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Utah Supreme Court

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 880087-CA

88-0087-CA

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH

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IN THE MATTER OF THE LICENSE,	)	
OF: NICK TOPIK, TO ACT AS A	)	BRIEF OF RESPONDENT
REAL ESTATE BROKER IN THE	)	
STATE OF UTAH	)	Docket No. 860119

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APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF UTAH,

OMER J. CALL DISTRICT COURT JUDGE

----oooo0oooo----

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FILED
JUL 7 1986
Clerk, Supreme Court, Utah

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IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH

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IN THE MATTER OF THE LICENSE, OF: NICK TOPIK, TO ACT AS A REAL ESTATE BROKER IN THE STATE OF UTAH	))))	BRIEF OF RESPONDENT Docket No. 860119

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APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF UTAH,

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The issue on appeal is whether or not the decision of the district court judge in over turning the decision of the Department of Business Regulations was reasonable or rational.

APPLICABLE STATUTES AND RULES

Utah Code Ann., Sec. 61-2-12 (d) (1953 as amended)

> ...The appeal shall thereupon be heard in due course by said Court, without a jury, which shall review the record and make its determination of the cause between the parties. If the Court shall find that the Commission has regularly pursued its authority and has not acted arbitrarily, it shall affirm the decision, order, or ruling of the commission.

Utah Code Ann., Sec. 61-2-11 (8) (9) (1953 as amended).

> The Commission...may...suspend, revoke, {or} place on probation...any licensee...if the licensee in performing or attempting to perform any of the acts specified in this chapter is found guilty of:
>
> (8) Being unworthy or incompetent to act as a principal broker, associate broker, or a salesman in such a manner as to safeguard the interest of the public;
>
> (9) Failing to voluntary furnish copies of all documents to all parties executing the documents;

The Rules and Regulations of the Division of Real Estate

> 11.f. Under no circumstances should a broker or salesman advertise property at a lower price than listed without the written consent of the seller.
>
> 11.g. Subjecting seller to liability of paying double commissions is prohibited.

STATEMENT OF THE CASE

Nick Topik, a licensed real estate broker filed an appeal from the decision of Ken Wahlgreen, an administrative law judge for the Department of Business Regulations for the State of Utah. The judgment was entered on the 31st day of August, 1984. In his

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appeal Nick Topik alleged that the administrative law judge and the director of the Department of Business Regulations acted arbitrarily in suspending his broker's license for a period of 150 days and placing him on probation for a period of three years. Judge Omer J. Call over turned the decision of the Utah Real Estate Commission.

The hearing before the administrative judge related to nine separate fact situations. At the hearing these fact situations were treated separately with all the testimony relating to each fact situation being given at one time. Consequently the record in this matter is segmented into nine fact situations. There is one transcending issue that related to almost all of the fact situations for which Topik was found in violation. The petition of the Department of Real Estate alleged in each fact situation that Mr. Topik violated a specific regulation or section of the code wherein a rule or regulation is clearly set forth. However, in addition to alleging those specific acts, the Department also alleged in each fact situation that Topik violated U.C.A., Section 61-2-11 (8). That section states "...being unworthy of incompetent to act as a principle broker, associate broker, or sales agent in such manner as to safeguard the interest of the public;..." U.C.A Section 61-2-11 Subparagraphs 1 through 7, 9 through 14, and Section 16 and 17 provide specific acts which are prohibited. Subsection 15 provides for the commission to adopt rules. Those rules also talk about specific acts of conduct; however, this is not true of Section 61-2-11 (8). The terms unworthy or incompetent to act as

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a principle broker are so vague that Topik alleged that the section is unconstitutional in nature. At the administrative law hearing the administrative judge ruled that the term unworthy was unconstitutionally vague, but that incompetent was not unconstitutionally vague. The State did not appeal nor argue to the District Court the administrative laws judgments as it related to the term unworthy. There was no testimony presented at the administrative hearing by any real estate agent or by any of Nick Topik's peers that indicated that the alleged violations were contrary to the practice within the real estate profession and there was not testimony as to what constitutes incompetence in the real estate profession.

FACT SITUATION NO. 1

The evidence submitted by the State consisted of Exhibits 1 through 5 and reference to Paragraphs 1, 2, and 3 of the pre-trial order. The State did not put on any testimony. The defendant, Nick Topik, did testify in his own behalf. All of the allegations of the State were found not to be true by the hearing examiner with the exception of finding that Topik had violated Section 61-2-11 (9) which states "failing to voluntarily furnish copies of all documents to all parties executing the documents." Topik testified that he did not remember if he had given a copy of the real estate listing to his client, but that he concluded he must have because the client acknowledged receiving a copy on the face of the listing. He also testified that the information on the listing in blue ink had been filled out while Topik was with the client and that the information in black ink was filled

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out at a later date based upon information given to him by the client. (Transcript (T) page (p) 32 and 38 through 39). The exhibit in question is marked as Exhibit No. 4. An examination of that document will indicate that the sales price, the date of the listing, the expiration of the listing, the exemption of the people from Florida from the listing, and all of the information on the bottom part of the document are filled out in blue ink. The client also signed the listing in blue ink and acknowledged receiving a copy of the agreement. The only information that is not in blue ink has to do with the mortgage, the monthly payments, and other general information that gives a description of the property. There was never any allegation that the information contained on the listing and the information placed with the Multiple Listing Board marked as Exhibit No. 5 was inaccurate.

The hearing examiner in Paragraph 5 of his findings related to Fact Situation No. 1, concluded that the examiner found no evidence that responded provided Mrs. Tsosie with "... a copy of the complete listing". However, the section Mr. Topik is found guilty of violating, Section 61-2-11 (9) merely requires that copies of all documents be furnished to the parties. It says nothing about copies of completed documents nor does it imply that there is anything wrong with filling out a document based upon information provided by the client. It should be noted that the client, Mrs. Tsosie, in this case did not complain to the Commission and no evidence was produced that she was in any way unhappy with the services provided by Mr. Topik.

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Judge Omer J. Call found that the listing party acknowledged a receipt of the copy of the document and that none of the added information altered the contracts between the parties and the broker nor endangered the public. Consequently, Judge Call reversed the commissioners decision on Fact Situation No. 1.

FACT SITUATION NO. 2

Joe Gonzales listed his property for sale with Wardley Corporation on March 28, 1982, and the listing was to expire on September 28, 1982. In July of 1982, Gonzales learned that his property was being foreclosed by a financial institution and called Mr. Tugaw, the agent representing Wardley Corporation, and told him that he was terminating his listing because of the foreclosure and he was to come and take his sign down. (T.p.51) Mr. Tugaw did not indicate to Gonzales whether the property would be taken off the listing or not and in fact did not make any response to Mr. Gonzales' instructions. (T.p.55) Thereafter, Mr. Gonzales contacted Mr. Topik for the purpose of renting a piece of property at which time Mr. Topik offered to assist him in selling his house before it was foreclosed. At that time, Gonzales informed Topik that he had instructed Wardley to remove their sign and to terminate the listing and Gonzales did sign a listing with Topik. Ultimately, the property was foreclosed and neither real estate agent sold the property. (T.p.52) Gonzales did not file a complaint with the Real Estate Board and to this date has not complained about the conduct of Topik, but was in fact pleased with his efforts. (T.p.57) The property had

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previously been listed with Topik and Gonzales had terminated the listing with Topik prior to the expiration of the listing by calling Topik, and Topik had honored that request of Gonzales. (T.p.59 through 60) Topik testified that when he was informed by Gonzales that the listing had been terminated, he assumed that information was factual. (T.p.61) Topik listed Gonzales' property on July 31, 1982.

Tugaw testified that Topik removed his signs from the property on approximately the 5th or 6th of September after having received a letter from Tugaw saying that Tugaw maintained that Wardley Corporation had a valid listing on the property. (T.p.61, 71, Exhibit No. 7) Mr. Topik removed his signs and terminated their listing activity as soon as he was informed that Wardley had not honored Mr. Gonzales' instruction to terminate their listing. Shortly thereafter the home was foreclosed in October of that year.

It should be noted at this time that the complaint that brought this fact situation before the Department of Business Regulations was filed by Mr. Tugaw or one of the agents in his office and was the subject of a grievance hearing conducted in Box Elder. At the time the grievance hearing was conducted, Mr. Tugaw was the chairman of the grievance committee and sat on the committee that determined that Topik was guilty of this grievance and forwarded it to the State for action. (T.p.40 through 41) It is obvious that this complaint was instigated by Mr. Tugaw, a competitor of Mr. Topik, who used his position as the chairman of the grievance committee to further his personal goals even though

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the rules require that a grievance committee consist of impartial parties.

The hearing examiner found that Mr. Topik was guilty of exposing Gonzales to two real estate commissions in violation of Rule 11(g) of the regulations and being incompetent under Section 61-2-11 (8). The only finding of the administrative judge that could be used to support the violations alleged against Topik was that he accepted the statement of Mr. Gonzales that he had terminated the listing and that he assumed Wardley would honor those instructions as Topik had done with an earlier listing on the same property. Upon learning that Wardley would not honor the instructions to terminate the listing, Topik immediately removed his signs. No evidence was presented before the administrative law judge as to whether or not Wardley was required to terminate his listing upon verbal notification from Gonzales and whether Wardley could have claimed a commission if Topik had located a buyer for the property.

Judge Omer J. Call found that the owner of the property involved had represented to Topik that he had terminated the prior listing and that Topik removed his signs from the property immediately upon finding out that the owner had extended the listing on the property and made no claim against the owner for a fee.

FACT SITUATION NO. 3

In this fact situation the administrative hearing judge found that Topik violated Rule 11(f) of the Rules and Regulations of the Department of Business Regulations in that he advertised

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property belonging to Stevens at a price lower than listed and without the written consent of the seller. Topik accepts the findings of fact as set forth in Paragraphs 11, 12, 13, 15, and 16 of Fact Situation No. 3 and that part of Paragraph 14 that refers to the letter dated August 14, 1983. Topik does not agree with the conclusion drawn in the bottom of Paragraph 14. Mrs. Stevens testified that she verbally authorized Topik to offer the property for sale at $60,000.00 with $5,000.00 down. (T.p.99 through 101) On August 14, 1983, Mrs. Stevens wrote a letter to Nick Topik in which she confirmed that she had authorized the sale of her home on the same terms and conditions as the last offer when she was in his office in July. (Exhibit C) Mrs. Stevens testified that offer was in fact the $60,000.00 which was a written counter offer made by her on July 14, 1983, a copy of which is marked as Exhibit E. (T.p. 100 through 101)

The evidence demonstrates that Mrs. Stevens executed a document which was a written counter offer to an earnest money agreement on July 14, 1983, wherein she set the price she was willing to accept for the home which was $60,000.00 with $5,000.00 down. She verbally confirmed that she was willing to sell the property for the sum to Mr. Topik. Mr. Topik advertised the property at $59,800.00 with $5,000.00 down. The advertisement has a typographical error in it which made it appear to be with zero down. The hearing examiner specifically found that was a typographical error. Mr. Topik stated that he intended to pay the difference of $200.00 between the price of $59,800.00 and the authorized listing price of $60,000.00 out of

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his commission.

FACT SITUATION NO. 4

Topic agrees with the statement of the fact situation as set forth in Paragraphs 17 and 18. The advertisement in question is marked as Exhibit 12. The pertinent part of that advertisement states as follows: "...for that matter you or any one referred by you to whom we sell property will be eligible for a $100.00 gift certificate which we suggest you use for home improvements." The hearing examiner did not find that Topik had violated any section of the State Code or any regulation except the one that provides that he was incompetent. It is important to note that there are specific rules and regulations that pertain to advertisements. Rule 10(d) of the Rules and Regulations promulgated by the Department of Business Regulations under a section entitled "Enforcement" states "the Division may grant any licensee a reasonable amount of time, not exceeding ten days, to correct any defect or violation...failure to comply with the notice and requirement may be grounds for suspense or revocation". Section 61-2-11 (13) states "Failing to correct any defect and/or violation of advertising practices, signs, business locations, office, or trust account operation within ten days after receiving a written notice from the Division of the defect or violation;" Section 61-2-11 (7) indicates that it is a violation to actually pay valuable consideration to any person.

The facts were clearly established that Mr. Topik did not pay any valuable consideration to any party. It is also clear that the Department did not give Mr. Topik any notice to

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terminate the advertising practices. Consequently, the hearing examiner could not find Topik had violated any of the specific sections of the regulations or code, but did find that he was incompetent even though the Department had not given the notice that the regulation and the statute anticipate. The danger of having a catch all section is manifested in the hearing examiner's decision concerning this fact situation. Mr. Topik did not violate any written rule or regulation and yet because the hearing examiner did not like his conduct, he arbitrarily decided that Topik was incompetent without giving any justification or reason for reaching such a conclusion. The hearing examiner then notes that no one was injured by the flyer, which of course is as reference to the fact that no one was paid any money pursuant to that advertisement.

FACT SITUATION NO. 5

The hearing examiner found in favor of Topik in this situation and found that he had not violated any rules or regulations.

FACT SITUATION NO. 6

Topik accepts the findings of fact as indicated in Paragraph 21 of Fact Situation No. 6, but contends that there are additional facts not included in that finding which are important to the determination of this fact situation. It should be noted that the person bringing the complaint concerning Fact Situation No. 6 is Mr. Ed Tugaw, the broker for Wardley Corporation. The same individual who supposedly sat as the impartial chairman of a grievance committee who originally heard all of the fact

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situations against Mr. Topik and then referred them to the Division of Business Regulations to be acted upon. Mr. Tugaw filed a complaint saying that Mr. Topik had filled in information on an earnest money receipt and offer to purchase which is marked as Exhibit 16. The information Topic is supposed to have filled in is accurately set forth in Paragraph 21 of Fact Situation No. 6. The information that is not included in the findings of the hearing examiner pertains to the fact that Topik was specifically authorized by his client, the Speers, to fill in the information complained of.

Mr. Speers testified that he and his wife authorized Mr. Topik to fill in the information on the earnest money receipt an offer to purchase and that he was fully informed at all times of what the offer contained. He also testified that neither he nor his wife at any time had any complaint concerning Mr. Topik's handling of the situation and that the property was sold by Mr. Topik to their satisfaction. (T.p.151 through 152) Speers also testified as follows: "So specific reference to the language, 'buyer will apply for a general electric loan, sell it to pay three and one-half points,' that was consistent with what you wanted?" Answer: "Yes...." (T.p.153) As pointed out by the hearing examiner in his findings in Paragraph 21, a counter offer was made on Exhibit 16 and was authorized by the Speers in writing. Consequently, the Speers authorized Mr. Topik to fill in the information and then specifically in writing confirmed that authorization when they were presented with a counter offer.

The hearing examiner found that there was no violation of

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any specific rule or regulation created by State Law or by the Department, but then concluded that Topik was incompetent in the manner in which he handled the matter.

FACT SITUATION NO. 7

The earnest money receipt and offer to purchase which is the subject of this fact situation is marked as Exhibit No. 17. That exhibit indicates that the total purchase price was $38,000.00 with a $50.00 deposit. That, of course, would leave a balance of $37,950.00. The complaint is based upon the fact that Line 27 of the earnest money receipt, states that the balance was "approximately $37,000.00." Topik does not deny that the document was filled out by him in the form that it exists in Exhibit No. 17. However, this is not a serious breach of any rules. It is interesting to note that in the pre-trial order prepared by the Attorney General's Office and signed by the hearing examiner, Kent Wahlgreen, a similar mistake is made. Paragraph 12 of that pre-trial order relates to a fact situation involving an Addie Rucker. That paragraph refers to what is Exhibit 19. The last sentence of that paragraph states, "This arrangement required Topik to come up with approximately $8,000.00 at closing." In fact, the document, Exhibit 19, requires Nick Topik to pay $33,140.00 at closing, of which $25,600.00 was to be loaned by Fred Mane. This leaves a balance of $7,540.00 which Topik was required to pay at closing; not $8,000.00 as stated by the Attorney General in Paragraph 12. The Attorney General's error was further complicated by the fact that Mr. Topik was to pay an additional $2,500.00 as a finders fee.

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Consequently, Topik was required to come up with $9,840.00 at the time of closing. It is interesting that the Attorney General's Office is seeking to have Topik's real estate broker's license suspended because he said approximately $37,000.00 when it should have been $37,950.00 and then in the very document which accuses Topik, the State makes a similar mistake. That mistake is then overlooked by the administrative law judge who signs the pre-trial order.

Any person who deals with figures and the complicated matters that are involved in real estate transactions or legal cases can and will make mistakes. It is the position of Topik that Exhibit 19 is clearly enforceable in a Court of law. The necessary information is co tained within the four corners of the documents and a title company or, if necessary, a Court interpreting the document would have no difficulty in determining the intent of the parties. Under the circumstances, it seems entirely inappropriate to discipline Topik and to apply a higher standard of care to him than applies to a member of the bar and of the judiciary.

FACT SITUATION NO. 8

This fact situation was dismissed by the Attorney General's Office.

FACT SITUATION NO. 9

Topik was accused of violating a number of specific rules and regulations in connection with this fact situation. He was accused of violating Section 61-2-11 (15) in sharing a finders fee; with violating Section 61-2-11 (1), making substantial

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misrepresentations; with Section 61-2-11 (2), making false promises; and with Section 61-2-11 (16) for dishonest dealing. The hearing examiner found that Topik had not violated any of these regulations. Again in this fact situation Topik was charged with the general allegation that he had acted incompetently under Section 61-2-11 (8).

The allegations in the State's petition which pertain to Fact Situation No. 9 and Section 61-2-11 (8) were as follows:

(1) That he shared a finders fee with a person who is not a real estate agent or broker,

(2) That he entered into a real estate transaction which was detrimental to his client's interest,

(3) That he altered the terms of an earnest money agreement, and

(4) That he prepared different earnest money agreements.

The hearing examiner specifically found that he did not share a finders fee and that he did not enter into a transaction at the expense of his client. The hearing examiner found that Topik prepared multiple documents with no indication of which was to be binding, that he failed to account for earnest moneys being transferred from one document to another, and added additional terms (however innocuous) after an earnest money agreement had been signed.

The administrative law judge found that Topik had executed multiple documents with no indication of which was to be binding. The judge does not make specific reference to which document he is referring. It can only be assumed that he is talking abut

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Exhibits 20 and 21. Both of those documents are an earnest money receipt and offer to purchase involving Kevin and Jill Jeppsen. Nick Topik testified that the first document which is dated June 4, 1983, was executed so that the deal could be tied down. (T.p.332) Exhibit 21 is also dated 6/4/83; however, it has additional terms added to it and is signed by both Kevin Jeppsen and his wife, Jill Jeppsen, on June 11, 1983. Bother Mr. Topik and Mr. Jeppsen indicated that the second document was necessary because of the wife's signature and because they had additional negotiations which were included on Exhibit 21. (T.p.332, 308 through 309) Mr. Jeppsen also testified that the first document was executed so that he would not lose his chance at the property and that the second document was necessary because there were more negotiations between he and Nick Topik between the 4th and the 11th of June. (T.p.308 through 309) Exhibits 20 and 21 are identical as it relates to the property and the purchase price. Exhibit 21 on its face was signed by the Jeppsens on June 11, 1983. It is clear that the last prepared document between two parties when it is dealing with the same property would be controlling. At the very least, both documents would have to be viewed so as to accomplish the purpose of the parties as set forth in both documents. In this case, Nick Topik and the Jeppsens both understood the status of their negotiations and there were no difficulties that arose by reason of the two earnest money agreements. The transaction was completed long before this matter was brought to the attention of the Department of Business Regulations. The State has not alleged that there is

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any statute or rule that requires that when you alter a document that something be placed in the second document indicating that the first is superseded. Consequently, the State has not demonstrated that Nick Topik did anything improper in executing Exhibits 20 and 21.

The hearing examiner found that Nick Topik was incompetent because he failed to account for earnest moneys being transferred from one document to another. Again this issue related to Exhibits 20 and 21. On June 4, 1983, there was a $100.00 earnest money deposit made with the execution of Exhibit 20. When Exhibit 21 was executed it reflected that $100.00 earnest money had been paid. Jeppsen did not pay more than $100.00 in earnest money and Exhibit 21 which was executed for the purpose of modifying and replacing Exhibit 20 merely reflected the receipt of the $100.00 earnest money. The State did not allege in its petition that anything was improper concerning the earnest money. Topik was not put on notice that he needed to respond to that issue and yet the hearing examiner found that Topik was incompetent as a result thereof. There is no representation by the State as to what should have been done in this case nor any indication that any regulation indicates that what Mr. Topik did do was in any way improper. It should be noted that the $100.00 earnest money was owed directly to Mr. Topik and that it was made out in the form of a personal check. Consequently, Mr. Topik was not holding it in trust for a client or customer and the check itself was evidence of the payment of the sum. Clearly no one was injured by this procedure and the only way it could have been

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handled differently would have been to make a notation on the second document indicating that the first was superseded and that the earnest money paid on the first applied towards the second. Again there is no useful purpose to such a notation and certainly no standard that requires that it be done by a broker in order for him to be "competent."

The hearing examiner found that Topik was incompetent because he added additional terms to an earnest money agreement (however innocuous). This reference apparently has to do with the part of the finding contained in Paragraph 31 which is set forth on Pages 11 and 12 where the hearing examiner makes reference to two copies of a May 27, 1983, earnest money agreement marked as Exhibits 18 and 19. The hearing examiner concludes that they are identical with the exception of a few additional filled in blanks on Exhibit 19. He then goes on to say that it appears that after Topik had Rucker sign the agreement he tore off a copy and left it with Rucker and took the remaining carbons (to which he at some point added a few innocuous details) to Mane for his signature. If in fact this is the finding referred to by the hearing examiner, then it is difficult to understand how he could find Topik incompetent based upon Exhibits 18 and 19. The only differences are contained on Lines 27, 28, 32, and 36. There are some notations on the face of Exhibit 18 at the very bottom where it says Hillam Agency per Nick 6/7/83 and June 15th. Those notations seem to be notations made by Topik for his own personal benefit which showed up when the document was photocopied for purposes of this hearing. The

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information contained on Lines 27, 28, 32, and 36 are consistent with the balance of the contract and the agreement of the parties. Apparently, they were filled in because of an oversight prior to the time that Manes signed the document. Even the hearing examiner has concluded that they are "innocuous details". Again there is no reference by the hearing examiner and no allegations by the State to any rules or regulations or laws that have been violated by Topik.

SUMMARY OF ARGUMENTS

The appellant has raised for the first time in his brief before this Court issues that were not raised before the District Court which acted as an intermediate court of appeal. Those issues relate to the standard of review which should be applied by the District Court and the deference that should be given to a review of the administrative law judge's decision by commissioners of the Department of Business Regulation.

The appellant contends that the standards enunciated by Justice Oaks in Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983) should be applied to the decision of the Department of Business Regulation being reviewed by this Court. The respondent contends that those standards were made with specific reference to the legislative requirements of review set for Public Service Commission decisions contained in U.C.A. Section 54-7-16. That section of the code does not apply to a review of the decisions of the Department of Business Regulations. The respondent contends that the standard of reasonableness and rationality applies to the

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review of a decision of the Department of Business Regulations by a district court judge, and that same standard applies to a review by the Supreme Court of the decision of the district court judge.

It is the position of the respondent that he was not permitted to appear before the commissioners of the Real Estate Division of the Department of Business Regulations, was not permitted to argue to the commissioners, and the commissioners were not able to view the demeanor of the witnesses or to judge the credibility of the witnesses that appeared before the administrative law judge. Consequently, no deference should be given to the commissioner's review of the administrative law judge's decision and said review did not substitute for presenting testimony at the hearing in order to determine whether or not the acts of the respondent constituted incompetency. That the State Legislature and the Commission have not defined the term incompetency nor was any evidence presented at the hearing to demonstrate whether or not the alleged acts of the respondent would be considered by other professionals as being incompetent. Consequently, the findings of the administrative law judge that the respondent was incompetent in violation of U.C.A. Section 61-2-11 (8) cannot be sustained.

The decision of the district court judge to reverse the findings of the administrative law judge was reasonable and rational and should not be reversed by the Supreme Court.

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ARGUMENT

POINT I

THE APPELLANT FAILED TO RAISE MANY OF THE LEGAL ISSUES CONTAINED IN THIS APPEAL BEFORE THE DISTRICT COURT AND THEREFORE SHOULD BE PRECLUDED FROM ARGUING THEM AT THIS TIME.

The appellant's brief addresses for the first time the weight that should be given to the decision by the Department of Business Regulation. This is true in regard to what the appellant believes should be the deference paid to the Real Estate Commission's review of the administrative law judge's decision and to the standard of review that should be applied by the District Court to the decision of the administrative law judge or Real Estate Commission. These issued will be addressed by the respondent under Point II and III of its argument. However, it is the position of the respondent that these issues should have been introduced before the District Court. By failing to raise these issues before the District Court, the appellant precludes these issues from being raised for the first time at the Supreme Court level. The Supreme Court has consistently held that a party will not be heard to complain of irregularities in a lower Court if that party did not raise the issues before that Court. Utah County v. Brown, 672 P.2d 83 (Utah 1983); Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733 (Utah 1984); Lamkin v. Lynch, 600 P.2d 530 (Utah 1979)

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POINT II

THE STANDARD OF REVIEW TO BE USED BY THE DISTRICT COURT IN REVIEWING THE DECISION OF THE DEPARTMENT OF BUSINESS REGULATION AND TO BE USED BY THE SUPREME COURT IN REVIEWING THE DECISION OF THE DISTRICT COURT IS THAT OF REASONABLENESS OR RATIONALITY.

The appellant has requested that this Court apply a standard of review to the Department of Business Regulation as defined in the case of Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983). While that case may be helpful in understanding the standard of review to be applied to administrative agencies, it does not control the standard of review to be used in the case presently before the Court. U.C.A. Section 61-2-11 (d) provides that the District Court may review the decision of the Department of Business Regulation to determine whether, "The executive director and the commission have regularly pursued their authority and have not acted arbitrarily...." The State Legislature has not given any additional guidelines as to the scope and standard that a District Court is to apply in reviewing the decision of the Department of Business Regulation. In reference to the word "arbitrary" and "capricious" Justice Oaks in Administrative Services stated as follows: "...standing alone, these words are subjected to the criticism that they are mere word formulas that give little guidance in defining the limited circumstances in which the reviewing court can upset the findings of the agency...." Justice Oaks then proceeds to define "arbitrary" and "capricious" in relationship to the statutory requirements for

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the review of decisions by the Public Service Commission. The appellant would have the Court believe that the standard of review for a decision by the Department of Business Regulation is that set forth in Justice Oaks' decision requiring that the greatest degree of deference shall be extended to the commissions findings on the basic questions of fact. However, it is important to note that U.C.A. Section 54-7-16 (2) provides that the findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. It was in this contexts that Justice Oaks defined arbitrary as it applied to basic questions of fact. No such statutory authority exists in relationship to the review of the decisions of the Department of Business Regulation. Consequently, this definition of arbitrary cannot be applied to a decision of the Department of Business Regulations.

It is the position of the respondent that arbitrary as used in relationship to the decisions of the Department of Business Regulation should be interpreted to mean that the District Court can decide whether or not the decisions of the Commission were reasonable or rational. This standard was applied by Justice Oaks in Administrative Services under a heading referred to as other decisions. Justice Oaks reserves this classification for review of the Public Service Commission decisions for "mixed questions of fact and law". Since the State Legislature has not given any definite guide lines other than the term "arbitrarily" to a review of the District Court of the Department of Business Regulations, it would seem appropriate

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that the standard of reasonableness and rationality be applied.

The appellant contends that the entire standard of review set forth in Administrative Services should be applied to decision by the Department of Business Regulation. The appellant cites the case of Board of Education of Severe County School District v. Board of Review of the Department of Employment Security, 701 P.2d 1064 (Utah 1985) as supporting that position. In fact, that case dealt with the standard of review to be applied by the Utah Supreme Court in reviewing a decision by an intermediate board of review or court of appeal. The Court stated in part as follows:

> "...In reviewing the conclusion of the board of review, we apply an intermediate standard of review which requires that the decision under consideration be reasonable or rational. City of Orem v. Christensen, Utah, 682 P.2d 292, 293 (1983). 'We will affirm the Board's decision unless, as a matter of law, the determination was wrong because only the opposite conclusion could be drawn from the facts'...."

In this case the Box Elder County District Court acted as an intermediate Court of Appeal and, consequently, the Supreme Court should support its decision unless as a matter of law, the determination was wrong because only the opposite conclusion could be drawn.

POINT III

THE DISTRICT COURT RULING WAS REASONABLE OR RATIONAL.

A. The term incompetent as defined is vague and uncertain and consequently its application in this case is unconstitutional in nature.

The appellant at the hearing before the administrative law

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judge contented that the terms unworthy or incompetent as used in the state statute was unconstitutionally vague. The administrative law judge supported the appellant's contention as to the term unworthy, but denied it as to the term incompetent. This issue was raised again in the appeal to the District Court judge and Judge Call concluded:

> "This court does not accept the Divisions conclusions as to the application of the Vance interpretation to the case at bar and therefore rejects the findings of the ALJ of violations of 61-2-11 (8), except and unless the broker's conduct also violated one or more of the other seventeen listed proscribed activities. As was pointed out in one of the Division's cited cases, competence is not perfection and the ALJ found much of the broker's conduct was either innocuous or resulted in no damage or injury to any person."

It has been generally held by all Courts that a regulation or law is void on its face as violating the due process clause of the constitution when it does not reasonably notify a person of the act or acts prohibited. The Utah Court has specifically addressed the issue of whether or not a regulation under the Department of Business Regulation is unconstitutionally vague. These cases have dealt with the medical profession, but are applicable to the situation presently before this Court. In the case of Athay v. State Department of Business Regulation, Utah, 262 P.2d 965 (1981) the Utah Supreme Court held that the Department had acted arbitrarily and deprived the plaintiff of her rights of due process when it refused to permit the plaintiff to take an examination for certification as a psychologist on the basis that her doctor's degree did not meet the statutory requirements of "a program of studies whose content was primarily

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psychological." The Court held that it was a violation of due process because the Department had not published uniform identifiable standards. It is the position of Topik that the Department has not set any standards or definitions that prescribe what unworthy or unprofessional means. Consequently, it would be arbitrary for a hearing examiner to make that determination without any guidance being provided. In the case of Vance v. Fordham, 671 P.2d 124 (Utah 1983) the Utah Supreme Court upheld the Department of Business Regulation in its revocation of a physician's license for unprofessional conduct. On Page 128 and 129 of that decision, the Court refers to a number of cases which support both sides of this argument. In reference to some of those cases, the Court says in part as follows:

> "...In the context of the statues and hearing procedures in those cases, the Courts held that 'unprofessional conduct' can not be used to revoke licenses without prior rules establishing the standards by which the professionals would be judged. Neither case denied (in fact both apparently conceded) that the standard of 'unprofessional conduct' could be applied by expert professionals to judge another professional's conduct in the care of patients. This was the holding in Chastek."

The Court indicated that in the case before it that the medical practice act gives a statutory definition of unprofessional conduct and that the adequacy and appropriateness of the definition had not been challenged in the appeal to the District Court. The court also observed that the plaintiff had been judged by his peers or other medical professionals who had determined that he had not followed the standards existing in the profession.

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In the case before this Court there was no testimony by any real estate agent that pertained to the regulations or statutes that the hearing administrator found Topik had violated. Consequently, there was no evidence by his peers that would indicate that the alleged violations were contrary to the practice within his profession. Nor was there a definition given in the Utah Code or in the regulations which in any way defined unprofessional conduct as there was in the Vance case. If a person has not violated any specific standard or rule promulgated by the State Real Estate Commission, if there is no definition of what constitutes unprofessional conduct, and if there is no evidence produced by other real estate brokers, then of necessity any determination that the person is unworthy or incompetent would have to be arbitrary since there would be no set standard by which such action could be judged. This could result in a hearing examiner allowing his own personal prejudices or biases to influence his determination, and that of course would be arbitrary and in violation of the due process clause of both the State and Federal constitution.

The appellant in his brief before this Court said that the respondent's actions were reviewed by his peers when the Commission reviewed the administrative law judge's decision. However, it should be noted that the respondent was not given any opportunity to appear before the commissioners, to argue to the commissioners, to learn of the commissioners qualifications or lack thereof, or learn of their prejudices. The appellant contends that the commissioner's reviewed in detail the decision

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of the administrative law judge. However, there is no way that the respondent can ascertain whether that representation is correct. In addition, the commissioners are generally not present at hearings and therefore cannot view the demeanor or make judgments as to the credibility of witness that appear before the administrative law judge. Consequently, the respondent believes that a review by the Commission does not afford him the type of review by his peers anticipated in the Vance case.

The administrative law judge ruled against the respondent on Fact Situations No. 2, 4, 6, 7, and 9 on the basis that the respondent was incompetent. The decision on all of these fact situations were reversed by the District Court's finding in relationship to the application of the standard of incompetency. Fact Situation No. 2 was also based upon a finding that the respondent has exposed his client to two commissions. This issue will be dealt with in Section B.

B. The determination of the administrative law judge as to violations of specific statutory regulations were not supported by the facts.

The administrative law judge found against the respondent on Fact Situation No. 1 on the basis that he had violated U.C.A. Section 61-2-11 (9) which requires a broker to voluntarily furnish copies of all documents to all parties executing the documents. The District Court Judge found:

> "As to the first finding that the broker had failed to furnish copies pursuant to subsection (9) it is noted that the listing party by signature acknowledges receipt of a copy of the document, and

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the only apparent basis for the claimed violation is that the broker had no recollection of handing the document to the party but assumes he did. As to amending the documents or adding thereto, the information added to the document was nothing more than property details to better help the broker in marketing the property and would likely not be known by the owner without consulting payment records, tax receipts, etc. None of the added information altered the contract between the party and the broker nor endangered the public."

The respondent contends that the facts as set out by the district court judge are correct and supported by the findings of the administrative law judge. The administrative law judge's conclusion that those facts constitute a violation of (9) was incorrect and the District Court's decision to reverse that conclusion was reasonable and rational and should be upheld by the Supreme Court.

In relationship to Fact Situation No. 2 the administrative law judge found that the respondent had violated Rule 11(g) of the Rules and Regulations of the Division of Real Estate which prohibits a real estate agent from exposing a client to two real estate commissions. In reviewing this fact situation, the district court judge stated:

"As to the findings that parties were subjected to payment of a double commission the record is clear that the listing was made with an owner who had represented that he had terminated the prior listing. While it is asserted and not denied that another broker had obtained an extension of his listing on the property, Topik removed his signs from the property and made no claim for his own listing upon receipt of the claimed extension."

In this fact situation the District Court accepted the factual findings of the administrative law judge, but disagreed with the conclusion of the Judge that the facts constitute

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exposing a client to a double commission. The decision of the district court judge was reasonable and rational and should not be over turned by the Supreme Court.

In Fact Situation No. 3 the administrative law judge found that the respondent has violated Rule 11(f) of the Rules and Regulations of the Division of Real Estate in that he advertised property at a price lower than listed and without the consent of the seller. The district court overruled the administrative law judge's decision in this fact situation without comment. It was obvious from the record that the respondent was authorized by his client to offer the property for sale at $60,000.00 with $5,000.00 down. This was done by a counter offer made by the client on July 14, 1983, which is marked as Exhibit E and by a letter addressed to the respondent dated August 14, 1983, which confirmed a phone call she previously had with the respondent which letter is marked as Exhibit C. The property was advertised at $59,800.00 with $5,000.00 down. The difference of $200.00 between the authorized price of $60,000.00 and $59,000.00 represented a reduction of $200.00 which the respondent intended to deduct from is commission thereby resulting in the client receiving precisely the amount of money which she anticipated. The conclusion by the administrative law judge that the respondent had violated Rule 11(f) was not reasonable or rational and the ruling of the district court judge in overturning that decision was reasonable or rational and should be affirmed by the Supreme Court.

Fact Situation No. 5 was decided in favor of the

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respondent by the administrative law judge and, consequently, was not a subject of appeal to the District Court or to the Supreme Court. Fact Situation No. 8 was dismissed by the appellate at the administrative hearing.

CONCLUSION

The respondent contends that the decision of the district court judge acting as an intermediate court of appeal was reasonable and rational and should be supported by the Supreme Court. The respondent contends that the findings in relationship to Fact Situations 1, 2, and 3 did not support the conclusions of the Administrative Law Judge and did not constitute a violation of the sections of the Utah Code referred to therein. The decision of the district court judge to reverse and over rule the the conclusions of the administrative law judge was sound and based upon findings that were made by the administrative law judge at the hearing.

The respondent contends that the application of the term incompetent to Fact Situations 2, 4, 6, 7, and 9 were not supportable given the fact that no evidence was presented before the administrative law judge as to the standards to be applied to a real estate agent in the State of Utah and no definition was given by the State Legislature or by the Commission of the term "incompetent" which would permit the Commission to even apply the standard to the respondent or others appearing before an administrative law judge.

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The respondent respectfully requests that the Supreme Court affirm the decision of the District Court Judge.

RESPECTFULLY SUBMITTED this ____ day of July, 1986.

____
ROBERT A. ECHARD
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify four (4) true and correct copies of the foregoing Brief of Respondent was mailed, postage prepaid, this _____ day of July, 1986, to David L. Wilkinson, Attorney General, Stephen G. Schwendiman, Chief, Assistant Attorney, and Robert B. Hicks, Assistant Attorney General, at Division of Real Estate, 130 State Capitol, Salt Lake City, Utah 84114.

____
ROBERT A. ECHARD
Attorney for Respondent

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A D D E N D U M

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IN THE DISTRICT COURT OF BOX ELDER COUNTY STATE OF UTAH

IN THE MATTER OF THE LICENSE TO ACT AS A REAL ESTATE BROKER IN THE STATE OF UTAH OF NICK TOPIK,	)	MEMORANDUM DECISION
	)	Civil No. 18944
	)	

The Broker in question appealed from the Order of the Executive Director of the Division and the Real Estate Commission confirming, approving and adopting the decision of the Administrative Law Judge (hereafter ALJ) in recommending the suspension of the broker's license for a period of 150 days and a three year period of probation commencing at the termination of the suspension.

The decision of the ALJ was based on a consideration of nine fact situations, some of which were found to constitute no violation and others found to violate U.C.A. Section 61-2-11 (9) failure to furnish copies of documents, Section 61-2-11 (8) subjecting a client to double commissions and advertising property lower than the listing price without written consent, Section 61-2-11 (8) offering to pay a finders fee to an unlicensed person, Section 62-2-11 (8) amending an offer without obtaining indication of consent of buyers, Section 61-2-11 (8) approximating as the 'balance due' on a listing as "approximately $37,000.00" when the actual balance was $37,950.00, and 61-2-11 (8) preparing multiple documents, listing and/or earnest money offers without indicating which ones were binding and by adding terms to an ernest money agreement after it had been [illegible]

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Section 61-2-11 provides in relevant part that:

"the commission - may suspend, revoke, place on probation, or deny re-issuance of any license issued under this chapter at any time if the licensee

- in performing or attempting to perform any of the acts specified in this chapter is found guilty of: (8) being unworthy or incompetent to act as a principal broker, associate broker, or sales agent in such manner as to safeguard the interests of the public;

(9) failing to voluntarily furnish copies of all documents to all parties executing the documents."

Appellant argues that 61-2-11 (8) is vague and uncertain and affords no standard by which a party can be judged citing principally two Utah Cases, Athay vs. State Department of Business Regulation 626 P2, 965, and Vance vs. Fordham 671 P2, 124. The Commission relies also on the Vance vs. Fordham Case wherein the court held that "unprofessional conduct" in a medical doctor licensing case was an adequate statutory standard and arguing therefore "being unworthy or incompetent" in a real estate broker's case is likewise an adequate statutory standard. Commission counsel noted that in the Vance case the referred to standards of performance would be interpreted by members of the profession in the process of administrative adjudication and equates that to other brokers filing the charges herein, even though no other brokers appeared and testified at the hearing before the ALJ. To be specific the Division argues in the first full paragraph on Page 9,

" Applying the foregoing principle of law to this case,

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> yields but one conclusion: Mr. Topik's license suspension was considered by a group of his peers who decided he was "unworthy or incompetent to act a a principal broker . . . in such a manner as to safeguard the interest of the public. Such was the decision considered and made by Mr. Topik's peers and therefore satisfies the requirements of Vance."

This court does not accept the Divisions conclusions as to the application of the Vance interpretation to the case at bar and therefore rejects the findings of the ALJ of violations of 61-2-11 (8), except and unless the broker's conduct also violated one or more of the other seventeen listed proscribed activities. As was pointed out in one of the Division's cited cases, competence is not perfection and the ALJ found much of the broker's conduct was either innocuous or resulted in no damage or injury to any person.

As to the first finding that the broker had failed to furnish copies pursuant to subsection (9) it is noted that the listing party by signature acknowledges receipt of a copy of the document, and the only apparent basis for the claimed violation is that the broker had no recollection of handing the document to the party but assumes he did. As to amending the documents or adding thereto, the information added to the document was nothing more than property details to better help the broker in marketing the property and would likely not be known by the owner without consulting payment records, tax receipts, etc. None of the added information altered the contract between the party and the broker nor endangered the public.

As to the finding that parties were subjected to payment of a

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double commission the record is clear that the listing was made with an owner who had represented that he had terminated the prior listing. While it is asserted and not denied that another broker had obtained an extension of his listing on the property, Topik removed his signs from the property and made no claim for his own listing upon receipt of the claimed extension.

As to the ALJ's finding of violation of 61-2-11 (8) by offering to pay a finder's fee to an unlicensed person, it would appear that if such were the case the broker had violated subsection 61-2-11 (7), that is:

> " - performing or attempting to perform any act specified - (7) paying valuable consideration as defined by the commission, to any person not licensed under this chapter, - ".

Exhibit No. 12 is an advertisement run by the broker proclaiming that any person to whom the broker sells property or refers persons to whom property is sold would be elibible for a $100.00 gift certificate. The record is silent as to why this conduct did not amount to at least an attempt to pay valuable consideration to persons not licensed under the chapter, but the record is devoid of any further reference or indication why such was not found.

Accordingly the order of the Executive Director and Commission is reversed, each party to pay their own litigation expenses.

Dated this 15th day of January, 1986.

BY THE COURT:

OMER J. CALL-DISTRICT JUDGE

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MAILING CERTIFICATE

Copy of the foregoing Memorandum Decision mailed this 15th day of January, 1986, to Robert A. Echard, Attorney for Respondent, 427 27th Street, Ogden, Utah 84401 and to Robert B. Hicks, Assistant Attorney General, Tax & Business Regulation Division, 130 State Capitol, Salt Lake City, Utah 84114.

Jay R. Hirschi
Box Elder County Clerk

By ______________________
Deputy

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BEFORE THE REAL ESTATE COMMISSION

OF THE DEPARTMENT OF BUSINESS REGULATION

OF THE STATE OF UTAH

In the Matter of the License of NICK TOPIK to Act as a Real Estate Broker in the State of Utah	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER No. RE-83-05-17

Appearances:

Nicholas Hales for the Real Estate Commission

Richard Echard for the Respondent

By the Administrative Law Judge:

Pursuant to notice duly served by certified mail, this matter came on regularly for hearing on August 27 and 28, 1984, before Kent Walgren, Administrative Law Judge for the Utah Department of Business Regulation. A Pre-Hearing Conference was convened on March 8, 1984 and a Pre-Hearing Order issued August 14, 1984. On August 27, 1984 the parties agreed to the following amendments in the Pre-Hearing Order: (1) Delete the last sentence of paragraph 9; (2) Delete the penultimate sentence of paragraph 10; (3) Delete the last sentence of paragraph 14. The Pre-Hearing Order is so amended. The Division moved to dismiss without prejudice Fact Situation #8 and the Counts relating thereto, which motion was granted; in the event it is not re-filed before October 11, 1984, it shall automatiically be dismissed with prejudice.

Evidence was offered and received and the Administrative Law Judge, having been fully advised in the premises, now makes and enters the

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following recommended Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Respondent is, and at all times relevant to these proceedings has been, a licensee of the Real Estate Division of the State of Utah.

Fact Situation #1

2. Rosalie Tsosie, as owner of certain real property located at 30 West 700 North in Brigham City, Utah, listed her property with C-21 Mountain Aire Realty, Inc. of Brigham City. The listing began May 5, 1982 with a term of six months. Sometime in or about the latter part of October, 1982, Ms. Tsosie extended the listing to January 5, 1983. Although notice of the extension of the listing appeared in the October 29, 1982, "Hot Sheet" of the Brigham-Tremonton Association of Realtors, of which Respondent is a member, we find that Respondent was unaware of the extension.

3. The initial listing would have expired November 5, 1982. On November 5 or 6, Respondent visited Ms. Tsosie about obtaining the listing for Western Hills Realty. Being unsophisticated in real property transactions, Ms. Tsosie did not understand that she was subjecting herself to a double commission; Respondent apparently did not ask if the prior listing had been extended.

4. On the listing form, using a blue-ink pen, Respondent filled in the asking price, the listing date and expiration date, the construction material of the house ("brick") and noted that "People from Florida are exempt." Then Respondent completed the bottom of the form (see Division Exhibit 5) and had Ms. Tsosie sign listing and sign again that she had received a copy of it. Respondent then placed a sign for Western Hills

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Gonzales apparently believed he had authority to unilaterally terminate the listing and that the telephone call accomplished same. No written release was requested or obtained. Wardley considered the listing valid at all times.

9. On July 31, 1982 Topik approached Gonzales about listing the property. Gonzales told Respondent: "If you want to, go ahead." Thereupon, Respondent had Gonzales execute a two month listing with Western Hills. Respondent knew the property had been listed with Wardley but accepted Gonzales' verbal assertion that he had terminated the listing. Respondent made no attempt to contact either Wardley or the MLS to ascertain whether or not the listing was still valid.

10. Respondent knew, or should have known, that one party to a written listing agreement cannot unilaterally terminate the agreement on a whim. Respondent also knew, or should have known (by reviewing the MLS book), that Wardley's listing did not expire until September 28, 1982. Under the circumstances, Respondent had a duty to make reasonable inquiries to assure that the Wardley listing was no longer in effect. By violating this duty, he subjected Gonzales to liability for paying two commissions. Respondent's failure to inquire also constitutes incompetence.

<u>Fact Situation #3</u>

11. Joan Stevens listed with Topik her property located at 672 North 100 West, Brigham City, Utah, for $65,500. On account of a VA appraisal (and by written agreement), the listing price was subsequently reduced to $64,100. The VA appraisal was contingent upon the completion of certain repairs which Mr. Topik ascertained would cost $10,593.20 (see

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without the written consent of the seller, Respondent violated Section 11.f. of the Rules and Regulations of Division.

15. The Division alleges that Respondent substantially misrepresented the terms of purchase by advertising that no down payment was required. Although the advertisement stated "%000.00 minimum down", we find that it was a typographical error (should have been "5000.00 minimum down") caused by inadvertently touching the shift key when typing the number 5. Since the error was caused by sloppiness rather than being intentional, we find no violation of Section 61-2-11(1).

16. The Division's allegation that Respondent obtained keys without permission and entered Ms. Stevens' units without prior appointments was unsubstantiated by the evidence. We find no violation of Section 61-2-11(8).

<u>Fact Situation #4</u>

17. Topik, as principal broker of Western Hills Realty, had promotional flyers printed and distributed bearing the name, address, and telephone number of his brokerage and offering to give a $100.00 gift certificate to any person "when we list and sell your home <u>or one referred by you</u>" (emphasis added). The Division alleges that such is a violation of Section 61-2-11(15), in that Respondent willfully and deliberately

> encouraged unlicensed persons to violate the provisions of Utah Real Estate Licensing Law by referring prospects to Topik in the expectation of receiving valuable consideration and thereby subjecting them to possible criminal prosecution." (Amended Petition, paragraph 53)

Respondent was never requested by the Division to cease distribution of the leaflets and there is no other evidence on the record indicating that

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have been more explicit, we cannot find that the January 18, 1983, Earnest Money agreement, the only one presented to the sellers, is so defective as to demonstrate incompetence within the meaning of Section 61-2-11(8).

Fact Situation #6

21. Topik prepared an Earnest Money Receipt and Offer to Purchase dated February 10, 1983 on a property located at 1099 Oak, Brigham City. The purchasers were Donald and Eleanor Speers. The total purchase price was shown as $49,000 with a $50. earnest money. The balance of the terms of purchase were spelled out in the body of the offer. When Topik presented the Earnest Money Offer to the listing broker, Ed Tugaw, Mr. Tugaw noted that there were some possible deficiencies in the terms. Topik took the signed offer from Mr. Tugaw and wrote in on line 24 and 25 "Buyer will apply for a General Electric Loan. Seller to pay 3 1/2 points." On lines 28 and 29 of the form there were two blank spaces which had not been filled in, which Topik then filled in with the terms pertinent to the interest rate and date of closing. Topik then handed the document back to Mr. Tugaw and requested that he present the document to the seller without returning to the prospective buyers to have them initial the additions. The offer was countered by the seller; when the buyers accepted the counter-offer they were also accepting Respondent's changes.

22. In amending the offer without obtaining some indication of consent from the buyers, Respondent demonstrated incompetence within the meaning of Section 61-2-11(8). In mitigation, the buyers ratified the additions on the same day and no one was injured.

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t least two other real property transactions since this one) agreed
erbally to purchase the home as follows: Total purchase price:
:45,800; Terms: Mayne to pay $30,000 cash ($5000 down and $25,000 at
:losing) and assume an existing mortgage in the amount of approximately
$15,800. The parties agreed to close on or about June 15, 1983, at which
time Mayne would have available the cash necessary to close the sale. In
early May, 1983, Mayne gave Rucker the $5,000 down payment, thereby
obtaining an equitable interest in the property; no written documents
were executed. Rucker knew that she was selling the home considerably
below market value; she needed to move and, as she explained to Mayne,
the home needed a new roof.

28. Mayne initially considered occupying the home but his wife
decided it was too far from church and shopping facilities so in early
May, 1983 Mayne decided to contact his friend and fishing buddy of ten
years, Nick Topik. The first few times Mayne went by Respondent's
office, he was out. The agents who were there encouraged Mayne to list
the property but he said he wanted to sell it, not list it (he didn't
want to pay the 6% sales commission). About mid-May, Mayne met with
Topik at the latter's office. Mayne told Topik he had purchased the
Rucker home, and that he wanted to turn it over for a $3000 profit (there
is a dispute here: Topik testified at the hearing that he agreed to pay
Mayne $2500 profit), and that he would sell it to Topik for $49,500.
Mayne did not tell Topik about the $5000 he had already paid to Rucker.

29. On May 24, 1983, Mayne and Topik signed an Earnest Money Receipt
and Offer to Purchase with the following terms: Total Purchase Price:
$49,500; Earnest Money: $500; Payment when Mayne accepts sale: $4500;

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(The record is not clear whether Mayne retained Topik's $500 earnest money noted in the May 24 Earnest Money agreement; did this, added to the $2500, constitute Mayne's $3000 profit? The closing statements are silent about the $500.) There are two copies of the May 27, 1983 Earnest Money agreement (Division Exhibits 18 and 19), both of which are identical with the exception of a few additional filled-in blanks on Exhibit 19. It appears that after Topik had Rucker sign the agreement he tore off a copy and left it with Rucker (Exhibit 18) and took the remaining carbons (to which he at some point added a few inocuous details) to Mayne for his signature. Although the purchase prices in the May 24 and May 27 Earnest Money agreements are identical, the terms differ. In the May 27 agreement, Topik notes having paid $560 earnest money to Rucker (which does appear on the closing statements), the $15,800 assumption, and the balance of $33,140 to be paid as follows: (a) $25,600 by a loan from Mayne to Topik ($200/month, payments at 9%--the loan from Mayne to Topik is substantially identical to the May 24 agreement); and (b) the remaining $7,540 presumably to be paid in cash at closing by Topik. The mystery of the May 27 Earnest Money agreement is how the figure of $560 (earnest money to Rucker) was arrived at. There is some evidence that Mayne also paid Rucker $650 for some items of personal property that eventually went with the house; perhaps that figure is somehow related to the personal property. No one who testified at the hearing, Topik included, was able to recall all the details and the documents are less than ideal, never mentioning whether one document supersedes another, never mentioning transfers of earnest monies. The May 27 Earnest Money agreement does state that Topik is a licensed Real

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ransaction on the day of closing. Subsequently, however, Mayne's hildren discovered that Mayne had invested $25,600 at 9% interest over 6 years and cried foul.

34. We are not convinced that the Division's tendency to portray ayne as a naive elderly gentleman who was duped by the Respondent is holly accurate. Mayne can still read without the help of glasses. hose who know Mayne testified they respect his shrewdness as a "horse-trader." We are inclined to believe Topik when he said he made it clear that this was a private, arms-length deal. We are convinced that Mayne knew he was loaning money to Topik--perhaps not exactly for 36 years, but for enough years that Mayne knew he wouldn't be around to collect it. Thus we find no substantial misrepresentation as alleged by the Division in Count 10, no false promises as alleged in Count 13, and no dishonest dealing as alleged in Count 15. Mayne seems to have been content with the transaction until his children objected and until he discovered the price for which Topik had resold the home.

35. Inasmuch as Mayne obtained an equitable interest in the property when he paid $5000 to Rucker, Mayne's $2500 profit, however denominated, was not technically a finder's fee. Even though there were no written documents between Rucker and Mayne, Mayne's partial performance on their verbal agreement may well have made the agreement enforceable in equity despite the Statute of Frauds. We thus can find no violation under Count 6 of the Petition.

36. We do find that Respondent's preparation of multiple documents with no indication of which was to be binding, his failure to account for earnest monies being transfered from one document to another, and his

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them, altering documents after they had been executed, offering to sell property below the listed price, offering to pay illegal finders' fees, preparing ambiguous documents and duplicate documents with no indication of which supersedes which and failing to account for the transfer of earnest monies from one document to another cannot be condoned. We are not convinced that Mr. Topik is dishonest; we are not convinced that Mr. Topik lacks the ability--if he took the time--to structure a competent real estate transaction. We are convinced that in 31 years of wheeling and dealing Respondent has developed a habit of cutting corners to the extent that he poses a threat to the public health, safety and welfare.

ORDER

WHEREFORE, IT IS ORDERED that the Real Estate Broker's License of NICK TOPIK be, and the same hereby is, suspended for a period of 150 days;

IT IS FURTHER ORDERED that Respondent's Real Estate Broker's License be, and the same hereby is, placed on probation for a period of three (3) years, said probation to commence at the termination of the aforementioned suspension.

In the event Respondent further violates any statute or rule governing the conduct of Real Estate Brokers in the State of Utah during any period of suspension or probation, he shall be ordered to appear and show cause why his License to Act as a Broker in the State of Utah should not be revoked.

DATED this 31st day of August, 1984.

KENT WALGREN, Administrative Law Judge

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