscores Respondents’ failure to attend carefully to details and their lack of professionalism.

The evidence adduced at hearing is sufficient to sustain a finding that Respondents were incompetent in their dealing with Complainant. They failed to explain the auction process, the options available, what options remained if the gloves did not sell, the term of the consignment, and the conditions of the consignment. They failed to act consistently with the instruction of the Complainant and failed to communicate effectively with the Complainant about what was happening with the gloves. Once the value of the gloves was unable to be verified, the Respondents should have clearly communicated the options available to the Complainant in writing. Whether the gloves were actually authentic is not relevant to the analysis of the Respondents’ actions. The Respondents had a duty to act consistently with the Complainant’s desire and perspective. The Complainant made clear from his first interaction with Respondent Kenneth Shaw that he believed the gloves to be authentic and had acted consistently with that belief. Complainant had rejected an offer of \$600 because he felt that the gloves were worth more.

It is clear from the testimony, that Respondents did not have a clear understanding of what was to happen to the gloves. At various points, they testified they were trying to return the gloves. This confusion was created by Respondents’ failure to effectively communicate with the Complainant and competently understand their role. The Respondents’ actions (of selling the gloves at auction for \$25) is also unreasonable given the totality of the facts.

2. Dishonesty

The contradictions in Respondents' own verbal and written testimony not only affects the assessment of their credibility but also warrants a serious consideration regarding whether those contradictions in testimony is evidence of dishonesty. The contradictions are:

- a. Respondents' statements regarding whether they explained the reserve or minimum price option to the Complainant. At first Respondent Kenneth Shaw stated that he explained the process, but then stated he did not.
- b. Respondents' written representations regarding the \$1,200 offer. One written statement states that \$1,200 was never discussed while another written statement explains the \$1,200 offer.
- c. Respondents' understanding regarding whether the gloves were to be returned. Amy Shaw testified that she told Mr. Shaw to return the gloves. The Respondents dispute that the Complainant ever told them to return the gloves. They testified that he wanted to sell the gloves, but also testify that they wanted to return the gloves but did not know his address.
- d. Respondents' understanding of the price of the gloves. The gloves did not sell for \$85. They stated that they were not going to issue a check for \$85, but for \$18.75 but in fact issued a check for \$85 to Complainant.
- e. Respondent Kenneth Shaw written statement (in the post-hearing submission) that Complainant called him on August 17, 18, and 22, 2008, but did not submit any phone records for August 2008. The phone records provided by Respondents are for specifically selected dates: April 21, 2008 (2 incoming calls for one minute each); May 22, 2008 (1 incoming call from Complainant for one minute); July 15,

2008 (1 incoming call from Complainant for two minutes); July 29, 2008 (1 incoming call from Complainant for three minutes); September 17, 2008 (1 incoming call for 1 minute); and, September 18, 2008 (1 incoming call for 1 minute). It is not clear why no phone records were provided for August 2008 to corroborate the alleged telephone calls by Complainant. Regardless of that corroboration, it is clear that based on Respondents' submission of the phone records, that Respondents' conversations with the Complainant were brief (the longest conversation was 3 minutes) and not frequent. This corroborates Complainants' testimony that he would call, get a status on the gloves, and requested that they be returned. Furthermore, Complainant writes after two times of trying to sell the glove:

...I spoke to him [Respondent Kenneth Shaw] over the phone telling him to come to my brothers house to his [Complainant's brother's] items, and Return Boxing Gloves then. He sold the gloves at Corner Stone without me knowing or calling me. He knows my number. (Complainant's Exhibit 2)

The Respondents assert confusion at pertinent times regarding the address of the Complainant, in that it was changing as he was moving. Respondents argue that this change in address made the return of the gloves as well as communication difficult. The Hearing Officer cannot find merit in this defense as it does not appear through the record that Complainant was ever out of telephone contact with Respondents. Further, if there was ever any confusion on part of the Respondents as to the address of Complainant for purposes of returning the gloves or continuing communications, prudence would indicate that a final disposition of the property could not be made until definite permission to do so could be obtained.

The above contradictions and evidence of confusion not only supports a finding of incompetence but it also demonstrates Respondents' dishonesty in performing their licensed activities.

B. Commercial Licensing Regulation 2 § 6(a)

The other statutory provision implicated in this matter, though not argued by Complainant, has nonetheless been implicated through both the admissions of Respondents and the evidence and testimony adduced at the Hearing. The Complainant is a pro se litigant and not a licensee of this Department, and as such is under no burden to know the law, rather a pro se litigant oftentimes only knows that they are aggrieved and should seek redress. The Respondents, however, are licensees and are under a burden to know the laws and regulations relevant to their profession.

CLR 2 § 6(a) provides that one of the responsibilities of a licensee is to remit payment to consignors of goods sold within thirty (30) days of the disposition of the consigned property unless the Auctioneer has entered into a written agreement with the owner or consignor to the contrary. Here, by the Respondents' admissions, the gloves were sold at Cornerstone Auction Galleries in August, and payment was remitted to Complainant in October. There was no agreement authorizing this delay. Respondents testified that following the sale of the gloves there was at least perceived difficulty contacting the Complainant via mail due to a recent move; however, they were in constant contact with the Complainant via telephone. As such, the Complainant did not disappear from July until October, suddenly appearing and requesting payment. Rather, there appears to be no compelling reason justifying the delayed payment.

As such, the Respondents' testimony and their submitted exhibits establish that the Respondents violated CLR 2 § 6(a).

C. Respondent Kenneth Shaw's Past Enforcement History

The undersigned Hearing Officer takes administrative notice of a Consent Agreement (a public record) entered into between the Department and Kenneth Shaw on October 10, 2006. This Consent Agreement, which is attached and incorporated herein in full as Exhibit A, gives Respondent Kenneth Shaw a conditional permit until December 1, 2009. The pertinent conditions on the issuance of his conditional apprentice auctioneers permit are that he:

- f. waived his right to obtain a full auctioneer's license until December 1, 2009;
- g. comply with all terms and requirements for licensure under R.I. Gen. Laws §§ 5-58-1 *et seq.* and CLR 2;
- h. ...shall immediately report to the Department any charge, allegation, complaint, or other action that may rise to the level of a criminal proceeding or civil action.

The Consent Agreement states that during the course of Respondent Kenneth Shaw's initial application process in 2006, the Department became aware of Respondent Kenneth Shaw's April 30, 1998 conviction to a plea of *nolo contendere* to conspiracy which resulted in a ten (10) year suspended sentence and probation for a period of ten (10) years. The undersigned was not presented with evidence regarding whether or not the Respondents' timely complied with the terms of the Consent Order (by reporting the Better Business Bureau Complaint). Also, the violations found herein, may be a potential violation of the Consent Agreement because it requires Respondent Kenneth Shaw to comply with statutory and regulatory requirements. Additionally, the Department will also have to assess if Ms. Shaw violated any statutes or regulations in not properly supervising Mr. Shaw's compliance with the Consent Agreement. Based on the facts related to Mr. Shaw's conduct with respect to the instant matter, the undersigned is concerned about and must necessarily refer this matter for further enforcement

due to the potential violation of the Consent Agreement by both Respondents for the violations found herein and for failure to comply with the terms of the Consent Agreement.

The facts stated in the Consent Agreement and the facts evident in the instant proceeding also give rise to a concern regarding the Respondents' ability to act consistently with the public interest in carrying out their respective licensed activities.

VII. DUTIES AND VIOLATIONS OF EACH RESPONDENT

Respondent Amy Shaw is licensed as an Auctioneer and is the listed supervisor for Respondent Kenneth Shaw who is licensed as an Apprentice Auctioneer. The Respondents' combined inaction and action evidence incompetence. The inconsistencies, contradictions in testimony as well as the confusion associated with their business demonstrate dishonesty. The record of this proceeding indicates that Kenneth Shaw engaged in most all, if not all, of the communications with Complainant. Amy Shaw testified that she supported Mr. Shaw's actions. The responses to the Complaint are signed by both Respondents. It is clear from the record that Amy Shaw did not properly supervise the communications and interaction between Mr. Shaw and the Complainant. Ms. Shaw testified that she told Mr. Shaw to return the gloves. Therefore, at some point in time, she was aware that the Complainant had an expectation of having the gloves returned or that Mr. Shaw should have been returning the gloves. Ms. Shaw did not follow through with her supervisory duties in finding out why the gloves were not returned.

Their inconsistent testimony and written evidence regarding the \$1,200 proposed offer also undermines their credibility and supports a finding of incompetence, at best, and bad-faith or dishonesty, at worst. Their collective incompetence and dishonesty is encompassed under a violation under CLR 2 § 9(a)(5). Based on the above facts, Respondent Amy Shaw's failure to properly supervise Mr. Shaw supports a finding of a violation under CLR 2 § 9(a)(5) based on

incompetency. Respondent Kenneth Shaw's actions in this consignment also evidence a violation pursuant to CLR 2 Section 9(a)(5) based on incompetency and dishonesty.

The undersigned Hearing Officer analyzed the contradictions in testimony and evidence in order to evaluate an appropriate penalty under the circumstances. Given the scope of penalties allowed pursuant to R.I. Gen. Laws § 5-58-8 (revocation, suspension, and/or administrative penalty), it is necessary to explain the rationale for the penalty imposed in this matter. After taking into account the testimony of the Respondents and the conduct of each of the Respondents, and the reasonable expectation of the Complainant, it is necessary to impose a penalty that fits the egregiousness of the Respondents' established violations. The Respondents both violated CLR 2 §§ 6(a) and 9(a)(5) as explained herein. Further, Respondents' inconsistent and contradictory testimony as described herein enhance the egregiousness of the violations. That is, while mere incompetence may be explained and attributed to many factors (none of which were proposed or explained by the Respondents), the element of dishonesty indicates an intentional behavior that is more difficult to explain and, for this agency's purposes, regulate. Therefore, it is necessary to impose a penalty that fits the seriousness of the Respondents' violations. The maximum monetary penalty under the statute for the two regulatory violations by each Respondent is not sufficient given the Respondents' actions and omissions. Based on the facts in this matter, the undersigned finds that because of the intentional acts of dishonesty displayed by Respondents during their respective violation of regulatory requirements, the undersigned Hearing Officer respectfully recommends that Respondent Amy Shaw's license be suspended for thirty (30) days and Respondent Kenneth Shaw's permit be suspended for sixty (60) days, and each Respondent pay a penalty of \$2,000.00 (\$1,000 per violation of the two regulatory sections, CLR 2 §§ 6(a) and 9(a)(5)). The undersigned Hearing Officer is

recommending a shorter suspension for Ms. Shaw because she had limited, if any, direct contact with the Complainant. However, her failure to supervise Mr. Shaw clearly demonstrated her incompetence especially with an existing conditional Consent Agreement and therefore, warrants a suspension beyond a monetary penalty. Respondent Kenneth Shaw is prohibited from having any involvement with any activities under R.I. Gen. Laws § 5-58-1 during the period of time that his license is suspended. The undersigned Hearing Officer is cognizant that Ms. Shaw's marital relationship with Mr. Shaw poses a regulatory problem in confirming that he is not involved in any activities requiring licensure or permit during his sixty (60) day suspension; however, the undersigned has specifically suspended Mr. Shaw's license for a longer period of time in order to give the Department time to address the inherent violation of the Consent Agreement by the Respondents presented by the violations found herein.

VIII. FINDINGS OF FACT

1. The facts contained in Sections IV, VI, and VII are incorporated herein.
2. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI, there is sufficient evidence to establish that Respondents' business practices indicate a failure to adequately advise Complainant of the remote likelihood of achieving an agreeable sale price at the Cornerstone Galleries auction, that Respondent Kenneth Shaw failed to adequately explain the reserve system, and that Respondent Kenneth Shaw failed to ascertain in a sufficiently definite manner the intent of the Complainant regarding the ultimate disposition of his property.
3. That the period of time elapsing between the sale date and the remittance of payment to the Complainant was in excess of thirty (30) days without a written agreement authorizing the delay.

4. That in her role as supervisor and as Respondent Kenneth Shaw's wife, Respondent Amy Shaw knew about his prior criminal history and the aforementioned Consent Agreement and should have closely supervised his activities.
5. That Respondents' failure to comply with the statutory and regulatory requirements as described herein is an implicit violation of Mr. Shaw's existing Consent Agreement.

IX. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

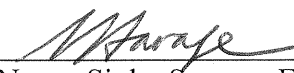
1. The Department has jurisdiction over this matter as set forth in Section 2, *supra*.
2. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI, Complainant established that Respondents exhibited incompetency and dishonesty in the carrying out of their auctioneering business, pursuant to CLR 2 § 9(a)(5).
3. Under the Standard set forth in Section V and the statutory framework and analysis set forth in section VI, it has been established that Respondents violated CLR 2 § 6(a) by failing to remit proceeds from the sale of Complainant's property within thirty (30) days and without a written agreement to the contrary.

X. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Director of the Department of Business Regulation find that Respondents committed a violation of CLR 2 §§ 6(a) and 9(a)(5) pursuant to R.I. Gen. Laws § 5-58-8 and imposes an administrative penalty to be attributed as follows:

1. \$1,000 to Respondent Amy Shaw for her failure to adequately supervise Respondent Kenneth Shaw and demonstrating incompetence and dishonesty (CLR 2 § 9(a)(5));
2. \$1,000 to Respondent Kenneth Shaw for his failure to act in a competent and honest manner (CLR 2 § 9(a)(5));
3. \$1,000 per Respondent for the violation of CLR 2 § 6(a).
4. Respondent Amy Shaw's Auctioneer License Number 8700 shall be suspended for thirty (30) days for the violations under CLR 2 §§ 6(a) and 9(a)(5).
5. Respondent Kenneth Shaw's Apprentice Auctioneer Permit Number 2535 shall be suspended for sixty (60) days for the violations under CLR 2 §§ 6(a) and 9(a)(5).
6. The matter is referred to the Division of Commercial Licensing of the Department for further enforcement for the potential violation of the terms of the existing Consent Agreement.

Dated: Jan. 19, 2010



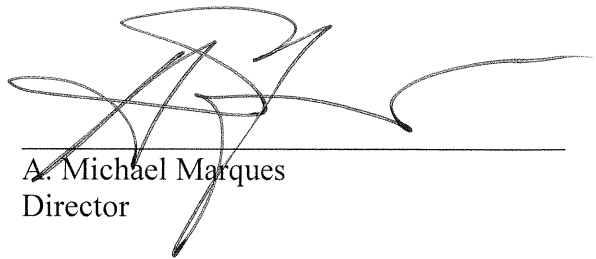
Neena Sinha Savage, Esq.
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Order in this matter, and I hereby take the following action:

ADOPT
 REJECT
 MODIFY

Dated: 01-20-2010



A. Michael Marques
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION AND DECLARATORY RULING CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT ITSELF DOES NOT STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 20th day of January, 2010, that a copy of the within Decision was sent by first class mail, postage prepaid to:

Frank Thibault
40 Waterman Avenue
Cranston, RI 02910

Barrington Antique Auction
ATTN: Amy and Kenneth Shaw
P.O. Box 75
Barrington, RI 02806

Suzanne Turcotte, Esq.
96 Alfred Drowne Road
Barrington, RI 02806

And by electronic mail to the following personnel of the Department of Business Regulation,
1511 Pontiac Avenue, Cranston, Rhode Island 02920:

Maria D'Alessandro, Esq.
Associate Director

Kimberly Precious
Implementation Aide