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

IN THE MATTER OF:	:	
	:	
MALCOLM J. CONNELL,	:	
	:	
vs.	:	**DBR: 08-L-051**
	:	
JAMES CONWAY,	:	
	:	
RESPONDENT.	:	
IN THE MATTER OF:	:	
	:	
MALCOLM J. CONNELL,	:	
	:	
vs.	:	**DBR: 08-L-052**
	:	
MARK D. HARRINGTON,	:	
	:	
RESPONDENT.	:	

DECISION

Hearing Officer: Neena Sinha Savage, Esq.

Appearances: Malcolm J. Connell: *Pro se*
James Conway: *Pro se*
Mark D. Harrington: James S. D'Ambra, Esq.; Stanley Pupecki, Esq.

Hearing Held: November 17, 2008 and December 15, 2008

I. INTRODUCTION

The above-entitled matter came before the Department of Business Regulation ("Department") as the result of a complaint filed on or about January 4, 2007 by Malcolm Connell ("Complainant") with the Department against Jim Conway and Mark Harrington (collectively the "Respondents"). This matter began as two (2) separate complaints against the Respondents, individually, however the matter has been consolidated with the

consent of all parties for hearing. Respondent Harrington holds a real estate salesperson license and Respondent Conway holds a real estate broker license issued pursuant to R.I. Gen. Laws § 5-20.5-1 *et seq.* ("License"). After consideration of the allegations contained within the Complaints, the Director of the Department appointed the undersigned as Hearing Officer in this matter. At the pre-hearing conference held in this matter on July 17, 2008 the issues in this matter were clarified and an opportunity for discovery was afforded to the parties. A hearing in this matter was held on November 17 and December 15, 2008. The record was kept open until January 15, 2009 for submission of additional written argument. Respondent Harrington was represented individually by counsel; Complainant and Respondent Conway proceeded *pro se*. In support of the testimony adduced at hearing, all parties stipulated to the eleven (11) exhibits comprising the documentary evidence admitted for consideration.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws §§ 5-20.5-1 *et seq.*, 42-14-1 *et seq.*, and 42-35-1 *et seq.*

III. ISSUES

1. Whether Respondents violated R.I. Gen. Laws § 5-20.5-14(a)(9) during the real estate transactions at issue.[1]

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[1] R.I. Gen. Laws §§ 5-20.5-14(a)(9), (20), and (24) state as follows: **Revocation, suspension of license – Probationary period – Penalties.** – (a) The director may upon his or her own motion, and shall, upon the verified complaint, in writing, of any person initiating a cause under this section, ascertain the facts and, if warranted, hold a hearing for the suspension or revocation of a license. The director has power to refuse a license for cause or to suspend or revoke a license or place a licensee on probation for a period not to exceed one year where it has been obtained by false representation, or by fraudulent act or conduct, or where a licensee, in performing or attempting to perform any of the acts mentioned in this chapter, is found guilty of:

...

(9) Failing to furnish a copy of any listing, sale, lease or other contract relevant to a real estate transaction to all signatories of the contract at the time of execution;

...

2. Whether Respondents violated R.I. Gen. Laws § 5-20.5-14(a)(20) during the real estate transactions at issue. (See Footnote 1).

3. Whether Respondents violated R.I. Gen. Laws § 5-20.5-14(a)(24) during the real estate transactions at issue. (See Footnote 1).

4. Whether Respondents violated Rule 14(a) of Commercial Licensing Regulation 11 ("CLR 11") – Real Estate Brokers and Salespersons during the real estate transactions at issue.[2]

5. Whether Respondents violated Rule 20(A) of CLR 11 during the real estate transactions at issue.[3]

IV. 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*

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(20) Any conduct in a real estate transaction, which demonstrates bad faith, dishonesty, untrustworthiness, or incompetency;

...

(24) Accepting an exclusive right to sell or lease or an exclusive agency and subsequently failing to make a diligent effort to sell or lease the listed property[.]

[2] Rule 14 (A) of Commercial Licensing Regulation 11 (effective at the time of the transaction) states:

(A) Any Licensee shall Promptly deliver to all parties to any agreement of sale, lease, option or any other instrument or any amendment to any agreement of other instrument affecting an interest in real property, a duplicate original of any such executed agreement, instrument or amended agreement shall be initialed by all parties to the transaction.

[3] Rule 20(A) of CLR 11 (effective at the time of the transaction) states:

(A) All Licensees are subject to and shall strictly comply with the laws of agency and the principals governing fiduciary relationships. Thus, in accepting employment as an agent, the Licensee pledges him/herself to protect and promote, as he/she would his own, the interests of the principal he/she has undertaken to represent. This obligation of absolute fidelity to the principal's interest is primary, but does not relieve the Licensee from the binding obligation of dealing fairly with all parties to the transaction.

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).

V. MATERIAL FACTS AND TESTIMONY

Complainant testified on his behalf and represented himself throughout the hearing process. Complainant testified that his prior professional experiences with Respondent Harrington in pursuing real estate deals similar to the subject of this hearing were satisfactory and he felt they had a good working relationship.

Complainant asserts violations against Respondent Harrington and Respondent Conway with respect to the failed transaction involving 300 Waterman Avenue in Providence, Rhode Island ("Waterman Avenue"). Complainant asserts additional violations against only Respondent Harrington in transactions involving Complainant's properties located at: 89-91 Laurel Hill Avenue in Providence, Rhode Island ("Laurel Hill Avenue") and 205 Eastwood Avenue in Providence, Rhode Island ("Eastwood Avenue").

Complainant explained that while he is licensed as a real estate salesperson licensee (as of the date of this hearing), he is not a practicing real estate salesperson and he has not been a practicing salesperson for about fifteen (15) years. He is, however, on a referral service and testified that at the time of this transaction he owned numerous

properties, but could not recall exactly how many properties he owned. Complainant testified at hearing that he had "somewhere between 15 and 20." Respondent Harrington's counsel indicated that at deposition Complainant testified that he owned "a couple of dozen" properties. The Complaints involve the attempt by Complainant to secure 300 Waterman Avenue by selling Complainant's two existing properties, the Eastwood Avenue and Laurel Hill Avenue properties, through a "1031 Exchange" or "Like-Kind Exchange."

A "1031 Exchange" or "Like-Kind Exchange" is a reference to the Internal Revenue Service allowance for a tax deferral which permits a taxpayer to reinvest the proceeds from the sale of property held for investment or for business purposes into another investment or business property and defer capital gains tax that would otherwise be due on the initial sale. Complainant testified that he was considering a 1031 Exchange but had other options available to him including a reverse 1031 Exchange. A reverse 1031 Exchange is one in which the replacement property is acquired before the relinquished property is sold. There are deadlines associated with a 1031 Exchange which relates to identifying a 1031 property and time frames for completing all transactions.

The Complainant states that the 1031 Exchange was something that he was "kicking around" but it was not the "sole purpose of selling or buying." This testimony by Complainant contradicts the written offers in Joint Exhibit 7 which all have references to a 1031 Exchange. Complainant indicates that he either wanted to do a cash sale at 70 percent or a 1031 Exchange.

The transactions at issue in this matter involved Complainant as a potential buyer of Waterman Avenue and the seller/owner of the Laurel Hill Avenue and Eastwood

Avenue properties. Respondent Harrington is involved in all three transactions as: (i) co-broker (with Complainant) (with no written buyer's agreement) for the Waterman Avenue property and (ii) the Complainant's (seller's) listing agent (with written exclusive listing agreements) for the Laurel Hill Avenue and Eastwood Avenue properties. Respondent Conway is involved only in the Waterman Avenue transaction as the seller's broker.

Each transaction is described separately.

A. 300 Waterman Avenue

Complainant requests that Respondents be found to have violated the statutes and regulations listed in Section III herein due to an agreement not being reached to purchase the Waterman Avenue property for what Complainant terms to be misrepresentation on part of Respondent Conway (the seller's broker and listing agent) and for Respondent Harrington's failure to submit offers to the seller's broker in a timely manner. Complainant testified that the basis of his Complaint against Respondent Harrington is that he did not respond to telephone messages left by Complainant regarding making offers for several days, and, consequently, the offers were not communicated to Respondent Conway in a timely manner thereby causing Complainant to not acquire the Property.

Complainant testified that he had no buyer's written agreement with Respondent Harrington with respect to the Waterman Avenue property. Respondent Harrington confirms that Complainant was never tied to an exclusive buyer agency agreement with Respondent Harrington and Complainant was actively viewing other properties on his own during this time period.

Complainant found the Waterman Avenue property on an electronic listing site and noticed that it was initially listed at one million dollars and then reduced to $875,000. Complainant wanted the property for income generating purposes. Complainant testified that he also wanted Respondent Harrington to be the co-broker because he had a very good working relationship with Respondent Harrington and he wanted Respondent Harrington to have the benefit of the commission.

According to the Complaints, Complainant met with Respondent Harrington to discuss a plan for making bids and reaching a deal on the subject property with the seller's broker. Complainant testified that he instructed Harrington to make a series of bids, of increasing value until one was accepted by the seller. According to the Complaint (Joint Exhibit 1, page 3, paragraph #3), "Mark and Malcolm discuss plan of attack to purchase #300 Waterman Avenue...they agree 725K is target price to purchase." However, on page 3, Joint Exhibit 1, paragraph #10, Complainant writes that "Mark was instructed to bid 710k, 725k, 750k in succession to close this deal in advance."[4]

Complainant testified that he had instructed Respondent Harrington to "make this deal happen" and that "the bus is waiting on you," and that this Complaint is based on the delay between the offers made on October 24, 2006 and November 7, 2006. Complainant acknowledges that the total period of time that he was out of contact may have been is forty-eight hours with only one voice mail from Respondent Harrington during this time indicating that "I am on it." This voice mail was the only communication between Respondent Harrington and Complainant from October 31, 2006 until November 6, 2006.

[4] Much of Complainant's written submissions are in all capital letters. The undersigned Hearing Officer has modified the capitalization in order to enhance readability.

Respondent Harrington testified that he never had authority to offer $750,000 until November 8, 2006. Complainant admits signing blank documents provided to him by Respondent Harrington. Respondent Harrington testified that the only blank document he signed was a seller's disclosure for Eastwood Avenue. Respondent Harrington testified that he did not have Complainant sign any other blank forms. Complainant testified that he signed "a bunch of stuff" at Twin Oaks and his recollection is signing blank forms because he had at least three transactions pending with Respondent Harrington in November 2006.

According to Respondent Harrington and the testimony presented at hearing, the timeline is indicated below. For ease of reference, the dates were confirmed by all parties at hearing and disputed testimony is noted where relevant:

> September 21, 2006: 300 Waterman Avenue shown to Complainant with both Respondents. Respondent Harrington's professional opinion after market analysis is that the property should be valued at $725,000.
>
> October 4, 2006: Complainant's verbal offer of $675,000 was declined by seller with no counteroffer. Complainant could not recall this offer at testimony. Respondent Conway testified that he had a "mental recollection" of this offer and Respondent Conway testified that $740,000 was never a counteroffer. Respondent Conway testified that all potential buyers were being told that the seller's counteroffer was $750,000.[5]
>
> October 13, 2006: Complainant's written offer of $700,000 was rejected by seller and a counteroffer of $750,000 was conveyed. Complainant testified that he was not aware of this written offer and he did not have a copy of the written offer. Complainant asserts that the date of "October 13, 2006" was put in after the fact because the copy that was provided to Complainant by Respondent Conway (the seller's broker) did not have the date filled in. Complainant did recall being pleasantly surprised by the counteroffer of $750,000. Additionally, the written offer from Respondent Harrington on "October__,2006" is confirmed to be October 13, 2006 from the fax machine date. Joint Exhibit 7 confirms that

[5] At the November 17, 2008 hearing Complainant kept referring to the value of "$740,000" as the counteroffer amount but the writings (including Complainant's) all reflect the seller's counteroffer of $750,000. Complainant conceded during the hearing that his recollections regarding the $740,000 counteroffer may be incorrect.

Respondent Harrington was communicating with Respondent Conway about including all three properties as part of 1031 exchange.

October 24, 2006: Complainant's verbal offer of $710,000 was rejected by seller and counteroffer of $750,000 was conveyed to Respondent Harrington.

Complainant claims that all 3 offers were to be conveyed to Seller's broker by October 31, 2006.

October 31-early November, 2006: Respondent Harrington testifies that he was not available due to Mr. Olivo's death. Mr. Olivo died September 25, 2006 according to an obituary provided at hearing. All parties agree that the period of time that Respondent Harrington was out of touch with Complainant was at least forty-eight hours. The only contact that Complainant had with Respondent Harrington during this time (until November 6, 2006) was a voice mail from Respondent Harrington that he was working on the transaction. Complainant was in constant contact with Respondent Conway during this time.

November 5, 2006: Complainant spoke to Respondent Conway on November 5th, agitated, unable to reach Respondent Harrington. Respondent Conway tells Complainant he would accept a signed offer and a check from Complainant and still include Respondent Harrington as co-broker for commission purposes.

November 6, 2006: Respondent Conway testified that on November 6, 2006 he received a signed Offer to Purchase the property with a deposit check of $5,000 (which are exhibits in this matter) from another buyer.

November 7, 2006: Complainant's verbal offer of $710,000 was presented again and Respondent Harrington was informed by Respondent Conway that another offer had been accepted. Respondent Harrington testified that he was instructed by Complainant to present this offer again.

November 7, 2006: Respondent Harrington informs Complainant that the property is no longer an option because the seller has accepted another offer.

November 8, 2006: Complainant's written offer of $725,000 is presented and declined by seller because another offer has been accepted. Respondent Harrington testified that that he did not have authority to increase to $750, 000.

November 9, 2006: Complainant's written offer of $750,000 is placed in back-up position of other offer.

Respondent Conway, the seller's broker, confirms that every offer (over $700,000) presented by Respondent Harrington was countered with an explanation that the lowest price acceptable to the seller was $750,000. Respondent Conway also

confirmed that Complainant started calling Respondent Conway directly during the time that Complainant could not reach Respondent Harrington, which was October 31, 2006 to November 5, 2006, and instructed him that if Complainant wished to put the offer in writing, Respondent Conway would forward the offer to the seller. Respondent Conway also stated that on November 6, 2006 he received a signed Offer to Purchase the property with a deposit check of $5,000 from another buyer. That offer was accepted and signed by the Seller on November 8, 2006. On November 8, 2006, Respondent Conway testified and presented documents confirming that he received two faxed offers from Respondent Harrington both with offers of $725,000 but one of the offers with a conditional seller financing of $400,000 (which was an unacceptable condition to the seller at any price). Respondent Conway stated that the offer that was accepted was for the full price of the property with no contingencies. Respondent Conway said that there were many prospective buyers that were attempting to get the property; it was a "hot" property and he was telling every potential buyer that the counteroffer was $750,000.

According to Complainant he was also frustrated because he had been told by two mortgage brokers that he was pre-approved and had conveyed this to both Respondents. (See Joint Exhibit 1, page 3, paragraph 9). Complainant did not understand why Respondent Harrington was not getting back to him when he was a "sure thing." Complainant testified that he went to Respondent Harrington's office on November 8, 2006 and signed two written offers: one for $725,000 and one for $750,000 dated November 9, 2006. These written offers included contingencies involving seller financing. Respondent Conway testified that the seller was not interested in financing. Complainant stated that the offers were made in the event the other agreement did not come to fruition.

Complainant asserts that when he spoke to Respondent Conway on November 5, 2006, Respondent Conway should have told him that there was a potential buyer and the deal was close, or that time was of the essence, or indicated the urgency of getting the offer in as soon as possible.

Complainant asserts that Respondent Conway may not have been completely honest about the pending negotiations on the property because Respondent Conway stood to gain a co-broke commission from a competing buyer. Complainant states that Respondent Conway told him he was receiving a co-broke commission. Respondent Conway vehemently disputes Complainant's assertion by stating that it is not his practice to discuss these (commission) issues and it was clearly none of Complainant's business.

Complainant testified that the basis of his Complaint against Respondent Conway is that in his communications with Respondent Conway, he (the Complainant) was led to believe that there was no urgency in making offers on the property. According to Complainant, Complainant asked Respondent Conway if he should make offers directly on the Waterman Avenue property, to which Respondent Conway allegedly replied that Complainant should wait until Monday to give Respondent Harrington more time to make the offers himself.

Respondent Conway disputes that he told Complainant to wait until Respondent Harrington could make an offer or that he acted inappropriately. Respondent Conway pointed out that in his conversation with Complainant on November 5, 2006, he encouraged Complainant to submit a written offer with a check without Respondent Harrington. Complainant confirmed this at hearing and as well as in the written Complaint that states:

> Malcolm calls Agent of seller Jim Conway who advises him "Don't worry if Mark isn't around I'll take your offer" Malcolm and Mr. Connell spoke

every day up to Sunday November 5th 2006 at 2 p.m., cellphone log available, when Mr. Conway says if you find cant find Mark I'll take your offer and still keep him in the deal.

Respondent Conway testified that all potential buyers were getting the same information that Complainant and Respondent Harrington received: that the only acceptable price from the seller was $750,000. Respondent Conway asserts that he conveyed this to Respondent Harrington on October 4, 2006 and October 13, 2006. Additionally, Respondent Conway states that he cannot mislead potential buyers about negotiations and that he only conveys facts. Additionally, he said that the property had been substantially marked-down from 1million dollars and $750,000 was the seller's final sale price.

With respect to Respondent Harrington's assertion that he was not authorized to make the offer of $750,000 until November 8, 2006, the following is part of the questioning at hearing:

Hearing Officer: Are we in agreement that between October 24, 2006 and November 7, 2006, Mr. Harrington was not authorized to offer $750K?

Complainant: It's a tricky question. I am going to answer the best I can. Had he responded to me, he would have; he did not respond to me.

The dispositive testimony in this matter as it involves Respondent Harrington is that which relates to why he was not in communication with Complainant for the period of time, which Complainant argues cost him his opportunity to purchase the Waterman Avenue property. Respondent Harrington testified that he was out of communication with Complainant for no more than two days and that this was due to his time being consumed by his involvement with other clients. Respondent Harrington also cited a friend's (Ronald Olivo) death and resulting wake and funeral as a reason for the delay in

responding to Complainant. The obituary records of the Providence Journal provided at hearing, however, list that this friend, Ronald Olivo, died on September 25, 2006 which was one month before the period that he was not in communication with Complainant.

After presentation of the obituary, Respondent Harrington stated that he confused the transactions (because there were at least twenty transactions pending and he confused the period involving Mr. Olivo' death with another transaction) because it was the same time frame that he was out of touch (from a Tuesday to Thursday). Respondent Harrington testified that Mr. Olivo died on September 25, 2010, which was a Monday, and the wake was on a Tuesday and funeral on Thursday and he recalls that he was not available and did not return calls during that time period as well. Respondent Harrington testified that his written responses and submissions were based on an appointment book and phone log and he just confused two different time frames.

B. 89-91 Laurel Hill Avenue

According to MLS documents presented in Joint Exhibit 9, Respondent Harrington was the listing agent for the Laurel Hill Avenue property owned by Complainant from January 5, 2006 until June 5, 2006, then from July 28, 2006 until September 28, 2006, and then from October 17, 2006 until April 18, 2007. The last MLS listing printout indicates that the 89 Laurel Hill was taken off the market on October 20, 2006 and sold for $295,000 and it was last listed at $279,000.

Complainant alleges that he was not provided any of the paperwork involving the transaction, that he was not informed of the inspection, and that Respondent Harrington did not appear at the inspection. Complainant alleges that Respondent did not make any effort to sell the property, and informed Complainant the deal was dead. When

Complainant successfully closed on the property Respondent Harrington proceeded to demand a commission.

Complainant testified that the potential buyers for the Laurel Hill Avenue property were "shaky" and consequently the transaction was "on-again and off-again." Complainant provided a tape recording of Respondent Harrington's voice mail regarding the Laurel Hill Avenue property. Respondent Harrington's voicemail recording is information to Complainant detailing the inspection date, time, as well as a statement that the lender or loan broker informed Complainant that the buyers could not get financing and therefore, the transaction was off. The date of the voicemail is not clear. Additionally, in the voice mail recording, Respondent Harrington notifies Complainant that he would facilitate the withholding of the deposit to Complainant.

Complainant provided copies of checks made out to Respondent Harrington which, according to Complainant, evidenced that Complainant had entrusted Respondent Harrington with a great deal of responsibility and as evidence of Complainant's "trust" in and "loyalty" to Respondent Harrington. Complainant asserts that the "loyalty" here was broken:

> ...not intentionally, by either [party] but by a chain of events that spun off course. In a time of 4 or 5 months, the parties misunderstood their obligations under the contracts here to procure these transactions to come to fruition.

Complainant was also upset that Respondent Harrington saw the furnace of the Laurel Hill Avenue property on a dolly near the basement door and did not inform Complainant or ask Complainant why the furnace would be on a dolly. The furnace was subsequently stolen and had to be replaced. Respondent stated that he was not acting as a property manager on the property and he does not attend inspections. Additionally, the Laurel Hill

Avenue property is a 3 family home and it was occupied at the time and it is not the broker's responsibility to provide "24 hour security of properties being listed."

Respondent Harrington testified that a Mr. Duquette from Semper Financial called him and told him that the buyers' loan application could not be approved and therefore, the sale could not go forward. Respondent Harrington then called Complainant to tell him that the potential buyer had "had defaulted on mortgage contingency agreement" and that he needed to sign a release. Respondent Harrington stated that he forwarded the release of escrow (deposit) documents but that Complainant never returned those documents. Respondent Harrington states that the purchase and sale agreement on this property is dated September 20, 2006 and the release of escrow document is dated December 1, 2006 (which Respondent Harrington testified was one day after he found out that the buyers would not be able to obtain financing). Respondent Harrington states that the only way that the deal was able to close was that Complainant gave the buyer a $35,000 gift of equity.

Respondent Harrington states that Complainant never sought release from the exclusive listing agreement and therefore, he was entitled to a portion of the commission for the sale of the Laurel Hill Avenue property. Respondent Harrington states that it is the same buyer that he worked with from September 2006 through November 2006 that ultimately purchased the property and he did work on the transaction for which he should be entitled to a commission. The exclusive listing agreement for the Laurel Hill Avenue runs from October 17, 2006 to April 18, 2006; however, Respondent Harrington states that the April date is a typographical error and should have been and is contextually, April 18, 2007. Complainant counters by stating that he does not know if the buyers are

the same because he did not receive any documentation and the typographical error is additional evidence of Respondent Harrington's errors and incompetence.

Complainant stated that he was "fit to be tied" by this chain of events because it was around Christmas time and the market was "going sideways." So, he proceeded to try to put the transaction together himself and was eventually able to close on the property. At the closing, a representative for Respondent Harrington called Complainant at the closing attorney's office and demanded to know why the closing was going forward without the listing agent.

C. 205 Eastwood Avenue

According to Joint Exhibit 8, Respondent Harrington was the listing agent for Complainant's Eastwood Avenue property as of October 20, 2006. According to the HUD-1 settlement statement, which is also part of Joint Exhibit 1, Eastwood Avenue sold at its listing price of $229,900 on November 27, 2006. Complainant asserts in the written Complaint that "agent reduced price to 200K from 205K without my permission verbally or written. He was told to stand at 205K because of 1031 tax implications on 23K 2nd note at 20%." Complainant also writes that "agent agreed to ½ (half) commission (4%) 2% since I initiated tenants as purchasers."

According to Respondent Harrington's testimony, the commission was reduced to 4%, which is a discount of 1% of his standard commission of 5%. The commission was then reduced from 4% to 3% (because Complainant found the buyer) and then to 2.5% (in order to resolve the dispute), which is the commission on the HUD-1 statement. Complainant asserts that Respondent Harrington is only entitled to a commission of 2% (which is half of the 4 percent that they agreed upon). In Joint Exhibit 2 Respondent Harrington writes that Complainant signed a listing agreement on October 19, 2006

which clearly stated a 3% commission fee if Respondent Harrington was to represent both buyer and seller. Respondent Harrington state that he agreed to a 2.5% commission (from $6,000 to $5,000) to resolve the commission between him (who felt he was entitled to 3%) and Complainant who only felt a 2% commission was appropriate under the circumstances.

Complainant testified that he found the buyers for the Eastwood Avenue property because they were his tenants and he approached them about buying the property and they agreed. Complainant testified that there were many issues with this sale because the tenants were "torturing" him because they were first-time buyers and that "perpetuates insane behavior."

Complainant states that communication between Respondent Harrington and Complainant broke down but that Respondent Harrington did not do anything on purpose. Complainant is assuming that Respondent Harrington forgot about the fact that Complainant was holding the second mortgage and the $5,000 unauthorized reduction in price would affect the second mortgage.

Respondent Harrington testified that Complainant was aware of the reduction in price on the property because Complainant signed the purchase and sale agreement. Respondent Harrington writes in Joint Exhibit 2 (his response to the Complaint) that "[t]he agreed upon sales price, was in fact $229,900, included a seller 2nd mortgage of $22,900.00 or 10% & a closing cost credit, from seller to buyer, for $6,910.00." Respondent Harrington stated that Complainant attended the closing on the property, which included a full review of the terms, conditions, and seller concessions all of which were confirmed and agreed upon at closing. Respondent Harrington states that he was not aware of Complainant's issues with Respondent Harrington, he states that

Complainant offered him additional listings after Waterman Avenue fell through. Respondent Harrington declined the listings (for Messier Street, Whittier, and Laven properties) because it was around Christmas time and it was not prudent to place the properties on the market during the Christmas season.

Respondent Harrington states that it is not part of his real estate brokering duties to attend inspections and that all closing documents were provided to Complainant. Respondent Harrington stated that Complainant was at his home office at least twice a week signing documents due to the number of transactions involving the parties. Respondent Harrington testified that he sent Complainant documents on November 29, 2006 to facilitate the release of the deposit to Complainant, but that Complainant never responded or returned the forms. Complainant admits that he did not open the envelope and he should have been provided documents earlier.

An examination of the documents in Joint Exhibit 8 (the Eastwood Avenue documents) confirms the Complainant's recollection that he signed blank documents because none of the dates next to Complainant's signature are filled in (See Purchase and Sale Agreement, Seller's Disclosure, Joint Exhibit 8). Additionally, the date filled in next to Complainant's signature on the Exclusive Right to Sell, Listing Agreement (Joint Exhibit 8) matches Respondent Harrington's date in style, font, and handwriting almost exactly.

VI. DISCUSSION

A. Motion to Dismiss

Respondent Harrington filed a Motion to Dismiss the Complaint based on allegations that Complainant "has repeatedly engaged in *ex-parte* communications with

the Department of Business Regulation, more specifically the Hearing Officer assigned to this case."

Central Management Regulation 2 ("CMR 2") entitled *Rules of Procedure for Administrative Hearings* states:

> No Person who is a Party to or a participant in any proceeding before the Department or the Party's counsel, employee, agent or any other individual acting on the Party's behalf, shall communicate *ex parte* with the Hearing Officer or the Director about any matter related to the proceeding, and the Hearing Officer and/or the Director shall not request or entertain any such *ex parte* communications. The prohibitions contained above do not apply to those communications which relate solely to general matters of procedure and scheduling.

At the December 8, 2008 hearing, Complainant was instructed by the undersigned Hearing Officer not to engage in further *ex parte* communications in response to emails that he had sent to the Hearing Officer but failed to copy the other parties. Complainant also called the Hearing Officer, but before he could get into the subject matter, the undersigned Hearing Office instructed him of the limitations in Section 23 of CMR2. After the December 8, 2006 instruction to Complainant, he continued to send emails without copying the other parties in this matter. The undersigned Hearing Officer forwarded the emails to the other parties and instructed Complainant to copy to all parties on every communication.

The undersigned Hearing Officer finds that because Complainant is a *pro se* litigant, and all of the parties were ultimately copied on emails, and there were no substantive contacts with the undersigned Hearing Officer, the Motion to Dismiss is denied.

B. Allegations Against Respondent Conway

Complainant alleges that Respondent Conway's conduct in the Waterman Avenue constitutes a violation pursuant to R.I. Gen. Laws § 5-20.5-14(a)(20), which relates to conduct in a real estate transaction that demonstrates bad faith, dishonesty, or incompetency, and Rule 20(A) of CLR 11, which requires real estate licensees to strictly comply with laws of agency and the principals governing fiduciary relations. Relevant to this context is the requirement in Rule 20(A) that while the obligation of absolute fidelity to the principal's interest is primary, it does not relive the Licensee form the binding obligation of dealing fairly with all parties to the transaction.

The undersigned Hearing Officer finds that the testimony and documentary evidence presented at hearing did not substantiate violation of R.I. Gen. Laws § 5-20.5-14 (a) (20) and/or CLR 11 Rule 20(A) by Respondent Conway. Respondent Conway acted professionally, focused on facts, conveyed material information to Complainant and Respondent Harrington at all times. Respondent Conway properly conveyed the counteroffer of $750,000 to Mr. Harrington on October 4, 2006, October 13, 2006, and October 24, 2006. This is corroborated by the testimony of Respondent Harrington and the written offers presented. Whether Respondent Harrington properly communicated these facts to Complainant will be discussed below; however, any oversight by Respondent Harrington is not the responsibility of Respondent Conway. Additionally, Respondent Conway's testimony that his seller wanted $750,000 with no contingencies is supported by the written documentation confirming the final sale on Waterman Avenue.

The evidence presented does not substantiate Complainant's assertion that Respondent Conway did not deal fairly with him. Complainant's assertion that Respondent Conway misled him during his conversation on November 5, 2006 is not

supported by Complainant's written statement about the conversation in the Complaint which corroborate Respondent Conway's willingness to take written offers from Complainant and still allow Respondent Harrington to receive a commission.

Complainant asserts that Respondent Conway should told Complainant that time was of the essence. This is not reasonable because Respondent Conway testified he was conveying the same price and information to all potential buyers. A real estate broker or salesperson must focus on material and tangible facts in their communications with potential buyers because there is potential for engaging in misleading behavior if they speculate or characterize the intensity of the sale. For instance, if a licensee tells buyers that there are competing buyers who are going to make an offer (when that is not able to be known), then that could improperly motivate a potential buyer to make a higher offer than that buyer would have otherwise made. It is not reasonable to ask a real estate licensee to speculate because it may result in an inappropriate benefit or detriment to the buyer or seller. After a review of all of the facts related to Waterman Avenue, Respondent Conway acted appropriately in every communication and went out of his way to assist Complainant given Respondent Harrington's prolonged absence.

The evidence does not substantiate Complainant's assertion that Respondent Conway was motivated by a potential for a higher commission from another buyer. Additionally, Complainant did not sufficiently answer the question of why he did not make offers directly to Respondent Conway when he was talking to Respondent Conway every day from October 24, 2006 to November 5, 2006. It is also not clear why Respondent did not make the successive offers verbally to Respondent Conway during the period of time that Respondent Harrington was out of touch with Complainant (so that he could get a sense of the seller's position with respect to all of the offers he wanted

to make). Therefore, based on the evidence presented, the undersigned Hearing Officer respectfully recommends that the Complaint against Respondent Conway be dismissed.

C. Allegations Against Respondent Harrington

It is clear that the relationship between Respondent Harrington and Complainant was based in numerous transactions and responsibilities agreed upon on an informal basis with Respondent Harrington probably taking on much more than he was able to handle and blurring the boundaries of their personal and professional relationship. The violations delineated below are mitigated by the fact that Complainant is a licensed real estate salesperson and has been one for approximately fifteen (15) years and should have known how to respond to protect his interests. Additionally, another mitigating factor in this matter is that there were apparent failures in communication by both Complainant and Respondent Harrington related to the transactions.

1. Violations by Respondent Harrington in Waterman Avenue Transaction

The evidence presented supports a finding that Respondent Harrington's conduct in the Waterman Avenue transaction constitutes a basis for administrative sanction based on R.I. Gen. Laws § 5-20.5-14(a)(20) and violation of Respondent Harrington's duties under Rule 20(A) of CLR 11. Even though Respondent Harrington did not have a written buyer's agency agreement with Complainant, he undertook that role and acted as a real estate salesperson in the Waterman Avenue transaction by submitting written offers and agreeing to fulfill the role of real estate salesperson. The lack of a written agreement in this matter does not mitigate Respondent Harrington's duty to comply with statutory and regulatory mandates once he undertakes that responsibility. R.I. Gen. Laws § 5-20.5-14(a)(20) provides that the Department may suspend or revoke a license upon finding that a licensee exhibited any conduct during a real estate transaction exhibiting bad faith,

incompetence, or dishonesty. Regarding professional standards, as the Department has stated in a prior decisions:

> One of these professional standards is communication between a realtor and his or her client. Communication is a 'basic obligation he [a realtor] has of informing and communicating with his clients about the material terms of any real estate transactions.'" *Gallo v. Smith* DBR No. 01-L-0058 (2001), p. 12.
>
> Communication is an important element between a real estate salesperson or broker and a client. Clients rely on real estate licensees for their professional advice and if the licensee does not communicate pertinent, material, and important information in a real estate transaction then there is no reason for a client to hire a real estate salesperson or broker. See *Gallo* at 12.
>
> Communication is a two way process. Both a client and a realtor must communicate with each other. However, a realtor is the professional in the relationship and it is incumbent on him or her to ensure that those lines of communication are kept open and that he or she keeps himself or herself fully informed of the details of the transaction. *Roberts v. Gosetti*, DBR No. 01-L-0150 (2001), p. 8.

The record supports a finding that Respondent Harrington did not substantively communicate with Complainant for a twelve (12) day period of time from October 24, 2006 through to and including November 5, 2006. During this time, Respondent Harrington left one voice mail stating he was working on the transaction. Complainant urges that this is sufficient time to warrant a finding that Respondent Harrington exhibited bad faith, dishonesty, or incompetence during the transaction at issue. From the evidence and testimony presented at hearing, it is obvious that there was no intent (of bad faith or dishonesty) on part of Respondent Harrington to summarily not communicate Complainant's offers to Respondent Conway; rather if Respondent Harrington's version

of the events is adopted, then he simply was busy with other clients and did not physically have time to communicate the offers or get in touch with Complainant.

The fact that Respondent Harrington initially cited a friend's death as a basis for his failure to communicate, then stated that he confused the basis for his defense because he was out of touch for another period of time (the month before due to the death) is troubling because any absence from communicating with clients is inexcusable and he inadvertently admitted to a pattern of absenteeism. This pattern of prolonged periods without communicating with a client (especially a client such as Complainant who had numerous issues pending with Respondent Harrington) is unprofessional and demonstrates incompetence. It is also evidence that Respondent Harrington had exceeded the boundaries of what he could handle professionally and should have communicated his limitations or issues to Complainant so that Complainant could take these limitations into account. Both Complainant and Respondent Harrington confirmed that they had numerous transactions that they were working on during this time.

Respondent Harrington clearly knew that the three transactions were being handled in order to facilitate a 1031 Exchange. The 1031 Exchange is referenced in every written offer presented by Respondent Harrington on the Waterman Avenue transaction. Because there are strict deadlines that need to be adhered to in a 1031 Exchange, Respondent Harrington's twelve day de facto absence from communicating with Complainant demonstrates incompetence.

Another fact that exacerbated Complainant's issues with Respondent Harrington is Respondent Harrington's failure to send Complainant copies of the written offer dated October 13, 2006 and failure to convey the response to the verbal offer on October 24, 2006 on the Waterman Avenue property. Additionally, Respondent Conway's (seller's

broker's) copy of the written October 2006 left the day blank. Only Respondent Harrington's copy had the date of "October 13, 2006" filled in and the first time that Complainant was provided a copy of the written offer was by Respondent Conway's counsel at hearing. It was also evident that Complainant did not know about the $710,000 verbal offer made on October 24, 2006 or the counteroffer of $750,000 on that date. This explains why the Complainant kept waiting for the process (as he understood it) to commence. Complainant had not been informed by Respondent Harrington of two (2) material offers in this transaction.

From the parties' testimony it is clear that the failure to communicate was not conducted in bad faith or dishonest intent by Respondent Harrington to avoid Complainant. A twelve (12) day absence from communication in the fast-paced real estate sales market of today is evidence of incompetence by Respondent Harrington and a basis for administrative action pursuant to R.I. Gen. Laws § 5-20.5-14(a)(20) and Rule 20(A) of CLR 11.

Respondent Harrington's failure to communicate as described herein (by being out of substantive contact for twelve days, by failing to submit information regarding the status of the offers, and by failing to submit copies of the written offers to Complainant) is also a violation of Rule 20 (A) of CLR 11 in that Respondent Harrington failed in his fiduciary obligations to Complainant. Respondent Harrington undertook to represent Complainant's interests in this transaction, and did not manage an adequate standard of care in fulfilling those obligations.

With respect to whether Respondent Harrington's failure to timely convey the offers as instructed by Complainant to Respondent Conway in the Waterman Avenue transaction is evidence of incompetence (in support of an additional violation based on

R.I. Gen. Laws § 14(a)(20) and Rule 20(A) of CLR 11), the evidence presented did not provide clear evidence to support such a finding. At hearing, Complainant confirmed that he did not authorize the offer of $750,000 until November 9, 2006, but had Complainant contacted him, he would have. Additionally, the written Complaint states that $725,000 was the target price, yet it states that Complainant instructed Respondent Harrington to bid $710,000, $725,000, and $750,000 in quick succession. Therefore, it is apparent that while Complainant may have had an expectation of action, he may not have communicated it to Respondent Harrington as well as he could have.

Complainant has asserted a violation of R.I. Gen. Laws § 5-20.5-14(a)(9) which allows the Department to sanction licensees who fail to furnish a copy of any contract relevant to a real estate transaction to all signatories of the contract at the time of execution. Because this transaction was not successful and both Respondent Harrington and Complainant proceeded without a written agreement, or buyer's agent disclosure, by choice, and Complainant (a licensed real estate salesperson) agreed to sign the blank forms, there is technically no contract that exists in this transaction that could have been provided. The evidence does support the finding that it was more likely than not that Respondent Harrington had Complainant sign blank forms (with Complainant's consent) in advance to expedite the presentation of offers. And, it is clear that Respondent Harrington did not forward copies of the written offers to Complainant in a timely manner. Given the context of this transaction (and Complainant's consent to signing blank forms), the failure to provide the written offers in a timely manner is evidence of Respondent Harrington's incompetence under R.I. Gen. Laws § 5-20.5-14(a)(20) rather than a violation of R.I. Gen. Laws § 5-20.5-14(a)(9). Respondent Harrington should not have signed blank forms and should have submitted the written offers expeditiously so

that Complainant was aware of the exact offers being submitted, the time of the submission of the offers, and the responses to all offers so that he could have directed Respondent Harrington accordingly. Thus, the undersigned Hearing Officer respectfully recommends a sanction based on a finding that Respondent Harrington's conduct in the Waterman Avenue transaction as described herein constitutes incompetence under R.I. Gen. Laws § 5-20.5-14(a)(20) and Rule 20(A) of CLR 11.

2. Violations By Respondent Harrington in Laurel Hill Avenue and Eastwood Avenue Transactions

With respect to the Laurel Hill Avenue transaction and the Eastwood Avenue transaction, the violations that are supported by the record in this matter are sanctions under R.I. Gen. Laws § 5-20.5-14(a) (9) for Respondent Harrington's failure to provide copies to Complainant of the purchase and sale agreements in the transactions to Complainant and under R.I. Gen. Laws § 5-20.5-14(a)(20) for a continuing failure to communicate competently during these transactions. Additionally, the undersigned Hearing Officer also finds that Respondent Harrington did not comply with his duties under Rule 20(A) of CLR 11 in that he did not promote the interests of the Complainant in carrying out his real estate brokering duties.

The only other applicable alleged statutory violation that could have been substantiated in these two transactions would have been under R.I. Gen. Laws § 5-20.5-14(a)(24) which deems accepting an exclusive right to sell and subsequently failing to make a diligent effort to sell the property a basis for regulatory sanction. However, the evidence presented did not support such a sanction. Specifically, with Laurel Hill Avenue, Complainant and Respondent Harrington clearly had a relationship that exceeded the professional boundaries of that of real estate broker and client. Respondent Harrington had undertaken to assist Complainant with managing repairs, and taking care

of the property, which is clearly outside the scope of the real estate broker/client relationship. This is more of a violation evidencing a continuing failure to communicate the boundaries and expectations in the professional real estate brokering relationship (evidence of incompetence) rather than a violation supported under any of the other statutory and regulatory basis alleged.

Once Respondent Harrington found out that the potential buyers could not get financing, Respondent Harrington conveyed information regarding the Laurel Hill Avenue to Complainant and forwarded the documents (to release the deposit) expeditiously. Complainant should have communicated his expectation (to continue to work with the same buyer), but from the evidence presented the communication between the parties with respect to specific direction on each transaction is not clear.

The record also indicates that there were purchase and sale agreements and other documents that were executed by the parties (prior to Respondent Harrington exiting the transaction) in the Laurel Hill Avenue transaction that are not part of this administrative record. Complainant repeatedly expressed frustration at not knowing details about the transaction and whatever documents may have existed were not presented to clarify the record (by Respondent Harrington). The MLS listing shows that the "contract date" for the Laurel Hill Avenue property was "10/20/06" but there were no purchase and sales documents presented to corroborate this event in the history of this transaction. Complainant indicated that he did not get copies of the executed documents for any of the transactions and it seems more likely than not that Respondent Harrington did not forward executed documents to Complainant in a timely manner or at all.

In these transactions, as was evident in the Waterman Avenue transaction, the evidence established that it was more likely than not that Respondent Harrington had

Complainant sign blank forms in advance and Respondent Harrington did not forward the purchase and sales contracts to Complainant upon execution by the potential buyers. This failure to provide the purchase and sale agreements in the Laurel Hill Avenue and the Eastwood Avenue transactions substantiates a violation of R.I. Gen. Laws § 5-20.5-14(a)(9) which deems a failure to "furnish a copy of any listing, sale, lease, or other contract relevant to a real estate transaction to all signatories of the contract at the time of execution" a violation that may justify regulatory sanction. In examining the documents in Joint Exhibit 8 (the Eastwood Avenue documents), the date next to Complainant's signature in the purchase and sale agreement matches Respondent Harrington's date exactly—indicating that Respondent Harrington probably dated this agreement. It appears that Complainant authorized the dating and signing of blank forms because Complainant admits to signing blank forms; however, this authorization, however misguided and unprofessional, does not excuse Respondent Harrington's responsibility to forward executed documents to the Complainant. This failure also contributed to the breakdown in communication between the Complainant and Respondent Harrington.

With respect to the Eastwood Avenue, it is clear that the informal relationship that the Complainant and Respondent Harrington had with respect to duties and responsibilities caused the misunderstanding that precipitated the Complaint. The fact that Complainant agreed to sign blank forms and that Respondent Harrington allowed the signing of blank forms is troubling. It seems that both Complainant and Respondent Harrington were motivated by their zeal to close the transactions, not bad faith or dishonesty. Additionally, as in the Waterman Avenue transaction, it does not appear that Respondent Harrington provided Complainant with copies of relevant documents (purchase and sales agreements, disclosures, written offers, written responses) during the

transaction and that further confused the Complainant about the status of the transactions. Once again, this is evidence of Respondent Harrington's incompetence under R.I. Gen. Laws § 5-20.5-14(a)(20) for a continuing failure to communicate competently during these transactions and under Rule 20(A) of CLR 11 for failing to promote the interests of the Complainant in carrying out his real estate brokering duties.

The Complainant and Respondent Harrington's informal, undocumented agreements are also evident in the handling of what commission was to be paid for the Eastwood Avenue and Laurel Hill Avenue transactions. The testimony presented by both Respondent Harrington and Complainant did not clearly establish the commission that was agreed upon between the parties. It is clear that they had some sort of informal agreement to reduce commissions based on functions performed, but the exact agreement could not be established based on the testimony and evidence presented.

A client's shortcomings, limitations, or informality does not relieve a licensee from his or her professional obligations under the statute or regulation at issue in this matter. It is clear that Respondent Harrington did not communicate effectively with the Complainant during the Laurel Hill Avenue and Eastwood Avenue transactions. Respondent Harrington should have provided documents during transaction contemporaneous with the events in the transaction. Respondent Harrington should have clarified boundaries/duties within the relationship in writing and been cognizant of any misleading expectations by Complainant. Given the number of transactions between the parties and their personal relationship, there was great potential for miscommunication about scope of professional real estate broker relationship. The burden is on realtor to communicate boundaries, responsibilities and maintain professionalism. Respondent Harrington failed to act competently in the three (3) transactions discussed herein and

there is basis to impose a statutory and regulatory sanction pursuant to R.I. Gen. Laws § 5-20.5-14(a)(20) and under Rule 20(A) of CLR 11. There is also a basis to impose statutory sanction based on R.I. Gen. Laws § 5-20.5-14(a)(9) in the Laurel Hill Avenue and Eastwood Avenue transactions. All other statutory and regulatory violations asserted against Respondent Harrington are found to be unsubstantiated by the evidence presented.

VII. FINDINGS OF FACT

1. The facts contained in Sections I, V, and VI are incorporated herein.
2. Under the standard set forth in Section IV and the analysis set forth in Section VI, there is sufficient evidence to establish that Respondent Harrington's conduct in three transactions (Waterman Avenue, Laurel Hill Avenue, and Eastwood Avenue) demonstrates incompetence and a failure to meet his fiduciary obligations to Complainant due to Respondent Harrington's: (i) failure respond to and communicate with Complainant in a timely manner (Waterman Avenue); (ii) failure to keep Complainant informed of status of transactions (Waterman Avenue, Laurel Hill Avenue, and Eastwood Avenue); (iii) failure to act prudently by encouraging the execution of blank documents and then failing to submit executed documents (Waterman Avenue, Laurel Hill Avenue, and Eastwood Avenue) to Complainant; and, (iv) failure to provide relevant documents related to the transactions (Waterman Avenue, Laurel Hill Avenue, and Eastwood Avenue) to Complainant.
3. Respondent failed to provide copies of the purchase and sale agreements in the Laurel Hill Avenue and Eastwood Avenue transactions to Complainant.

4. There was no evidence presented to substantiate any findings of fact that would give rise to violations by Respondent Conway.

VIII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter as set forth in Section II, *supra*.
2. Under the standard set forth in Section IV and the analysis set forth in Section VI, Complainant established that Respondent Harrington exhibited incompetency warranting regulatory sanction pursuant to R.I. Gen. Laws § 5-20.5-14(a)(20) based on the findings of fact in paragraph 2 in Section VII herein.
3. Under the standard set forth in Section IV and the analysis set forth in section VI, it has been established that Respondent Harrington violated CLR 11 Rule 20(A) based on the findings of fact in paragraph 2 Section VII herein.
4. Under the standard set forth in Section IV and the analysis set forth in Section VI, Complainant established that Respondent Harrington failed to submit material contracts warranting regulatory sanction pursuant to R.I. Gen. Laws § 5-20.5-14(a)(9) based on the findings of fact in paragraph 3 in Section VII herein.
5. The Complainant did not sufficiently establish any violations by Respondent Conway.

IX. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Director of the Department of Business Regulation find that there is a basis to impose an

administrative sanction on Respondent Harrington's License for the three (3) separate violations (in three (3) separate transactions) of R.I. Gen. Laws § 5-20.5-14(a)(20) and Rule 20(A) of CLR 11. Furthermore, the undersigned also recommends an additional sanction for Respondent Harrington under the violations in two (2) separate transactions (Laurel Hill Avenue and Eastwood Avenue) based on R.I. Gen. Laws § 5- 20.5-14(a)(9) as described herein. In addition to the authority in R.I. Gen. Laws § 5-20.5-14(a) which allows the Department to suspend a license for violations found under that section, R.I. Gen. Laws § 5-20.5-14(b) also allows the Director of the Department to "...levy an administrative penalty not exceeding one thousand dollars ($1,000) for any violation under this section or the rules and regulations of the department of business regulation." Therefore, the Hearing Officer recommends that Respondent Harrington pay an administrative penalty of $500 for each violation in each separate transaction. Consequently, the total administrative penalty is $2,500 and is calculated as follows: (i) $500 for each violation of R.I. Gen. Laws § 5-20.5-14(a)(20) and Rule 20(A) of CLR 11 in each of the three (3) transactions which is a total under this violation of $1,500 plus (ii) $500 for each violation of R.I. Gen. Laws § 5-20.5-14(a)(9) in each of the Laurel Hill Avenue and Eastwood Avenue transactions which is a total under this violation of one thousand dollars ($1,000) for a total administrative penalty ((i) plus (ii)) of $2,500. This penalty has been reduced based on the mitigating facts discussed in Section VI herein (the total penalty per violation could have been $1,000 per statutory and regulatory violation). The undersigned Hearing Officer also respectfully recommends that Respondent Harrington be given the option of paying the administrative penalty or serving a suspension of his license for seven (7) days for the violations delineated herein.

The undersigned Hearing Officer further respectfully recommends that the Complaint against Respondent Conway be dismissed.

Dated: 11/1/10

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: 11-03-2010

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 3rd day of November, 2010, that a copy of the within Decision was sent by first class mail, postage prepaid to:

Mr. Malcolm J. Connell
P.O. Box 19369
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Mr. Mark D. Harrington
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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.
Deputy Director

William Deluca
Real Estate Administrator