THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge

Docket No. 11-ALJ-11-0168-AP

Vanessa Patrick,.....Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation,
State Real Estate Commission, ...Respondent

BRIEF OF RESPONDENT

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JUN 29 2012
SC Court of Appeals

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STATEMENT OF THE CASE

This matter originated by a letter that was sent to the South Carolina Department of Labor, Licensing and Regulation (LLR), Real Estate Commission (Commission). The allegations contained in the letter were investigated by LLR. Ultimately, a Notice of Charges and Notice of Hearing dated October 13, 2010 was filed and served upon Appellant, and her attorney, Thomas E. Lydon. **(R.29-34).**

On February 16, 2011, a hearing before the Commission was conducted. The LLR attorney for this matter was Paula Magargle, and both Appellant and her attorney were present. At the conclusion of the hearing, the Commission went into Executive Session to discuss the merits of the case. After returning to open session, a motion was made to revoke Appellant's license and issued a fine in the amount of $2,500. **(R.216).**

On March 24, 2011, Appellant filed a notice of appeal to the Administrative Law Court (ALC). Respondent filed and served a Motion to Conform and Strike or in the Alternative, a Motion to Seal, and Appellant filed a response. **(R.261-263).** Thereafter, Respondent filed and served the Record on Appeal. After Appellant filed her brief, Respondent filed and served its Motion to Conform Appellant's Brief to the Requirements of Rule 37(B) or in the Alternative to Strike. The ALC failed to rule on either motion and instead, on October 5, 2011, issued an order affirming the Commission's order. **(R.367-374,1).** The Appellant timely served her notice of appeal.

FACTS

Appellant was a real estate agent licensed by the Commission during the times relevant to this matter; however, Appellant placed her license in an inactive status in late November 2008. In 2003 or 2004, Appellant began working for Asset Realty, Inc. as the broker-in-charge but after a couple of years went back to being a sales broker full time. **(R.140).**

On March 8, 2008, Riverpath Investors, LLC (Riverpath), an entity formed by Appellant and Sally Grooms, a fellow co-worker from Asset Realty entered into a contract with the Pinner family to purchase property located in Little Mountain, South Carolina for a price of $5,396,000. **(R.232-233).** Appellant signed the contract—an Asset Realty form agreement—as the "selling agent" and listed her office as Asset Realty. **(R.235).** Grooms signed the contract as a member of Riverpath. **(R.235).** There was no indication in the contract that Appellant was also a member of Riverpath, and she did not disclose the fact she was also one of the buyers to the sellers. **(R.80).**

The addendum to the contract contained a paragraph entitled "Earnest Money," which provided:

> Purchaser shall deposit $30,000.00 earnest money with Asset Realty, Inc. This earnest money will become non-refundable after 120 days. At the end of 120 days, purchaser will deposit an additional $50,000 earnest money, also non-refundable and proceed to closing. Closing to take place on or before August 29, 2008.

(R.236). In connection with that provision, Appellant presented to Andy Bowers, the Pinner family's representative, copies of two checks from Grooms' account. One check was for $25,000 and the other was for $5,000. **(R.242,84).** Although the contract

specifically required that the $30,000 in earnest money be held in trust by Asset Realty, neither of the two checks was deposited into Asset Realty's escrow account. **(R.202).** When questioned about this during the hearing, Appellant testified that she did not deposit the checks because, after she showed the checks to Bowers, she learned that Grooms only had money in her account to cover the $5,000 check. **(R.147).** She further testified that she borrowed the $25,000 from a friend to cover the remaining $25,000 in earnest money due under the contract. **(R.147-48).** However, Appellant testified she did not deposit the $25,000 into Asset Realty's escrow account. Rather, she told her friend to "just leave it there [in her friend's account] until it's needed." **(R.148).** This friend did not testify at the hearing.

Although the contract called for the $30,000 in earnest money to be held in trust by Asset Realty and provided for a 3% commission to be paid to Asset Realty, Appellant did not inform Asset Realty's management of the contract. **(R.234,136).** Moreover, she did not inform the Pinner family in writing that she was a licensed real estate agent and one of the purchasers. **(R.117).**

Under the terms of the addendum, after the 120 day expiration date, an additional $50,000 was to be deposited in escrow. **(R.237).** Ultimately, the transaction did not close by the August 29, 2008 deadline set forth in the contract, and the parties entered into a contract addendum extending the deadline to September 30, 2008. **(R.240,106-07).** Under the terms of the original March 8th contract, one thirty-day extension was permitted as long as Riverpath demonstrated good-faith in its due diligence activities and deposited an additional $30,000 in non-refundable money. **(R.236).**

At the end of September 2008, the closing still had not taken place. After some negotiations, the parties entered into a contract extension in October 2008. **(R.240,87-88)** Under the terms of the extension, the parties agreed to extend the contract to no later than December 31, 2008, in exchange for the deposit of an additional $75,000 in "non-refundable penalty funds." **(R.24241).** In its recitals, the extension stated that a total of $110,000 ($30,000 plus $50,000 plus $30,000) in non-refundable earnest money had previously been deposited in the trust account of Asset Realty. **(R.240).** At this point, the total amount that should have been in Asset Realty's escrow account was $185,000. The extension also stated that, going forward, "the earnest money and penalty money is to be held in escrow in the trust account of Henry P. Bufkin, Attorney for the Sellers." Grooms signed the extension for Riverpath and Appellant signed as a witness.[1] **(R.240-41).**

Subsequently, members of the Pinner family became concerned about the delays in the contract and had questions concerning where the money was located. **(R.59).** Henry Bufkin, an attorney for the Pinner family, started making phone calls to ascertain the location of the money. **(R59-60).** On November 24, 2008, Bufkin wrote a letter to Appellant, Grooms, Asset Realty, and Acquire Real Estate, Inc., the real estate firm Appellant had transferred to in October of 2008. In the letter, Bufkin outlined the terms of the contract and demanded that a total of $185,000 in non-refundable earnest and penalty funds be transferred to his trust account by December 4, 2008. **(R.227).** Additionally, he stated that it appeared "several real estate agents have breached their

[1] Respondent is providing this information only as background. Although it is Respondent's position that the contract is clear as to the $185,000 that should have been in the Asset Realty escrow account, the Commission based its decision on Appellant's admission of the mishandled initial $30,000 escrow amount.

fiduciary responsibility with regards to gathering the funds and depositing them in trust." A copy of the letter was sent to the Commission. **(R.227-29).**

As a result of receiving the letter, the Commission began investigating the transaction. On October 13, 2010, the Commission served Appellant with a Notice of Charges, which alleged Appellant violated Sections 40-57-135(B)(8), (C)(2), and (D), 40-57-137(K), 40-1-110(c),(f)(g), and (k), and 40-57-145(A)(1),(4),(10) and (20) of the South Carolina Code (2011). **(R.29-33).**

An administrative hearing regarding the matter was held on February 16, 2011, and the Commission ultimately found that Appellant violated all of the statutory sections charged, except for section 40-57-135(C)(2). **(R.15-19).** Based upon those findings, the Commission revoked Appellant's license and fined her $2,500. **(R.18).** Thereafter, Appellant timely filed an appeal with the Administrative Law Court, which affirmed the Commission. This appeal followed.

STANDARD OF REVIEW

The standard of review on orders on appeal from the ALC is set forth in the Administrative Procedures Act (APA), section 1–23–610(B) of the South Carolina Code (Supp. 2011). The court of appeals may reverse or modify the decision of the ALC if its findings, conclusions, or decisions are "in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1–23–610(B). "The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." Id.

Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached. Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (1999). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Midlands Utility, Inc. v. S.C. Dep't. of Health & Envtl. Control, 298 S.C. 66, 69, 378 S.E.2d 256, 258 (1989).

The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence. Palmetto Alliance, Inc. v. S. C. Public Service Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Where there is a conflict in the evidence, the agency's findings of fact are conclusive. Id.; see also Harbin v. Owens-Corning Fiberglass, 316 S.C. 423, 450 S.E.2d 112 (Ct. App. 1994).

Arguments

I. DID THE ALC ERR BY FAILING TO RULE ON ANY PRETRIAL MOTIONS?

Initially, Respondent notes this issue is not preserved for appeal. This issue was not raised to or ruled on by the administrative law court and therefore, not preserved for appellate review. See MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control, 394 S.C. 567, 576, 716 S.E.2d 111, 115-16 (Ct. App. 2011) (quoting Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the [ALC] are not preserved for appellate consideration.").

As to the merits, Respondent filed a motion to conform Appellant's brief or in the alternative to strike **(R.367).** Appellant filed a response, and the ALC did not issue a ruling on the motion before issuing a final order affirming the Commission's decision revoking Appellant's license. **(R.1,369).** Appellant argues that her case was somehow irreparably damaged because the ALC failed to rule on Respondent's motion. Because the ALC failed to rule on the motion, the references and exhibits that should not have been a part of the record on appeal to the ALC, because they were not presented to the Commission, were, in fact, not omitted from the record. **(R.335-365).** Accordingly, Appellant suffered no prejudice from the ALC's failure to rule on the motion because she was able to insert new arguments and exhibits in the record before the ALC.

II. DID THE ALC ERR BY FAILING TO FIND APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED?

Appellant argues her due process rights were violated by Respondent giving Appellant the evidence against her nine days before the hearing, by the proceedings not

being conducted promptly, by not being given an opportunity to respond to the charges against her before the hearing, by being prosecuted for additional charges with no notice, by being prosecuted on statutes for which no explanation was given, and for irregularities that occurred during and after the hearing. These issues are not preserved for appeal. These issues were not raised to and ruled on by the Commission and no motion for reconsideration was filed. In addition, these issues were not ruled on by the ALC, and Appellant did not file a rule 59(e), SCRCP, motion to secure a ruling. Accordingly, these issues are not preserved for appeal. See Home Medical Systems, Inc. v. S. C. Dep't. of Revenue, 382 S.C. 556, 562-63, 677 S.E.2d 582, 586 (2009) ((citing Brown v. S. C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled upon by the ALC are unpreserved for appellate review"); Carson v. S.C. Dep't of Natural Res., 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) ("[C]ourt sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency")).

As to the merits, Respondent will address each argument in turn.

A. Respondent timely provided Appellant a copy of the complaint and evidence against her.

Appellant argues the complaint letter and other evidence, which she does not specify, were not given to her attorney in adequate time to prepare for the hearing. This argument is without merit. The letter, which served as the complaint that prompted the investigation into this matter, was mailed to Appellant and copied to the Commission on November 24, 2008. **(R.227).** Therefore, Appellant and her attorney had ample time to review the complaint and prepare a defense. Further, the evidence in this case consisted of the contract and addenda, and Appellant was very familiar with all the documents. In

addition, the Appellant and complainants in this matter were involved in a civil action and she and her counsel were extremely familiar with both the subject transaction that formed the basis of the underlying complaint and the documents and correspondence that were Respondent's exhibits **(R.218-254, 310).** As will be discussed below, Appellant and her counsel were provided with notice by mail of the facts and conduct which warranted the intended action. Further, Appellant and her counsel were given an opportunity to show compliance with all lawful requirements for the retention of the Appellant's license. Respondent complied with all requirements of the APA in providing Appellant and her counsel with notification of the pending charges. Appellant and her counsel had a significant amount of time to prepare for this matter in that the Notice of Charges was dated and served October 13, 2010 and the hearing was held on February 16, 2011. In addition, she received all documents Respondent planned to use at the hearing in plenty of time to prepare an adequate defense. Therefore, Respondent submits Appellant has failed to present any credible evidence that the Commission violated her procedural due process rights.

B. Appellant allowed her license to be placed on inactive status

Section 40-57-150(C) of the South Carolina Code provides in part "when the department has reason . . . an investigation must be initiated in 30 days." Appellant uses this statutory provision to argue the proceedings did not occur promptly. This statutory section provides simply that an investigation must be initiated within thirty day, and has no bearing on when the proceedings should occur. In addition, at no time did Respondent suspend Appellant's license during the pendency of this action. Appellant voluntarily placed her license in inactive status. At the time, LLR's policy, which has changed, was

to not prosecute cases where a licensee chooses to inactivate his or her license. Once Appellant wanted to reactivate her license, the outstanding disciplinary matters needed to be dealt with and the investigation resumed.

C. Appellant was able to present her evidence to the Respondent prior to agency proceedings.

The record is replete with documentation from Appellant and her counsel where she explained her actions. **(R.316-324,333-334).** In addition, Appellant mailed a detailed six page letter to Respondent that served as her official response to the complaint. **(R.319-324).** Accordingly, this argument has no merit.

D. Appellant was adequately given Notice of the Charges against her and the Notice adequately explained the conduct that constituted statutory violations.

Appellant argues that she was prosecuted for violations not included "in the original complaint." Respondent is not exactly certain what document Appellant is referring to by the word "complaint." It is Respondent's belief that Appellant may be confusing the complaint filed by the attorney representing the sellers in the underlying land purchase with the Notice of Charges. Specifically, Appellant's brief states "the Complaint did not take issue with . . . Appellant's failure to notify her BIC about the transaction . . . the Complaint did not claim damages from Appellant failing to disclose her status as a buyer and licensee." **(App. Br. 11).** Regardless of what issues were raised in the initial complaint, Respondent is not bound by the initial facts alleged. Through the investigation process, the agency is able to discover new facts and assert new violations based on those facts. In addition, the Notice of Charges in this case fully presented the facts and the statutes Respondent believed Appellant violated and fully complied with the APA notice requirements.

APA section 1-23-320(b), requires that the Notice of Charges and Hearing include:

> (1) a statement of the time, place and nature of the hearing;
>
> (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
>
> (3) a reference to the particular sections of the statutes and rules involved;
>
> (4) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issue involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

A review of the Notice of Charges plainly shows it is APA compliant. **(R.29-31)**. The Notice of Charges and Notice of Hearing adequately provided Appellant with the notice of charges against her. Specifically, the Notice provides in paragraphs two and five that Appellant did not tell her broker-in-charge about the transaction and that the broker-in-charge did not consent.

In addition, Appellant was charged with violating section 40-57-135(D) of the South Carolina Code (2011) which provides "No licensee either directly or indirectly may buy for his own account or for a corporation or any other business in which he holds an interest or for a close relative, real estate listed with him or real estate for which he has been approached by the seller or prospective buyer to act as agent, without first making his true position clearly known in writing to all parties involved." Accordingly, Appellant was fully aware that her failure to disclose her status as a buyer and licensee was an issue in the case.

E. No irregularities occurred that affected Appellant's hearing and no videotape of the proceeding exists.

Appellant argues that Respondent failed to post a video of the hearing on its website and the videotape would show the prosecutor's disruptive behavior. The hearing before the Commission was recorded by a court reporter and Appellant fails to point to any specific place in the record where any disruptive behavior occurred. Moreover, some, but not all, Board meetings are videotaped. Only two of the board rooms at LLR are equipped for videotaping. Counsel for Respondent did her own investigation into the matter and discovered since 2008 only two board meetings for the Real Estate Commission have been videotaped, and this current hearing was not videotaped. Accordingly, no videotape exists and, therefore, Respondent could not post it on the website.

III. DID THE ALC ERR IN FINDING RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD SUPPORTED THE COMMISSION'S ORDER?

Appellant argues that the Administrative Law Court erred by finding she violated certain statutory provisions. Appellant's brief from pages 16-25 lists specific instances where she believes the contract was misinterpreted and where she contradicts the Commission's and ALC's findings of facts. For the reasons set forth in this section of the brief, the ALC's findings of fact and conclusions of law are supported by substantial evidence and should be affirmed.

Section 40-57-135(B)

Section 40-57-135(B)(8) of the South Carolina Code (2011) provides:

> All cash monies or certified funds received by a licensee in connection with a real estate transaction in which the licensee is engaged for his broker-in-charge or property

> manager-in-charge immediately must be delivered to the broker-in-charge or property manager-in-charge, except for checks received as escrow or security deposits for sales or lease agreements, which must be delivered to the broker-in-charge or property manager-in-charge as soon as the sales or lease agreement is ratified by both parties.

(emphasis added). In the present case, Appellant and her attorney both conceded that she failed to deposit the initial $30,000 into Asset Realty's escrow account. During opening statements, Appellant's attorney stated, "We have no defense to the way the initial $30,000 escrow deposit was handled. It was mishandled and it was not handled the way it should have been." **(R.46).** During closing he stated: "We acknowledge that the $30,000 should have been put in the Asset Realty escrow account." **(R.208)** In addition, Appellant admits the $30,000 in earnest money was not placed into Asset Realty's escrow account. When asked by the Chairman of the Board "[you] presented copies of the two checks totaling $30,000 made out to Asset Realty to give the appearance that the money had been placed in the appropriate account," Appellant replied: "I disagree with the intent, but the outcome is the same. It was not placed in the correct account." **(R.202).**

Appellant argues that she did not commit any statutory violation because she did not enter into the transaction on behalf of the broker-in-charge. This argument is without merit because first, she has already conceded that she should have placed the money in the broker-in-charge's (Asset Realty's) account. Second, the contract was prepared using an Asset Realty form that specifically stated the earnest money was to be held in trust by Asset Realty. **(R.233-34).** The contract also listed Appellant as the "selling agent" and her office as "Asset Realty." Appellant also admitted during the hearing that it at least appeared Asset Realty was the broker-in-charge: "And that is what I did wrong. I

admitted that. That was very, very poor judgment on my part. That was really not smart at all, sir. Because I can see where that gave the appearance that I was representing my broker or some other person, but that was not the case. But I do see where that makes it look that way, I do." **(R.200).** Therefore, substantial evidence exists showing that Appellant represented that she was acting on behalf of the broker-in-charge and that she failed to properly deposit $30,000 into the Asset Realty escrow account, and the order of the ALC should be affirmed.

Section 40-57-135(D)

Section 40-57-135(D) of the South Carolina Code provides:

> No licensee either directly or indirectly may buy for his account or for . . . any other business in which he holds an interest . . . without first making his true position clearly known in writing to all parties involved. Upon request of the department, the licensee shall provide evidence of having made this disclosure.

(emphasis added). In the present case, substantial evidence in the record shows Appellant acted as both the selling agent and buyer for the transaction and failed to make her true position known to the parties. J. Andrews Bowers, a real estate agent and representative of the Pinner family who was helping put the deal together testified he believed Appellant worked for Asset Realty and did not know she was an investor on the project. **(R.80).** Dr. Carroll Pinner also testified he believed Appellant was the real estate agent who represented the investors and was unaware she was involved as an investor. **(R.126).** Dr. Pinner's sister, Dr. Laura West, also testified that she believed Appellant was a real estate agent that was representing the sellers and did not know she was also one of the buyers. **(R.117).** In addition, when asked "at what point did you ever inform anyone that you

were also one of the buyers/purchasers," Appellant testified, "I don't think I ever formally informed anyone." **(R.194).** Accordingly, because substantial evidence in the record exists showing Appellant was one of the buyers in the transaction, and because she failed to disclose her true position, the order of the ALC should be affirmed.

Section 40-57-137 (K)

Section 40-57-137(K) provides in part: "A licensee who represents a buyer shall treat all prospective sellers honestly and may not knowingly give them false or misleading information about the buyer's ability to perform the terms of the transaction." In the present case, Appellant violated section 40-57-137(K) by leading the sellers to believe that the earnest money was in the Asset Realty escrow account when she knew the money did not exist to cover the checks. **(R.84,118,126,147-48).** This information was false, because the money was never placed in the escrow account and at no time did Appellant ever reveal this fact to the sellers. Accordingly, substantial evidence in the record exists to show Appellant violated section 40-57-137(K) and, therefore, the order of the ALC should be affirmed.

Section 40-1-110(1)(c),(f) and (g)

Section 40-1-110(1) provides in part:

> A board may cancel, fine, suspend, revoke, or restrict the authorization to practice of an individual who . . .
>
> (c) has intentionally or knowingly, directly or indirectly, violated or has aided or abetted in the violation or conspiracy to violate this article or a regulation promulgated under this article;
>
> (f) has committed a dishonorable, unethical, or unprofessional act that is likely to deceive, defraud, or harm the public;

(g) lacks the professional or ethical competence to practice the profession or occupation;

With respect to all three subsections stated above, Appellant argues that the parties did not understand the terms of the contract and were unsure as to the total amount of earnest money due, and that the ALC "only assumed that the sellers were 'deceived, defrauded or harmed,'" however, this argument is without merit. **(App. Br. 29)**. Appellant admitted she was required to place $30,000 earnest money in to the Asset Realty escrow account and that she failed to do so. Appellant also failed to disclose in writing or otherwise, that she was one of the buyers in this deal. Moreover, Appellant utilized an Asset Realty contract and gave the impression she was working for Asset Realty, when her broker-in-charge did not know about the existence of this deal until Bufkin sent a letter evidencing concern about the earnest money. **(R.134-35).** This conduct shows that Appellant "intentionally or knowingly, directly or indirectly" engaged in actions that constituted statutory violations. In addition, Appellant's conduct shows she committed a "dishonorable, unethical, or unprofessional act" that deceived and defrauded the sellers and that she lacks the "professional or ethical competence" to practice the profession. Accordingly, the order of the ALC should be affirmed.

Section 40-57-145(A)(4) and (10)

Appellant argues the ALC erred in concluding she violated section 40-57-145(A)(4) and (10) because the earnest money "did not belong to others" but rather the funds were Appellant's, and Respondent failed to prove "the location of the funds would have prohibited the buyers from remitting said funds to the sellers." **(App.Br. 30)**. This argument is without merit.

Section 40-57-145(A) of the South Carolina Code (2011) provides in part:

> In addition to Section 40-1-110, the commission may deny issuance of a license to an applicant or may take disciplinary action against a licensee who:
>
> (4) in the practice of real estate demonstrates bad faith, dishonesty, untrustworthiness, or incompetency in a manner as to endanger the interest of the public;
>
> (10) fails, within a reasonable time, to account for or to remit any monies coming into his possession which belong to others;

The contract provided "Purchaser shall deposit $30,000 earnest money with Asset Realty, Inc. This earnest money will become nonrefundable after 120 days." **(R.237).** Appellant in this case was one of the investors in Riverpath, but she was also acting as the real estate agent in the transaction. Simply because she was one of the buyers, did not mean that the earnest money was Appellant's; in fact, the checks came from Grooms. **(R.242).** In addition, by the terms of the contract, after 120 days the money was nonrefundable and therefore belonged to the buyers. Accordingly, because Appellant failed to deposit the earnest money into the escrow account, the order of the ALC finding she practiced real estate in a dishonest manner by failing to remit monies should be affirmed.

IV. DID THE ALC ERR BY FINDING THE COMMISSION PROPERLY ADMITTED THE BUFKIN LETTER?

Appellant asserts that she was unfairly prejudiced by the admission of the November 24, 2008 letter (the "Bufkin letter"). Initially, Respondent questions whether the letter contained hearsay because it was not admitted for the truth of the matter asserted. In any event, no prejudice occurred. Mr. Bufkin was simply testifying to the events that led up to his writing of the letter. **(R.56-57).** The author of the letter, Henry Bufkin,

testified during the hearing and was cross-examined by Appellant's counsel. **(R.55-69).** Further to the extent the letter contained hearsay, the attorney for the board, Jamie Saxon, stated that "no hearsay from this document or anything else will be used in making of any decision by the board." **(R.73).**

Appellant also argues that the "improper evidence and hearsay testimony" led to cumulative harm. Appellant fails to specifically state whose testimony she believes is based on hearsay and how exactly she was prejudiced. She only states that it was "inconceivable that they [the ALC and Commission] were not swayed by the admission of said hearsay." **(App. Br. 17).** Accordingly, this argument is without merit.

V. DID THE ALC ERR BY FINDING THE DECISION OF THE COMMISSION TO REVOKE APPELLANT'S LICENSE WAS NOT ARBITRARY OR CAPRICIOUS?

Appellant also mistakenly argues that she is permanently revoked from practicing in the real estate profession; however, that is not the case. Although the Commission did revoke her license, it was not a permanent revocation. **(R.).** Appellant may contact the Commission and petition for reinstatement.

In addition, the Commission's decision is not arbitrary or capricious and therefore, the ALC did not err in affirming the sanction. "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. S. C. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). In the present case the Commission was statutorily authorized to permanently revoke Appellant's license. See

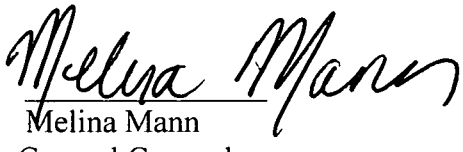
S.C. Code Ann. § 40-1-120(A)(4) (2011). Therefore, the Commission's decision to revoke Appellant's license was within the range of permissible sanctions and was not arbitrary or capricious. Further, Appellant's conduct in the case warrants revocation. She mishandled at least $30,000 in earnest money, she did not disclose her true position as buyer and agent to the sellers, and she held herself out as acting on behalf of Asset Realty, without having any intention of going through place of employment. Accordingly, revocation was an appropriate sanction in this case.

Appellant also argues that she was "singled-out" and disciplined, while others were not. Respondent is not able to discuss whether an investigation and/or discipline proceedings against someone else have been initiated. However, it is the policy of the Commission and LLR to investigate all matters that involve alleged practice act violations.

CONCLUSION

For the reasons stated above, the decision of the ALC should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the original **Brief of Respondent** and served a copy thereof on the persons hereafter named, by depositing same in an envelope, securely wrapped in the United States mail, by certified mail, properly addressed to the said persons hereafter named, at the places and addresses stated below, which are the last known addresses for same:

The Honorable Jenny Kitchings
Clerk, S. C. Court of Appeals
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Vanessa Patrick, Appellant
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June 29, 2012

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SC Court of Appeals

The Honorable Jenny Kitchings
Clerk, S. C. Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

RE: Vanessa Patrick v. S. C. Department of Labor, Licensing and Regulation
State Real Estate Commission
Docket No.2011-ALJ-11-0168

Dear Ms. Kitchings:

I have enclosed for filing the original and fifteen (15) copies of the Brief of Respondent in the above-referenced matter. By copy of this letter, I am also serving a copy of the Brief of Respondent upon Vanessa Patrick, Appellant.

Sincerely,

Melina Mann
General Counsel

MM:lhs
Enclosure

cc: Vanessa Patrick, Appellant