

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

<u>MICHAEL NARDELLA,</u>	:	
	:	
COMPLAINANT,	:	
	:	
v.	:	DBR No.: 05-L-0005
	:	
RICHARD W. MOULTON,	:	
	:	
<u>RESPONDENT.</u>	:	

**DECISION**

Hearing Officer: Neena Sinha Savage, Esq.<sup>1</sup>

Hearing Held: January 12, 2006  
November 25, 2008  
January 15, 2009

Appearances:

For Complainant: Gregory A. Mancini, Esq.

For Respondent: Frederick G. Tobin, Esq.

**I. INTRODUCTION**

The above-entitled matter came before the Department of Business Regulation (“Department”) as the result of a complaint filed by Michael Nardella (“Complainant”) against Richard W. Moulton (“Respondent”), a real estate salesperson licensee. Based on the evidence presented at hearing and the applicable law, Complainant has successfully

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<sup>1</sup> The undersigned Hearing Officer is the fourth appointed Hearing Officer in this matter since the initiation of this matter in 2005.

presented a basis for sanctioning Respondent's real estate salesperson license pursuant to R.I. Gen. Laws §§ 5-20.5-14(a) (15), (20) and (27).<sup>2</sup>

## 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. TRAVEL AND ISSUES PRESENTED

An order appointing hearing officer was issued on March 1, 2005 and a pre-hearing conference was held on May 6, 2005. At the pre-hearing conference, the issues were clarified and it was ordered that written discovery be propounded by June 30, 2005, all answers to discovery be made by July 29, 2005, and oral discovery be completed by August 31, 2005. An order appointing a substitute hearing officer was issued on August 22, 2005 and a hearing was held on January 12, 2006. Another order appointing a substitute hearing officer was issued on September 14, 2007. The Director issued a final order appointing a substitute hearing officer on October 3, 2008 for the purpose of

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<sup>2</sup> R.I. Gen. Laws §§ 5-20.5-14(a) (15), (20), and (27) 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:

...  
(15) Violating any rule or regulation promulgated by the commission or the department in the interest of the public and consistent with the provisions of this chapter;

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

...  
(27) Submitting to an owner a written offer to purchase or lease unless that offer contains the essential terms and conditions of the offer including the manner in which the purchase price is to be paid, and if that offer is contingent upon certain conditions, those conditions shall be clearly stated in the offer, or unless the offer is conditioned upon the later execution of a complete agreement for sale;

conducting any further hearing and preparing a decision in this matter. Hearings were subsequently held on November 25, 2008 and January 15, 2009.

The issues are further clarified here and presented as follows:

A. Whether or not Respondent engaged in any conduct in a real estate transaction that demonstrated bad faith, dishonesty, untrustworthiness, or incompetency in violation of R.I. Gen. Laws § 5-20.5-14(a)(20) and if so, whether or not such violation warrants an administrative sanction against his license; and

B. Whether or not Respondent submitted a written offer to purchase to his client that did not contain the essential terms and conditions of the offer in violation of R.I. Gen. Laws § 5-20.5-14(a)(27) and if so, whether or not such violation warrants an administrative sanction against his license.

C. Whether any other regulatory violations are implicated by findings of violations in Sections III (A) and (B) above.

#### **IV. MATERIAL FACTS AND TESTIMONY**

Respondent and Complainant are licensed as real estate salesperson and broker, respectively, pursuant to R.I. Gen. Laws § 5-20.5-1, *et seq.* Complainant represented a buyer in a real estate transaction for a property located at 8 Winterberry Drive in Coventry, Rhode Island. Respondent represented the sellers in the transaction. Complainant gave Respondent the buyer's Offer to Purchase the property on May 9, 2003 ("Offer to Purchase"). The sellers promptly accepted the offer. Respondent prepared the purchase and sale agreement (the "Purchase and Sale Agreement"), which was signed by the buyer on May 10, 2003 and by the sellers on May 11, 2003. The closing took place on June 30, 2003. The total commission paid at the closing to both real estate licensees was

6% of the sale price of the home and distributed as: 4.5% to the Respondent and 1.5% to the Complainant.

In his initial complaint, filed on September 2, 2004, Complainant makes the allegation that Respondent failed to honor a written agreement to pay Complainant a 3% commission rate on the sale of the property as the co-broker/buyer's broker. Complainant avers that Respondent instead paid him a rate of only 1.5%. In support of his claim that Respondent owed him 3% of the sales price, Complainant states that the Multiple Listing Service ("MLS") listing indicated that a 3% commission rate would be paid to the buyer's broker with a notation of it being variable/negotiable. Additionally, Complainant states that the Offer to Purchase submitted to Respondent reaffirmed the 3% commission rate. Complainant asserts that the P&S did not reflect any change in Complainant's Offer to Purchase.

At the closing, Complainant submitted an invoice for the 3% commission, but received a commission of only 1.5%. The amount of the commission paid to Complainant at 1.5% was five thousand two hundred and fifty dollars (\$5,250) and would have been ten thousand five hundred dollars (\$10,500) at 3%. Complainant wrote to both Respondent and Respondent's principal broker, Virginia Perry, about the matter, but to no avail. As a result, Complainant claims that Respondent acted in violation of R.I. Gen. Laws § 5-20.5-14(a)(20) and (27).

Respondent provided a response to the complaint, dated October 20, 2004. In it, he avers that Complainant misrepresented himself in the course of the transaction by not informing Respondent that he was not a member of the Rhode Island Association of Realtors ("RIAR"), any local real estate board of RIAR, or the Statewide Multiple Listing

Service (“MLS”), a subsidiary of RIAR. Respondent asserts that the 3% commission on the MLS listing was for MLS members only. Respondent states that his personal office policy is to pay 1.5% to non-MLS members, a fact confirmed to Complainant by Respondent’s office manager, John Haronis.

Respondent states that Complainant joined the Kent/Washington Board of Realtors, the local RIAR board (it is not clear from the record exactly when he joined), and then filed a complaint against Respondent. The complaint was dismissed. Respondent avers that the “bottom line” was that Complainant was not a member of RIAR or MLS and that there was no separate, negotiated agreement for compensation between him and Complainant.

In his rebuttal to Respondent’s response, received by the Department on February 1, 2005, Complainant states that he was not a member of RIAR or MLS, but that he is and has been a licensed real estate broker. Complainant asserts that he presented Respondent with the written offer with a line that stated that Complainant’s brokerage, U.S.A. Realty, Inc., would receive 3% of the sale price. Complainant contends that Respondent did not dispute the commission rate at the time. He also states that the MLS listing provided by the listing agent to Complainant indicated a 3% commission to the co-broker. Complainant further asserts that Respondent never mentioned anything about an office policy that required Respondent to pay a smaller commission rate to non-MLS members.

Complainant insists that it is customary to honor the percentage payment listed on MLS to any co-brokers, a practice he follows as well as most other real estate professionals with whom he worked. Complainant states that he tried to settle this

disagreement with Respondent in the beginning, but Respondent basically declined to discuss the matter. In sum, Complainant calls for “a bit of simple justice.” The Complainant testified that the written Offer to Purchase clearly stated that the seller would pay him 3% of the sale price. The offer was accepted without any further conditions. It was only when he received his commission check of 1.5% of the sale price that Complainant found out that Respondent would not pay the 3% commission rate.

At hearing, Complainant testified to the following on his own behalf. On May 9, 2003, he submitted his client’s Offer to Purchase to Respondent, which included the condition that he be paid a 3% commission rate. Respondent’s MLS listing had indicated that a 3% commission rate would be paid to the buyer’s broker with a notation of it being variable/negotiable, so Complainant believed that Respondent had already offered and planned on paying a 3% commission rate. Complainant was promptly advised that the offer was accepted, and Respondent did not express any disagreement about the requested commission rate. Complainant offered to draw up the Purchase and Sale Agreement but Respondent insisted on drafting the agreement. On May 10, 2003, the buyer signed the Purchase and Sale Agreement, and on May 11, 2003, the sellers signed it.

The Purchase and Sale Agreement forms used by RIAR did not provide any language provision regarding the commission division between Realtors, and Complainant never obtained a copy of the Offer to Purchase that was signed by Respondent. Complainant stated that when he asked Respondent for a signed copy, Respondent said that he could not find it, but told Complainant not to worry about it. Complainant assumed that he and Respondent had an understanding that Respondent

would pay him a 3% commission rate. Complainant believes that Respondent never indicated to him that he would be receiving less than 3% during the time between the acceptance of the Offer to Purchase and the closing on June 30, 2003. Complainant did not realize that Respondent would be paying him less than 3% until Complainant received his commission check in the mail for 1.5% of the sale price.

Complainant testified that shortly after he received his check, he called Respondent to ask why he was paid only half of what he had expected. Complainant stated that Respondent told him that his brokerage would only pay a 1.5% commission rate to non-MLS participants, thus Complainant would only be receiving 1.5%. Complainant stated that this was the first time that he was informed of this commission policy. Regardless, Complainant stated that he was a member of MLS on June 30, 2003, the date of the closing. Because he was an MLS member on the date of the closing, Complainant contends that he is entitled to the full 3% commission rate that Respondent had advertised on the MLS listing.

Respondent also testified on his own behalf and provided the following testimony. Complainant presented him an offer to purchase on May 9, 2003 ("Offer to Purchase"), which he then presented to his seller. Respondent's seller promptly accepted the offer.

Respondent prepared the Purchase and Sale Agreement, which was signed by the buyer and sellers on May 10, 2003 and May 11, 2003, respectively. Respondent characterized the 3% commission for Complainant on the Offer to Purchase form as a request. Respondent states that he did not accept this commission offer and did not believe that his sellers' acceptance of the Offer to Purchase implied that the commission offer was also accepted.

Respondent stated that his personal office policy was to pay a 3% commission rate to MLS members and a 1.5% commission rate to non-MLS members. He asserted that it was the duty of non-MLS members to inform the other broker that they were not MLS members. Respondent testified that he did not learn that Complainant was not an MLS member until May 12 or 13, 2003, after the buyer and sellers had signed the Purchase and Sale Agreement. Respondent stated that when he tried to enter Complainant's name into his computer system, Complainant's name did not come up as an MLS member. Respondent thought it may have been an error and he promptly called MLS to verify whether or not Complainant was an MLS member. Respondent testified that MLS confirmed that Complainant was not a member. Respondent called Complainant within a day or so to inform him that his brokerage's policy was to pay non-MLS members a 1.5% commission rate. Complainant disputes that this phone call ever took place. Respondent stated that informing Complainant promptly of his commission policy as soon as he learned of his non-MLS status was an exercise of good faith. Because Complainant was not an MLS member at the time the buyer and sellers executed the P&S, Respondent asserts that his brokerage's policy of paying 1.5% commission applied here regardless of the fact that Complainant had become an MLS member by the time of the closing.

Complainant provided a letter from MLS dated December 29, 2008, which indicated that he became a member of MLS on June 12, 2003. According to Complainant's memorandum, Complainant applied for his MLS membership on May 30, 2003 and was an MLS member by the date of closing.



Respondent also contends that Complainant, as a member of the Kent Washington Board of Realtors, had agreed to resolve fee disputes through the board's arbitration procedure. Complainant did not file his arbitration request within the required 180 days, so the Board of Realtors rejected Complainant's request for arbitration. When Complainant appealed, the Board upheld their decision to deny his request for arbitration because his request had not been filed within the time limit. Respondent stated that as a result of this, Complainant has essentially forfeited his opportunity to resolve this fee dispute.

Respondent testified that commission rate splits are generally not included in purchase and sale agreements. He stated that an addendum could have been added to the Purchase and Sale Agreement as an agreement for a broker's commission rate but this was not done. As such, there was no commission agreement between them.

Finally, Respondent argued that the Statute of Frauds prevents Complainant from successfully claiming that there was a commission agreement, as it requires that such an agreement be documented in writing.

One of the issues at hearing was that Complainant repeatedly requested a copy of the signed Offer to Purchase. Respondent (according to Complainant) said he would mail it later. The Offer to Purchase signed by both parties was not presented at hearing (only the Offer to Purchase signed by the buyers and presented by Complainant to Respondent is an exhibit in this proceeding). Neither was any subsequent writing indicating a modification of the commission. It seems that the only defense that Respondent presents is that he verbally informed Complainant that he would not give the 3% commission

without evidence of membership in MLS, or a local RIAR Board. And, Respondent does not dispute that Complainant was an MLS member by the date of the closing.

At hearing, Complainant entered 9 exhibits into the record. Complainant's Exhibit 1 is the Broker Detailed Display with the notation that the handwritten markings were made by Complainant and are not being introduced/admitted for their truth. Complainant's Exhibit 2 is the Offer/Deposit Form signed by Complainant and the buyer, dated May 9, 2003. Complainant's Exhibit 3 is the Single/Multi-Family P&S, signed by the buyer on May 10, 2003 and signed by the sellers on May 11, 2003. Complainant's Exhibit 4 is the Commission Statement signed by Complainant, dated June 30, 2003. Complainant's Exhibit 5 is the U.S. Department of Housing & Urban Development ("HUD") Settlement Statement signed by the buyer and seller, dated June 30, 2003. Complainant's Exhibit 6 is a copy of the check paid to USA Realty for the amount of \$5,250.00 and Re/Max Central's Commission Split Invoice indicating 25% of the total commission being distributed to Complainant, dated July 1, 2003. Exhibit 7 is the State-Wide Multiple Listing Service, Inc. Rules and Regulations (2008) (this Exhibit is also Respondent's Exhibit A2). Exhibit 8 is a letter from the State-Wide Multiple Listing Service ("MLS") that indicates that Complainant became a member of State-Wide MLS, Inc. on June 12, 2003. Complainant also submitted a multiple document Exhibit A1 which consists of correspondence, copies of commission check and other documentation related to the dispute).

Respondent also submitted six (7) exhibits for consideration. Respondent's Exhibit 1 is the Code of Ethics and Standards of Practice of the National Association of Realtors, Effective January 1, 2003. Respondent's Exhibit 2 is a letter from the Kent

Washington Board of Realtors indicating that Complainant's request for arbitration was denied by the Grievance Committee, dated February 24, 2004. Respondent's Exhibit 3 is a letter from the Kent Washington Board of Realtors affirming the Grievance Committee's decision to deny his request for arbitration and dismissing Complainant's request to appeal, dated March 26, 2004. Respondent's Exhibit 4 is Appendix I to Part Ten, Arbitrable Issues, of the Code of Ethics and Arbitration Manual. Respondent's Exhibit 5 is a document entitled *Before You File an Ethics Complaint*, the Kent Washington Association of Realtors' guide to filing an ethics complaint. Respondent's Exhibit 6 is the Broker Detailed Display, pending, dated May 12, 2003. Respondent also submitted Exhibit A2, which is the State-Wide Multiple Listing Service, Inc.'s Rules and Regulations from 2008.

#### **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 Complainant. As such, he bears the burden for establishing why it is more likely than not that Respondent conducted himself in a manner that violated the statutes and regulations under which he holds his real estate brokers license. To be clear, it is not the role of this agency to determine how much of the commission is to be paid to whom, it is the role of this agency to determine whether the licensee in the performance of his duties (of justifying the reduction in commission) violated R.I. Gen. Laws §§ 5-20.5-14(a) (15), (20) and/or (27).

## **VI. DISCUSSION**

R.I. Gen. Laws §§ 5-20.5-6(b) and 5-20.5-14(a) provides that the Department, after a due and proper hearing, may suspend, revoke, or refuse to renew any license upon proof that the license was obtained by fraud or misrepresentation or upon proof that the holder of the license has violated this statute or any rule or regulation issued pursuant to this statute. In addition, R.I. Gen. Laws § 5-20.5-14(b) authorizes 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.

The facts alleged in the complaint and during the hearing implicate three (3) statutory provisions of the Rhode Island laws and rules pertaining to real estate licensure. Each will be addressed in turn.

### **A. R.I. Gen. Laws § 5-20.5-14(a)(20) – Bad faith, Untrustworthiness, Incompetency in a Real Estate Transaction.**

The first statutory provision implicated is R.I. Gen. Laws § 5-20.5-14(a)(20). It authorizes the Department to suspend or revoke a license where a licensee engaged in any

conduct in a real estate transaction that demonstrates bad faith, dishonesty, untrustworthiness, or incompetency. “The purpose of licensing real estate salespersons and real estate brokers is to ensure professional standards within the real estate business.” See R.I. Gen. Laws § 5-20.5-1, *et seq.*, and CLR11; *Gallo v. Smith*, DBR No. 98-L-0058 4/19/00 at 12. As such, licensees have certain statutory and regulatory duties imposed upon them in order to maintain these standards and to ensure that the public receives a certain level of service. *Id.* As held in a Department decision,

A [real estate] licensee’s honesty, trustworthiness, integrity and reputation affect his or her ability to conduct all real estate transactions fairly. If one of these character traits are [sic] compromised, then the stability and integrity of the transaction is compromised. *D’Orsi v. Santilli*, DBR No. 99-L-0086 (July 18, 2000).

In other words, “[t]he statutory and regulatory scheme of licensing real estate salespersons and brokers ensures a system where consumers can rely on licensed professionals to handle real estate sales in a trustworthy and competent manner.” *Altomari v. Clark and Shirley*, DBR No. 01-L-0160 at 24.

The crux of the issue in this matter is whether Respondent should have informed Complainant of his policy of paying other than the 3 % commission upon the presentation of the Offer to Purchase. The Offer to Purchase clearly states in Complainant’s handwriting that the commission of 3% was to be paid to him (as U.S.A. Realty) by Respondent. Respondent does not dispute that the Offer to Purchase was presented or that the presented commission was 3%. Respondent did not present any documentation to support his position that the 3% commission was modified either upon receiving the Offer to Purchase or afterward.

Thus, in the instant matter, the threshold question is not whether or not Complainant has a valid claim to the balance of the commission sought but whether or not Respondent engaged in conduct exhibiting bad faith, dishonesty, or untrustworthiness given the particular facts and circumstances of this real estate transaction. Complainant alleges that Respondent acted in bad faith by accepting Complainant's offer of a 3% commission rate, but then paying him only 1.5% after the closing. If proven, Respondent's conduct would constitute a violation of R.I. Gen. Laws § 5-20.5-14(a)(20), which states that a real estate license may be subject to suspension or revocation if it is found that the licensee is guilty of "any conduct in a real estate transaction, which demonstrates bad faith, dishonesty, untrustworthiness, or incompetency."

While not necessarily dispositive in this licensing matter, a review of Rhode Island law pertaining to claims for real estate commissions provides some context in this matter. The first consideration then must be R.I. Gen. Laws § 9-1-4(6), the applicable provision within the statute of frauds.<sup>3</sup> In short, it provides that "the Statute of Frauds requires that an individual seeking the payment of a commission in connection with the sale of real estate is denied recovery, unless the agreement is documented in writing." *Brochu v. Santis*, 939 A.2d 449, 453 (R.I. 2008).

The Rhode Island legislature enacted R.I. Gen. Laws § 9-1-4(6) to protect the public against the "unfounded claims of a specific class of persons, namely, real estate

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<sup>3</sup> R.I. Gen. Laws § 9-1-4(6). It provides in pertinent part as follows:

No action shall be brought:

...

(6) whereby to charge any person upon any agreement or promise to pay any commission for or upon the sale of any interest in real estate, unless the promise or agreement upon which the action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him or her thereunto lawfully authorized.

brokers and agents.” *Heyman v. Adeack Realty Co.*, 228 A.2d 578, 580-81 (R.I. 1967). Given that the intent of this statute is to protect against the groundless claims of real estate brokers, it must be strictly construed and applied. *Heyman*, 228 A.2d at 581; *Dooley v. Lachut*, 234 A.2d 366, 368 (R.I. 1967). Courts have frowned on anything short of complete compliance with the statute by a real estate broker. See *Kates Corp. v. Kirshenbaum*, 409 A.2d 540, 543 (R.I. 1979) and *Peacock Realty Co. v. E. Thomas Crandall Farm, Inc.*, 278 A.2d 405, 410 (R.I. 1971). Importantly, no exclusion or exception for oral agreements among real estate brokers to share a commission exists. See *Metro Properties, Inc. v. Yatsko*, 763 A.2d 617, 620-621 (R.I. 2000). Indeed, it is well established that a written agreement is necessary for a broker to recover a commission. *Id.* at 622 (citing *Dooley*, *supra*, and *Wright*, *supra*).

Moreover, an oral agreement precludes recovery of a commission “irrespective of whether the action is based on the contract, on quantum meruit for services rendered, or on a theory of estoppel.” *Brochu*, 939 A.2d at 453 (quoting *Zexter v. Cerrone*, 265 A.2d 328, 328-29 (R.I. 1970)). It is well-settled that “any attempt to apply the doctrine of promissory estoppel to real estate brokerage agreements so as to take them out of the statute would, in the absence of fraud, defeat the very purpose for which clause Sixth was enacted, specifically, protection against the assertion of unfounded claims.” *Id.* (quoting *Heyman*, 228 A.2d at 580).

Notwithstanding the requirement for a written agreement, there is a well-established exception to the statute of frauds under Rhode Island law. In *Adams-Riker, Inc. v. Nightingale*, 383 A.2d 1042 (1978), the Rhode Island Supreme Court adopted the rule that, if the party to be charged admits in a pleading or on the witness stand that an

oral agreement exists and defines all of its essential terms, the writing requirement is satisfied. 383 A.2d at 1044-45. In addition, an admission that a contract was made certainly cannot “be ignored when all the other evidence submitted supports the same conclusion.” *Peacock*, 278 A.2d at 409-410 (quoting *Radke v. Brenon*, 134 N.W.2d 887, 891 (Minn. 1965)). Thus, a memorandum that lacks the formal requirements contemplated by the statute of frauds may be sufficient when taking into account the surrounding circumstances, the pertinent facts, and all the evidence in the case. *Id.* at 409-410. Without an admission, however, the requirements of the statute of frauds must be satisfied in their entirety. *MacKnight v. Pansey*, 412 A.2d 236, 243 (1980).

After a review of the material facts and the caselaw, it is troubling that Respondent did not communicate with Complainant in writing in conjunction with and at the same time as the presentation and acceptance of the Offer to Purchase and the drafting of the Purchase and Sale Agreement. It is this type of failure to communicate in writing (especially when the impact of that disagreement could have significant monetary consequences) that creates problems in real estate transactions. Respondent should have informed Complainant in writing that the acceptance of the Offer to Purchase was contingent upon a reduction of Complainant’s commission. But, this modification of the commission was probably not communicated because it may have affected the consummation of the sale. Rather, Respondent waited until May 12<sup>th</sup> or 13<sup>th</sup> 2003 (after the Purchase and Sale Agreement had been signed on May 10, 2003 by the buyers and May 11, 2003 by the sellers) to check to see whether Complainant was an MLS member (according to his version of the facts). Respondent had several days from the time he presented the Offer to Purchase until the Purchase and Sale Agreement was signed to



communicate with Complainant regarding the proposed commission, and he chose not to do so. Respondent's failure to present (at the time of the transaction and during this hearing) an executed Offer to Purchase is also an indication that he may have been remiss in his duties. Failing to communicate the terms and conditions for obtaining a commission (especially one as simple as joining MLS and without clarifying when one has to be a member) gives rise to confusion in the process and the ability of licensees in Respondent's position to take advantage of fellow licensees representing other buyers. Also, Respondent's claim that this practice (of MLS members getting 3% and non-MLS members getting 1.5 %) is known in the industry is not supported by the record. Additionally, because real estate brokers and salespersons often use their commissions (usually by reducing it) in sales negotiations, a unilateral reduction such as the one in this case is not conducive to fair dealing in a transaction.

Any pressure that Respondent may have been experiencing in expediting and finalizing the sale does not mitigate the Respondent's duty to deal fairly with all parties to a transaction. Failure to communicate the variation in commission in writing during the negotiation phase of the transaction (at the time the Offer to Purchase was presented and prior to the execution of the Purchase and Sale Agreement) is evidence of incompetence. Additionally, Respondent, as a professional with a fiduciary duty, should have realized that he was depriving a fellow broker of more than \$5,000 in commissions and that should have led to some written communication regarding the issue. This duty is underscored in Standard of Practice 3-2 in Respondent's Exhibit 1 (The Code of Ethics and Standards of Practice of the National Association of REALTORS®) states that:

REALTORS® shall, with respect to offers of compensation to another REALTOR®, timely communicate any change of compensation for

cooperative services to the other REALTOR® prior to the time such REALTOR® produces and offer to purchase/lease the property.

The undersigned Hearing Officer is also troubled by the fact that Respondent, a licensed real estate salesperson, did not offer any testimony by his supervising broker to corroborate office policy and procedure or any evidence that the supervising broker was aware of the unilateral withholding of the commission.

Therefore, the undersigned Hearing Officer finds that Respondent's failures: (i) to communicate the modification of the commission at the time of the Offer to Purchase and (ii) to realize that such a significant unilateral withholding of a commission necessitated a written confirmation of the terms are a basis for sanction pursuant to R.I. Gen. Laws § 5-20.5-14(a)(20) and are evidence of incompetence, untrustworthiness, and dishonesty in the transaction at issue.

**B. R.I. Gen. Laws § 5-20.5-14(a)(27) – Submitting to an Owner a Written Offer to Purchase Without Including the Essential Terms and Conditions of the Offer.**

The second potential violation involves R.I. Gen. Laws § 5-20.5-14(a)(27), which authorizes the Department to suspend or revoke a license where a licensee submits to an owner a written offer to purchase that did not contain the essential terms and conditions of the offer. It is clear from the record that the Offer to Purchase was the basis for the Purchase and Sale Agreement that Respondent insisted on drafting. It is also clear that Respondent did not reflect in an addendum, or any other written document, any condition, dispute, or problem with the 3% commission delineated in writing. For the reasons, explained above, the commission amount is a term that the buyer and seller and co-broker should have been made aware of during the negotiation of the transaction at issue. Failure to communicate the term in writing to all interested parties is a violation of R.I. Gen. Laws § 5-20.5-20(a)(27) because Respondent failed to submit a written offer to

purchase which contained all of the essential terms and conditions of the offer, including the condition that the offer was allegedly contingent upon the acceptance of a 1.5% commission by the buyer's broker.

**C. Violation of Regulation 11, Rule 20, General Obligations of Licensees**

After reviewing all of the facts, evidence, the context of the transaction, and the credibility of the parties, the undersigned Hearing Officer also finds that Respondent violated Central Management Regulation 11 entitled *Real Estate Brokers and Salespersons*, Rule 20 (2003). The rationale for withholding the commission without communicating in writing is self-serving and does not reflect Respondent's compliance with Rule 20 (2003) which requires, in pertinent part:

- (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.* (Emphasis added)

Respondent, by failing to communicate competently, honestly, and in a trustworthy manner, also violated his duty under Rule 20. Additionally, R.I. Gen. Laws § 5-20.5-14(a)(15) which states that “[v]iolating any rule or regulation promulgated by the commission or the department in the interest of the public and consistent with the provisions of this chapter” is also a basis for sanction under the statute.

## VII. Penalty

This case involves statutory and regulatory violations culminating in Respondent taking \$5,250 of a fellow licensee's money that he was not entitled to. The self-serving rationalization for keeping half the commission was based on an intentional violation of Respondent's duties to communicate fairly by putting forth all material terms to an offer in writing. The Department has addressed similar issues in other cases. Revocation was deemed the appropriate sanction in *In the Matter of Kathleen Giorgio*, DBR No. 00-L-0010 (10/16/02), where the real estate licensee retained commission money that she was not entitled to retain. The Department found this violated R.I. Gen. Laws § 5-20.5-14(a)(20) and revoked her real estate license.

The purpose of R.I. Gen. Laws § 5-20.5-14(a)(14) in authorizing the Department to take administrative action against a license or to deny an application for license is to protect the public from dishonest, untrustworthy and incompetent individuals. *In the Matter of Scungio*, DBR No. 00-L-0003 (6/15/01), at p. 7. "The Department must consider honesty, competency, and trustworthiness in the granting of a real estate license application." *In the Matter of David Catalano*, DBR No. 02-L-0060 (10/25/02), at 7-8. See also *Scungio*, at 11. See *In the Matter of Steven Ceceri*, DBR No. 02-L-0041 (December 23, 2004) (Revocation of License).

R.I. Gen. Laws §§ 5-20.5-6(b) and 14(a) allow the Department to revoke or suspend a license and R.I. Gen. Laws § 5-20.5-14(b) allows the Department to impose an

administrative penalty of one thousand dollars (\$1,000) per violation.<sup>4</sup> The Department also has a duty to consider mitigating and aggravating circumstances in imposing its sanctions. Central Management Regulation 2 entitled *Rules of Procedure for Administrative Hearings*, Section 16 (Penalties) requires that the Department consider aggravating and mitigating circumstances.<sup>5</sup>

In the matter at hand, the Respondent has a long licensing history with no adverse record. However, an aggravating factor that has to be considered in this case is the degree of harm to the public and in this case, the co-broker/licensee/complainant. It is troubling that Respondent would treat a fellow licensee in this manner when he has knew the scope of reliance that the licensee had on the money at stake. In reviewing the facts,

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<sup>4</sup> R.I. Gen. Laws § 5-20.5-14(a) and (b) state, in pertinent part,:

(a) **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: ...

(b) The director is authorized 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.

<sup>5</sup> Central Management Regulation 2, Section 16 states:

(A) In determining the appropriate penalty to impose on a Party found to be in violation of a statute(s) or regulation(s), the Hearing Officer shall look to past precedence of the Department for guidance and may consider any mitigating or aggravating circumstances.

(1) Mitigating circumstances may include, but shall not be limited to, the following: the Party's licensing history, i.e. the absence of prior disciplinary actions; the Party's acceptance of responsibility for any violations; the Party's cooperation with the Department; and the Party's willingness to give a full, trustworthy, honest explanation of the matter at issue.

(2) Aggravating circumstances may include, but shall not be limited to, the following: the Party's prior disciplinary history; the Party's lack of cooperation and/or candor with the Department; the seriousness of the violation; whether the Party's act undermines the regulatory scheme at issue; whether there has been harm to the public; and whether the Party's act demonstrates dishonesty, untrustworthiness, or incompetency.

(B) The finding of mitigating factors will not necessarily lead to a reduction in the penalty imposed if the circumstances of the violations found by the Hearing Officer are such that they do not warrant a reduction in penalty.

while it may seem reasonable to those not involved in the minutia of real estate brokering and sales to unilaterally withhold a commission which is contrary to all of the writings evident in a transaction based on some undocumented office policy, it is unreasonable given the context of fiduciary, statutory, and regulatory duties among these licensed individuals. For that reason, the undersigned Hearing Officer is recommending that Respondent be sanctioned \$1,000 for each statutory violation as delineated herein as well as a five (5) business day suspension of the Respondent's License. Therefore, the undersigned recommends that Respondent pay a total administrative penalty of \$3,000 for violating: R.I. Gen. Laws §§ 5-20.5-14(a)(15) (for violating Rule 20 of Commercial Licensing Regulation 11); (20) (for conduct demonstrating incompetence, untrustworthiness, and dishonesty); and, (27) (for failing to submit a written offer that contains all terms and conditions to that Offer to Purchase) and serve a five (5) business day suspension of his License upon the expiration of the appeal period for this Decision (which is 30 days from the date of the Decision).

#### **VIII. FINDINGS OF FACT**

1. Complainant gave Respondent an Offer to Purchase a property located at 8 Winterberry Drive in Coventry, Rhode Island on May 9, 2003 and it was promptly accepted.
2. The Offer to Purchase indicated that a commission of 3% would be paid to Complainant.
3. The MLS Listing stated that a commission of 3% would be paid to the buyer's broker.

4. Respondent drafted the Purchase and Sale Agreement and the buyer signed it on May 10, 2003 and the sellers signed it on May 11, 2003.
5. The closing on the property at issue took place on June 30, 2003.
6. Respondent paid Complainant a 1.5% commission at closing and had not previously notified the Complainant in writing that the commission would be less than stated on the Offer to Purchase.
7. On or about September 2, 2004, Complainant filed a complaint against the Respondent with this Department.
8. A full, evidentiary hearing was held on January 12, 2006, November 25, 2008, and January 15, 2009.
9. Respondent did not act competently, honestly, and fairly in his conduct with Complainant in this transaction.
10. Respondent did not submit a written offer to purchase to the Complainant that reflected the commission that was paid to Complainant.
11. All other facts contained in Section VI is incorporated by reference herein.

## **IX. 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 V and the statutory framework and analysis set forth in Section VI-A, Complainant did establish by a preponderance of the evidence that Respondent engaged in any conduct in a real estate transaction that demonstrated bad faith, dishonesty,


untrustworthiness, or incompetency in violation of R.I. Gen. Laws § 5-20.5-14(a)(20).

3. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI-B, there is sufficient evidence to establish by a preponderance that Respondent submitted to an owner a written Offer to Purchase that did not contain the essential terms and conditions of the offer in violation of R.I. Gen. Laws § 5-20.5-14(a)(27).
4. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI-C, there is sufficient evidence to establish by a preponderance that Respondent violated Rule 20 of Commercial Licensing Regulation 11 and therefore R.I. Gen. Laws § 5-20.5-14(a)(15) is an additional basis for sanction under the statute.

**X. RECOMMENDATION**

Based on the above analysis, the Hearing Officer recommends that the Director of the Department find that Complainant has met his burden that Respondent violated R.I. Gen. Laws §§ 5-20.5-14(a) (15) (20) and (27) and that Respondent be sanctioned by paying an administrative penalty of \$1,000 per violation pursuant to R.I. Gen. Laws §§ 5-20.5-14(b) for a total administrative penalty of \$3,000 and serving a five (5) business day suspension of his License upon the expiration of the appeal period for this Decision (which is 30 days from the date of the Decision).

Dated: Jan. 28, 2011

  
\_\_\_\_\_  
Neena Sinha Savage  
Hearing Officer



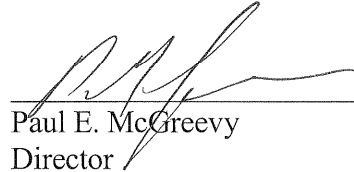
**ORDER**

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

I hereby take the following action:

ADOPT  
 REJECT  
 MODIFY

Dated: 31 January 2011

  
\_\_\_\_\_  
Paul E. McGreevy  
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 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 31<sup>st</sup> day of January, 2011, that a copy of the within Decision was sent by first class mail, postage prepaid to:

Attorney for Respondent:  
Frederick G. Tobin, Esq.  
300 Centerville Road, Suite 100E  
Warwick, RI 02886-1222

Respondent:  
Richard W. Moulton  
37 Sandy Bottom Road  
Coventry, RI 02816

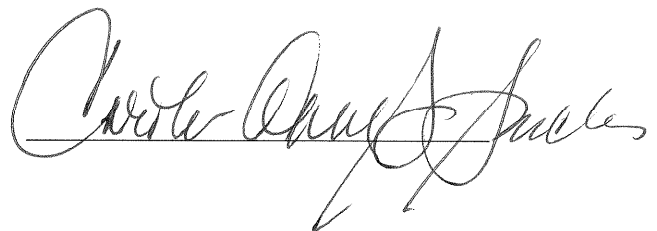
Attorney for Complainant:  
Gregory A. Mancini, Esq.  
Sinapi, Formisano, & Coleman  
100 Midway Place, Suite 1  
Cranston, RI 02920-5707

Complainant:  
Michael Nardella  
6 Veronica Court  
Coventry, RI 02816

and by hand-delivery to:

Maria D'Alessandro, Deputy Director  
Division of Commercial Licensing  
Department of Business Regulation  
1511 Pontiac Avenue  
Cranston, RI 02920

William J. DeLuca  
Administrator – Real Estate  
Department of Business Regulation  
1511 Pontiac Avenue  
Cranston, RI 02920

A handwritten signature in cursive script, appearing to read "Charles Andrew Spade", written over a horizontal line.