

represented by Michael Lipizzera, Esq. The Department presented testimony from Judith Fortes and Gary Crumb. The Department introduced into evidence Exhibits 1 through 20. Respondent objected to admission of the portions of the exhibits which contained hearsay statements. Exhibit 1 was admitted for the sole purpose of establishing when and by whom a complaint had been made in this matter. Exhibits 2 through 20 were admitted on stipulation of the parties excluding the portions of those exhibits which constituted writings by Ms. Fortes (each of those writing being identified on the record at the hearing.)

The Department called Judith Fortes and Gary Crumb as witnesses. After presenting the testimony of Ms. Fortes and Mr. Crumb, the Department requested a brief continuance to allow for a subpoena to issue for the testimony of Mr. LeFort who had not appeared personally at the hearing. The hearing was continued until March 11, 2008 to allow for testimony from Mr. LeFort pursuant to subpoena and presentation of Mr. LeFort's case. A subpoena was issued by the Director to Mr. LeFort. Counsel for Mr. LeFort informed the Department and the hearing officer that Mr. LeFort, if called to the stand, would take the Fifth Amendment to all questions asked.

At the hearing on March 11, 2008, the Department read thorough the questions it intended to pose to Mr. LeFort and his counsel affirmed that he would take the Fifth Amendment to each of those areas of questioning. The Department requested that the Hearing Officer draw an adverse inference against Mr. LeFort as the result of that assertion with regard to those areas of inquiry.

The Hearing Officer requested that the parties file their closing arguments in written form. On April 28, 2008, the Hearing Officer received an email from Department Counsel

noting that Mr. LeFort's counsel had not submitted a brief and requesting that a Decision be issued.

II. JURISDICTION

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

III. ISSUES

Whether or not Respondents' actions in two real estate transactions constituted unlicensed real estate sales or brokering activities prohibited by R.I. Gen. Laws §§ 5-20.5-1 *et seq.*

IV. MATERIAL FACTS AND TESTIMONY

This administrative action involves two properties purchased by Gary Crumb in late 2006. The first property was 16-18 Bernon Street, a three family home located near Douglas Avenue in Providence which was purchased for \$375,000. The second property was 167 Oxford Street, a two family home in South Providence, which was purchased for \$260,000.

The first witness called by the Department was Judith Fortes. Ms. Fortes is Mr. Crumb's mother and had filed the complaint with the Department. Ms. Fortes was not involved with these transactions and did not have first hand knowledge of many of the facts. Rather, her knowledge was discerned by reviewing the documents or speaking to her son. While hearsay evidence can be admitted in an administrative hearing, in this case, a witness with first hand knowledge was available as were the documents which were entered into evidence in this matter. Therefore, the Hearing Officer will disregard Ms. Fortes testimony except as to areas in which she had first hand knowledge.

As to the areas for which she has first hand knowledge, Ms. Fortes testified that she was very familiar with her son's signature (in addition to the familial relationship, her son had served two tours in Iraq during which she had his power of attorney). She testified that the initials and signatures on Exhibit 8, relating to the Bernon Street property, were not that of her son. Ms. Fortes personally visited each of the properties in November of 2006. She testified that the Bernon Street property was not in the condition reflected on the appraisal at the time of her viewing. Specifically the third floor of the Bernon street property was not habitable.

Gary Crumb testified that in the summer of 2006 an acquaintance named James McNeil told him that he owned two investment properties that he wanted to sell. Mr. McNeil indicated that he was "in over his head" and would sell the properties for the amount of the mortgages on those properties. Mr. Crum believed that Mr. McNeil owed approximately \$300,000 on the Bernon Street property and \$230,000 on the Oxford Street property. After coming to a general agreement with Mr. McNeil, Mr. McNeil referred him to Mr. LeFort to assist in completing the transactions.

When he first met with Mr. LeFort he believed that Mr. LeFort was going to provide both mortgage brokering and real estate services. He went to Mr. LeForts' home at 121 Ring Street, Providence, Rhode Island to discuss the potential purchase. Mr. LeFort provided all of the information and the loan applications concerning these properties. The Purchase and Sales agreements for the properties were filled out in Mr. Lefort's home. Mr. LeFort did not express his exact position but he did indicate to Mr. Crum that he "had been in real estate" for years. Mr. Lefort informed Mr. Crum that "RCPM" was Mr. LeFort's company.

Mr. LeFort referred him to a mortgage broker. He went to that individual's office and filled out paperwork. He was turned down for a mortgage on the basis of his income to debt ratio. He was then given \$40,000 by Mr. LeFort and told to deposit the money in his personal account. Mr. LeFort then instructed him to use the funds by writing the checks admitted in this matter as Exhibits 2 through 6. Mr. Crumb also produced his checking account statement showing these transactions (admitted as Exhibits 7 and 8). While he thought this was a bit unusual he believed that Mr. LeFort was a real estate professional and, therefore, relied on his instructions.

The closing of these properties occurred at Mr. LeFort's home located at 121 Ring Road. The only persons present at the closing were Mr. Crum and Mr. LeFort. He was given all of the documents related to the properties in this matter at the closing by Mr. LeFort.

Mr. McNeil and Mr. LeFort told him that there was approximately \$30,000 in equity on one of the properties and \$60,000 in equity in the other property. His conversations were that he would use this equity to perform repairs to the properties. After the closing on the Bernon Street property Mr. LeFort gave him the \$6,115 which was listed on the HUD 1 on Exhibit 11 as being paid to RCPM. He believed that this was a down payment on the "equity" which he was to use to make upgrades to the property.

A number of other issues were raised concerning the HUD 1 including why the amount owed to Narragansett Bay Commission was so high; the involvement of other persons listed as on the HUD-1 (such as the closing attorney); the disparity between the appraisals and the condition of the property and why Mr. Crumb's signature appears to be forged on Exhibit 8. While the Hearing Officer finds that there are a number of

“irregularities” in this transaction they are not directly relevant to the only issue in this hearing – whether Mr. LeFort’s activities required licensure – and will not, therefore, be addressed here.

Following closing he found that the rental income represented by the seller and Mr. LeFort was overstated. For example, instead of the \$950, \$950 and \$900 listed on Exhibits 14 and 18, the actual rents for the Bernon property were \$700 for the first floor and \$650 for the second floor. The third floor was not in habitable condition. Therefore, the rental income did not cover the mortgage payments. He covered the difference for a time with income from his two other rental properties but was unable to continue indefinitely. The mortgages, therefore, went into default and both properties were foreclosed. As a result of the foreclosures his credit score was adversely affected preventing him from refinancing the two other rental properties he owned. Both of those properties were foreclosed as well.

Mr. LeFort refused to testify and, therefore, there is no evidence in the record as to why Mr. LeFort was involved in this transaction other than the testimony of Gary Crumb and the documents themselves. Exhibit 8, the Purchase and Sale agreement for 15-18 Bernon Street and Exhibit 9, the Purchase and Sale for 165-167 Oxford both indicate that the agreement was prepared by the “listing agent” who is identified as “RCPM 121 Ring Road Providence, Rhode Island.” Mr. Crumb testified that Exhibits 8 and 9 were completed by Mr. Lefort.

As evidence by exhibit 19 in this hearing, this is not the first encounter Mr. LeFort has had with this Department. On July 21, 2000, the Department issued an Emergency Order suspending Mr. LeFort’s real estate license. The investigation leading up to that suspension had found that Mr. LeFort had violated numerous provisions of R.I. Gen. Laws

§ 5-20-5-1 *et seq* with regard to real estate transactions. Mr. LeFort was afforded an opportunity for a full hearing under the Administrative Procedures Act but declined to afford himself of that opportunity. Mr. LeFort has not held a real estate license in the state of Rhode Island since the time of the issuance of that order.

Mr. LeFort's counsel argued at the hearing that Mr. Crumb and Mr. McNeil had already come to an agreement to purchase and sell the properties at the time that Mr. LeFort became involved in this transaction and that, therefore, Mr. LeFort's activities did not require a real estate license.

R.I. Gen. Laws § 5-20.2-1(4) defines the activities which require licensures as follows:

"Real estate broker":

(i) Within the meaning of this chapter, includes all persons, partnerships, associations, and corporations, foreign and domestic, who:

(A) For a fee, commission, or other valuable consideration, or who with the intention or expectation of receiving or collecting a fee, commission, or other valuable consideration, lists, sells, purchases, exchanges, rents, leases, appraises residential property containing four (4) or fewer units, or auctions any real estate, or the improvements on real estate including options or who negotiates or attempts to negotiate any such activity;

(B) Advertises or holds himself or herself, itself, or themselves out as engaged in those activities;

(C) Directs or assists in the procuring of a purchaser or prospect calculated or intended to result in a real estate transaction.

As mentioned above, the only evidence in this proceeding regarding why Mr. LeFort was involved in this transaction comes from Mr. Crumb and the documents. Mr. LeFort was offered the chance to testify, and was even compelled by subpoena to do so, but declined that opportunity. The hearing officer must, therefore rely on the information

before her. Mr. Crumb testified that he believed that Mr. LeFort was a real estate agent. While Mr. LeFort's counsel attempted to question the validity of this belief, the surrounding circumstances indicate that Mr. Crumb's belief was logical and justified based upon Mr. LeFort's actions. Specifically, Mr. Lefort completed all of the paperwork and presented it to Mr. Crumb, activities a lay person would expect a from real estate agent; Mr. LeFort listed RCMP, at his home address, as the listing agent on the purchase and sale agreements and Mr. LeFort took care of all of the details related to the purchase of this property as a lay person would expect from a real estate agent. '

Mr. LeFort's counsel stipulated that if Mr. LeFort were to testify he would not respond to areas of inquiry surrounding the purchase of the two properties at issue in this proceeding on the basis of his Fifth Amendment right to be free from self incrimination. While the Fifth Amendment allows Mr. LeFort to take this position, its assertion also allows an administrative agency to draw the inference that the testimony would be adverse to the witness asserting the Fifth Amendment. In this case, therefore, the Hearing Officer may draw an inference that, had Mr. LeFort testified, he would have provided additional evidence that he was performing functions in this transaction for which he was required to be licensed under R.I. Gen. Laws § 5-20.5-1 *et seq.*

R.I. Gen. Laws § 5-20.5-1(4) provides three sets of activities for which a real estate license is required. With regard to R.I. Gen. Laws § 5-20.5-1(4)(i)(A), there is ample evidence that Mr. LeFort acted as the "listing" broker in this transaction up to an including the fact that he lists his dba as the "listing agent" on the purchase and sale. The compensation for these services is, however, a little confusing. The evidence presented is that a fee is included on the HUD-1 for "RCMP", however, Mr. Crumb testified that this

exact amount was given to him after the closing by Mr. LeFort. Mr. LeFort's counsel argued that this showed that Mr. LeFort was not receiving a fee. However, Mr. LeFort chose not to testify to clear this up and, therefore, the Hearing Office finds that the weight of the evidence, including the fee listed for RCPM on the closing documents shows an anticipation of a fee or commission sufficient for this basis.

R.I. Gen. Laws § 5-20.5-1(4)(i)(B) prohibits a person from holding himself out "...as engaged in" activities which require a real estate license. On this issue, the evidence is overwhelming. Mr. Crumb testified that he believed that Mr. LeFort was a real estate agent from the totality of his dealings with Mr. LeFort. Of extreme import in these activities are that Mr. LeFort prepared the purchase and sale and closing documents, listed his dba as the listing agent on the purchase and sale and handled the closing himself. This was far more activity than simply "arranging for a loan" as argued by Mr. LeFort's counsel.

R.I. Gen. Laws § 5-20.5-1(4)(i)(C) prohibits "procuring purchasers" for real estate. There is no evidence that in this case Mr. LeFort violated this provision. However, the statute prohibits any of the activities without a license and the fact that he participated in less than all the statutory categories is not relevant to whether he violated the statute. The hearing officer finds that the evidence supports the conclusion that Mr. LeFort was acting as a real estate agent in his dealings with Mr. Crumb in violation of R.I. Gen. Laws § 5-20.5-1(4)(i)(A) and (B).

R.I. Gen. Laws § 5-20.5-28 provide that the Department may bring an administrative action against any person whom it believes is acting without a license and provide full due process owed under the Administrative Procedures Act. The Department

has done so in this case and finds Mr. LeFort and RCPM in violation of R.I. Gen. Laws § 5-20.5-28.¹ The Department further finds, in accordance with R.I. Gen. Laws § 5-20.5-28, that Mr. LeFort and RCPM should be ordered to cease and desist from all activities which required licensure under R.I. Gen. Laws § 5-20.5-1 *et seq.*

V. FINDINGS OF FACT

1. On or about, a complaint was filed against Respondent alleging that Respondents acted as real estate agent/broker in connection with two real estate transactions involving property purchased by Gary Crumb from James McNeil.

2. After an investigation by the Department, an order appointing the undersigned as Hearing Officer was issued and a pre-hearing conference was held in this matter on March 29, 2007.

3. A hearing in this matter was held on January 31, 2008. After presenting testimony and documentary evidence, the Department sought a short continuance to all for a subpoena to issue to require the personal appearance and testimony of David LeFort.

4. A subpoena issued to David LeFort, however, it was represented by his attorney that he would refuse to answer any questioned posed to him in this administrative hearing on the basis of his Fifth Amendment right to be compelled to offer evidence which may subject him to criminal penalties.

¹ The Order to Show Cause also alleges that Mr. LeFort undertook activities requiring a real estate license under the dba's Rite Choice Realty Ltd. and Rite Choice Property Management. No evidence was produced with regard to either of these dba's and, therefore, they are not addressed in this opinion. This does not mean that Mr. LeFort may operate as a real estate agent under these or any other dba's. Mr. LeFort must hold a license to conduct the activities for which licensure is required regardless of the business name under which he is operating.

5. The seller of the properties, James MacNeil, referred Mr. Crumb to Mr. LeFort to complete the transaction. Mr. LeFort provided all of the information and the loan applications concerning these properties to Mr. Crumb.

6. The Purchase and Sales agreements for the properties were filled out in Mr. Lefort's home located at 121 Ring Street, Providence, Rhode Island.

7. Based upon the facts and circumstances, Mr. Crum came to the reasonable conclusion that Mr. LeFort was acting in the capacity of a real estate agent in these transactions.

8. Mr. Crum was informed by Mr. Lefort that "RCPM" was Mr. LeFort's company.

9. R.C.P.M., with an address of 121 Ring Road, is identified as the "listing agent" on the purchase and sale agreements which were completed by Mr. LeFort.

10. The closing of these properties occurred at Mr. LeFort's home located at 121 Ring Road and the only persons present at the closing were Mr. Crum and Mr. LeFort.

11. Mr. Crumb was given all of the documents related to the properties in this matter at the closing by Mr. LeFort.

12. The HUD 1 for the Bernon Street lists a payment of \$6,115 to R.C.P.M.

13. With regard to the Bernon Street property, Mr. LeFort gave Mr. Crum the \$6,115 which was listed on the HUD 1 on Exhibit 11 as being paid to R.C.P.M..

14. David LeFort was undertaking the activities described in this Decision under the dba of R.C.P.M.

15. Although the order to show cause alleges that Mr. LeFort was operating under the dba's Rite Choice Realty Ltd and Rite Choice Property Management, no evidence was presented at the hearing concerning either of these names.

16. The parties were afforded an opportunity to present closing argument in writing to the Hearing Officer. Respondents failed to make any submission. On April 28, 2007 the Department submitted its closing statement to the Hearing Officer.

17. Any conclusion of law which is also a finding of fact is hereby incorporated.

VI. CONCLUSIONS OF LAW

Based on the testimony and facts presented I conclude as follows:

1. 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.*

2. David LeFort does not hold a valid real estate license and, therefore is statutorily prohibited from undertaking any of the acts in R.I. Gen. Laws § 5-20.5-1(4)(i) whether those acts are done in his own name or in any fictitious name including but not limited to R.C.P.M.

3. In evaluating the evidence presented, the Hearing Officer is entitled to and does make an adverse inference against Mr. LeFort for his refusal to testify in this matter.

4. In undertaking the acts outlined in the findings of fact above, David LeFort individually and doing business as R.C.P.M. fell within the definition of persons required to hold a real estate license as defined in R.I. Gen. Laws § 5-20.5-1(4)(i)(A).

5. In undertaking the acts outlined in the findings of fact above, David LeFort individually and doing business as R.C.P.M. fell within the definition of persons required to hold a real estate license as defined in R.I. Gen. Laws § 5-20.5-1(4)(i)(B).

6. Any finding of fact which is also a conclusion of law is hereby incorporated.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that


1. Respondents David LeFort and David LeFort dba R.C.P.M. be found to have violated R.I. Gen. Laws § 5-20.5-28 by engaging in activities for which a real estate license is required pursuant to R.I. Gen. Laws § 5-20.5-4(i)(A) and (B).

2. Respondent David LeFort, individually or using any dba including but not limited to R.C.P.M., be ordered to cease and desist from engaging in any activities for which a license would be required pursuant to R.I. Gen. Laws § 5-20.5-28.

3. That if Respondent applies for an real estate license in the future that this Decision be taken into account in the evaluation of that application.

4. That a copy of this Decision by provided to the Rhode Island Attorney General's office for consideration of prosecution pursuant to R.I. Gen. Laws § 5-20.5-28.

Dated: July 2, 2008


Elizabeth Kelleher Dwyer, Esq.
Hearing Officer

I have read the Hearing Officer's Decision and Recommendation in this matter, and I
hereby

ADOPT
 REJECT
 MODIFY

the Decision and Recommendation.

Dated: July 2, 2008


A. Michael Marques
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I.G.L. § 42-35-12. PURSUANT TO R.I.G.L. § 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 DOES NOT ITSELF 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 2 day of July, 2008 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid to

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