1988

Nick Topik v. : Brief of Appellant

Utah Supreme Court

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88-0087-CA

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BEFORE THE SUPREME COURT OF THE 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 APPELLANT

Docket No. 860119

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APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF UTAH,

OMER J. CALL DISTRICT COURT JUDGE

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STATEMENT OF ISSUES PRESENTED ON APPEAL

This appeal raises two general issues. The first is extremely important to the efficient state regulation of occupations and profession. It deals generally with the main issue first raised before this Court in Vance v. Fordham, 671 P.2d 124 (Utah 1983). Vance dealt with the issue whether the general disciplinary standard of "unprofessional conduct" as it related to the treatment of patients could be found by a professional peer review board on a case by case and based in part upon the knowledge possessed by the board's professional members. The major issue in this case is similar: May the Real Estate Commission ("the Commission") delegate a case alleging violations of the general disciplinary standard "being unworthy or incompetent" to an Administrative Law Judge ? Collateral and assuming an affirmative answer thereto, does the Vance decision cover a Commission decision based upon a recommended decision of an Administrative Law Judge ("ALJ") who finds a violation of a general standard without first finding a more specific disciplinary violation? The second general issue is whether the District Court exceeded the proper scope of review in overturning certain findings of fact made by the Commission?

STATEMENT OF THE CASE

This appeal is from the decision of Omer J. Call, First Judicial District Court Judge. Judge Call overturned the

decision of the Utah Real Estate Commission. The Commission's decision approved a recommended decision of the ALJ to whom the case had been assigned for hearing. The ALJ adjudged Respondent guilty of several licensing violations including "being unworthy or incompetent to act as a principal broker . . . in such manner as to safeguard the interests of the public" and recommended that his license to practice as a principal real estate broker be suspended for 150 days followed by a three year probationary period.

STATEMENT OF FACTS

Nick Topik ("Respondent) is a real estate broker licensed in the State of Utah, and at all times material hereto, was acting in his capacity as a real estate broker.

On January 26, 1983, the Division, based upon eight facts situations, charged Respondent, by petition and order to show cause, with one count of willful or deliberate violation or disregard of the rules and regulations of the Commission, one count of substantial misrepresentation, one count of making false promises of a character likely to influence, persuade or induce, one count of failing to voluntarily furnish copies of all documents to a party in a real estate transaction, one count of dishonest dealing and one count of being unworthy or incompetent to act as a real estate broker. See Petition.

On April 23, 1984, the Division amended the original Petition to include an additional fact situation and charged

Respondent with seven counts of willful or deliberate violation or disregard of the rules and regulations of the Commission, two counts of substantial misrepresentation, two counts of making false promises of a character likely to influence, persuade or induce, two counts of failing to voluntarily furnish copies of all documents to a party in a real estate transaction, one count of dishonest dealing and one count of being unworthy or incompetent to act as a real estate broker. See Amended Petition.

On August 27 and 28, 1984 a hearing was conducted on the Amended Petition. At the hearing, Fact Situation Number eight and the violations in connection therewith were dismissed without prejudice. Findings of Fact, Conclusions of Law, and Order at 15.

On August 31, 1984 the ALJ hearing the case concluded that Respondent was guilty of failing to furnish voluntarily copies of all documents to all parties executing the same, being unworthy or incompetent as to five of the fact situations, subjecting a seller to double commissions, and advertising a property at a lower price than listed without written consent. Findings of Fact, Conclusions of Law, and Order at 15, 16.

On September 11, 1986, the Real Estate Commission considered the recommendations of the ALJ and affirmed his decision. Findings of Fact, Conclusions of Law, and Order at 17.

Thereafter, Respondent appealed the Commission's decision to the First Judicial District Court.

The District Court decided the case on January 15, 1986, by Memorandum Decision.

Before the District Court, Respondent argued that Utah Code Ann. § 61-2-11(8) was unconstitutionally vague. The Commission and Division argued that Section 61-2-11(8) was not unconstitutionally vague under Vance v. Fordham, 671 P.2d 124 (Utah 1983). The District Court concluded that Vance did not apply because the case was heard by an ALJ. The District Court further concluded that "incompetence or unworthiness" cannot be found by an ALJ "except and unless the broker's conduct also violates one or more of the other seventeen listed proscribed activities." Memorandum Decision at 3.

The District Court also concluded that the following findings of facts and conclusions of law by the Commission were unsupported by the evidence: The Commission found that (1) Respondent failed to furnish copies to all the parties of the transaction, (2) Respondent subjected a seller to a double commission, and (3) Respondent paid an illegal finders fee to an unlicensed person.

The fact situations at issue are as follows:

FACT SITUATION NO. 1

This fact situation involves the dealings of Mr. Topik with Rosalee Tsosie, who was the owner of certain real property located in Brigham City, Utah. With respect to this Fact Situation the Commission found that Mr. Topik violated § 61-2-11(9) by failing to furnish Ms. Tsosie with a copy of the completed listing agreement. Findings of Fact, ¶ 6. Paragraphs 4 and 5 of the Commission's findings of fact relate to the violation of § 61-2-11(9).

On November 5th or 6th Mr. Topik visited Ms. Tsosie about obtaining a listing on her property. In the presence of Ms. Tsosie, Mr. Topik filled in certain terms of the listing agreement in blue ink, including the listing and expiration dates, the name of the realty company, the commission percentage, the date of execution and the city and state. See Exhibit No. 4; Transcript at 38. Mr. Topik caused Ms. Tsosie to affirm acceptance of the listing agreement and acknowledge receipt thereof by signature. Transcript at 38. At the hearing Mr. Topik explained that later in his office he filled out the remainder of the listing agreement in black ink, including the loan balance amount, percentage interest rate on that loan, the loan payment amount, the annual cost of taxes, and certain facts relative to the home such as square footage, number of bedrooms, bathrooms, improvements, etc. Id. Mr. Topik also testified that he did not

recall providing Ms. Tsosie with a copy of the completed listing agreement. Id. Based upon this evidence the Commission concluded that Mr. Topik had failed to provide Ms. Tsosie with a completed copy of the listing agreement.

FACT SITUATION NO. 2

On March 28, 1985, Antonio Gonzales listed his property on South Highway 89, Perry, Utah with Wardley Corporation. Division's Exhibit 6. The listing was to expire on September 28, 1982 and was published by the Brigham-Tremonton Multiple Listing Service of which Mr. Topik was a member. Transcript at 50.

Sometime in July, 1982, Mr. Gonzales telephoned Wardley and informed the office manager that the property was being foreclosed and that Wardley might want to come and take down its sign because he was terminating the listing agreement. Transcript at 52. On July 31, 1982, Mr. Gonzales visited the office of Mr. Topik inquiring about certain rental property. Transcript at 59. At that time Mr. Topik approached Mr. Gonzales about listing the property to be foreclosed. Transcript at 58. Mr. Gonzales explained to Mr. Topik that he had verbally attempted to terminate the listing agreement with Wardley Corporation and based upon such allowed Mr. Topik to list the property. Id.

The Commission with respect to Fact Situation 2 found that Mr. Topik knew or should have known that one party to a listing agreement could not unilaterally terminate the agreement

and that Mr. Topik was under a duty to make a reasonable inquiry to assure that the prior listing was no longer in effect. The Commission thus concluded that Mr. Topik was unworthy or incompetent to act as a principle broker, broker, or salesman so to protect the public interest because he subjected Gonzales to liability for paying for two commissions and failed to make a reasonable inquiry to assure that the Wardley listing was no longer in effect.

FACT SITUATION NO. 3

Joan Stephens listed her property at 672 North, 100 West in Brigham City, Utah with Mr. Topik for $65,000 on July 14, 1983. Transcript at 41. Ms. Stephens agreed to a counter offer to sell the property for $60,000 with $5,000 down at 11% interest. Transcript at 93, 94. The counter offer was rejected by the prospective purchaser. Mr. Topik testified that he believed that on the basis of Ms. Stephens counter offer of July 14, 1983 that he had authority to list the property for $60,000 with $5,000 down and at 11 percent interest. Id.

The Commission found that Mr. Topik had no written or verbal authority to advertise the property for under $64,100. Findings of Fact, ¶ 13. Nevertheless, Mr. Topik listed the property at various prices including $60,500 (July 5, 1983 hotsheet) $59,800 (August 10, 1983 hotsheet) $61,000 (August 23, 1983 hotsheet) and $60,000 (September 7, 1983 hotsheet).

On August 14, 1983 Ms. Stephens wrote Mr. Topik a letter after she had gained knowledge of the August 10, 1983 listing price of $59,800 which reads in part:

> I just heard the ad you placed in the Boxelder News and Journal, and I am very disappointed and upset about it. . . . I have told you every time what my terms are--the same as the last offer, when I was at your place in July.
>
> As a result of your last ad, many people have been bothering the renters. . . .

Transcript at 100.

On the basis of the foregoing the Commission concluded that Mr. Topik violated Rule 11.f. of the Rules and Regulations of the Division of Real Estate which states that "[u]nder no circumstances should a broker or salesman advertise property at a lower price than listed without the written consent of the seller."

FACT SITUATION NO. 4

With respect to Fact Situation No. 4 the Commission concluded that Mr. Topik violated § 61-2-11(8). Conclusions of Law, ¶ 4. The basis of that conclusion appears to be the promotional flyer printed and distributed by Mr. Topik which offered to give a $100 gift certificate to any person "when we list and sell your home or one referred by you." Division's Exhibit 12.

FACT SITUATION NO. 5

Fact Situation No. 5 was resolved in favor of Mr. Topik.

FACT SITUATION NO. 6

On behalf of Donald and Eleanor Spears, Mr. Topik prepared on February 10, 1983 an Earnest Money Receipt and Offer to Purchase a property located in Brigham City. Division's Exhibit H; Transcript at 150. Many of the terms of the proposed purchase were given in the Earnest Money Agreement. However, when Mr. Topik presented the Earnest Money Offer to the listing broker, the broker noted several deficiencies in terms. Mr. Topik took the earnest money agreement from the broker and wrote in on line 24 and 25 "buyer will apply for a General Electric loan. Seller to pay 3½ points." On lines 28 and 29 Mr. Topik filled in the terms relating to the interest rate and date of closing. Mr. Topik then handed the document back to the listing broker and requested that the offer be presented to the sellers without returning it to the prospective buyers for consent. The Commission found with respect thereto that Mr. Topik "demonstrated incompetence within the meaning of S 61-2-11(8)."

FACT SITUATION NO. 7

On March 22, 1983, Mr. Topik prepared another Earnest Money Receipt and Offer to Purchase Agreement for Donald and Eleanor Speers, in which the Speers offered to purchase certain

property in Brigham City. See Division Exhibit 17. The total purchase price was listed at $38,000 and $50 was listed as earnest money. The balance should have been listed at $37,950, but was listed at $37,000. The hearing officer held that the defective listing of the balance was incompetence within the meaning of § 61-2-11(8).

FACT SITUATION NO. 8

At hearing the Division made a motion to dismiss Fact Situation No. 8 and the counts associated therewith without prejudice, which motion was granted by the Commission.

FACT SITUATION NO. 9

Sometime in April, 1983, Addie Rucker decided to sell her Brigham City home. Fred Mayne, Mrs. Rucker's 87-year-old neighbor, agreed verbally to purchase the home for $45,800; terms: $5,000 down, assumption of a mortgage of $15,800; $25,000 to be paid at closing; and closing was scheduled on June 15, 1983. Mayne paid Rucker the $5,000 down in early May, 1983. Transcript at 166, 191.

Mayne thereafter decided to sell the property and approached Topik about working out a deal. Mayne told Topik that he had purchased the Rucker home and wished to turn it over for $2,500 or $3,000. Transcript at 232.

On May 24, 1983, Topik and Mayne executed an Earnest Money Receipt and Offer to Purchase wherein Topik agreed to purchase the Rucker home from Mayne for $49,500; terms: $500 Earnest Money; $4,500 payment when Mayne accepts the sale; $3,000 when Mayne delivers the deed; assumption of existing mortgage of $15,915.25 and $25,584.75 loan from Mayne to Topik payable at $200/month, 9% interest. Division's Exhibit 19. Topik and Mayne also executed a listing agreement on the property wherein "Topik ETAL (Trust)" was designated as the owner. Respondent's Exhibit L.

Later the same day, Topik completed another listing agreement on the property wherein "Nick Topik ETAL" was listed as owner. Respondent's Exhibit K. This agreement listed the price at $55,000 and indicated that the owner would accept a 10½% wrap-around mortgage with $12,500 down and $450/month payments.

On May 27, 1983, Topik prepared a second Earnest Money Receipt and Offer to Purchase which altered the purchaser, listing Mr. Topik as such and the terms of sale: $49,500 sales price; $560 Earnest Money to Rucker; $15,800 assumption; $25,600 to Rucker to loan from Mayne ($200/month for 36 years at 9%) and presumably, $7,540 cash at closing. Division's Exhibit 18. Apparently, Mr. Topik decided to buy the property directly from Rucker and pay Mayne a $2,500 finders fee. After Mrs. Rucker had executed the document, Rucker took a copy to Mayne for approval, but before doing so added a few additional terms.

On June 4, 1983, Kevin and Jill Jeppsen, for whom Topik had been trying to locate a home, made a full price offer for the Rucker property. "Again, two Earnest Money agreements (Division Exhibits 20 and 21), bearing the same date, were executed." ¶ 32, Findings of Fact, Conclusions of Law and Order. On the first agreement, Topik noted that he was a real estate broker and obtained Mr. Jeppsen's signature only. Division's Exhibit 20. On the second agreement, which both Mr. and Mrs. Jeppsen signed, Topik did not specify that he was a real estate broker. Division's Exhibit 21. The second agreement is silent about the first and does not specify whether it supersedes the first or if the Earnest Money paid on the first is to be applied to the second.

On June 15, 1983, the sale was closed. Mayne was paid a $2,500 finders fee and Topik arranged to take his profit from the Jeppsens over 36 years at $104/month. Division's Exhibit 24.

The Commission ruled that Topik's "preparation of multiple documents (presumably two multiple Earnest Money Agreements executed on behalf of Jeppsens) with no indication of which was to be binding, his failure to account for earnest monies being transferred from one document to another, and his addition of terms (however innocuous) after the agreement had been signed constituted incompetence within the meaning of § 61-2-11(8)." Order at 36, 37.

SUMMARY OF ARGUMENT

In Vance v. Fordham, supra, this Court held that the general disciplinary standard of "unprofessional conduct" was not impermissably vague where a group of professional peers defined the standard on a case by case basis as it related to the treatment of patients.

In the present case, the Court is asked to clarify an issue not resolved in Vance, to take Vance one step further and allow a peer review board to delegate authority to an ALJ to hear such a case and based upon the ALJ's recommended decision find a violation of a similar disciplinary standard.

The basis for the foregoing request lies in the efficient administration of all occupations and profession. As the number of professional licensees increase and as State resources dwindle, the need for administrative law judges becomes more and more apparent. With respect to regulation of some occupations and professions, peer review boards are able to hear all licensee disciplinary hearings. But with respect to the vast majority of professions and occupations, such as with the regulation of real estate licensees, peer review boards simply do not have the time to devote to hearing all disciplinary cases. Furthermore, if the State is to effectively use the expertise made available to it by peer review boards, such boards cannot be engaged exclusively for hearing cases.

Additionally, the lower court under the guise of concluding that the general disciplinary standard of "being unworthy or incompetent" was overly vague and ambiguous has called into question the very process by which the Legislature has established hearings which are designed to guarantee real estate licensees due process.

Thus, it becomes necessary to decide whether the hearing procedure established for real estate licensees and exercised relative to this case is constitutionally infirm. Of course, it is the position of the Appellant that (1) delegating a case for hearing before an ALJ, (2) allowing the ALJ to find a violation of a general disciplinary standard, (3) requiring the ALJ to transmit a recommend order together with recommended findings of fact and conclusions of law to the peer review board for review, and (4) requiring a professional peer review board to review the recommended decision and consider the ALJ's recommended decision in light of knowledge gained in the course of engaging in the profession is not constitutionally repugnant.

ARGUMENT

POINT I

RESPONDENT WAS NOT DENIED DUE PROCESS BY THE APPLICATION OF A VAGUE AND AMBIGUOUS STANDARD OR BY AN IMPROPER HEARING

Respondent before the District Court argued that Utah

Code Ann. § 61-2-11(8) (1953 as amended)[1] is impermissably vague and uncertain. The lower court, notwithstanding Vance, ruled in favor of Respondent reasoning:

> 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 [sic] 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. . . .
>
> This court does not accept the Divisions [sic] 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. . . .

Memorandum Decision at 3 (emphasis added).

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[1] Utah Code Ann. § 61-2-11(8) states:

> The Commission . . . may . . . suspend, revoke, [or] place on probation . .. any license . . . 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 salesagent in such manner as to safeguard the interests of the public.

Aside from the fact that the lower court apparently misunderstood Appellant's argument, namely that Vance applied because the Commission reviewed the recommended decision of the ALJ and not because other brokers filed the charges against Respondent, the court held that a case alleging "being unworthy or incompetent" could not be heard by an ALJ except and unless the ALJ also found "one or more of the other seventeen listed proscribed activities." Memorandum Decision at 3. Two inferences are possible from the court's decision: (1) the standard, "being unworthy or incompetent," is simply too vague, or alternatively, (2) the hearing process, because it allows a case alleging "being unworthy or incompetent" to be tentatively decided by an ALJ, is constitutionally defective.

Both inferences are unsound. The first is unsound because it misapplies the facts of the case to Vance, supra. The second is unsound because it disregards well settle principles of administrative law.

A. The Commission May Delegate a Case Alleging "Being Unworthy or Incompetent" to an ALJ.

Notwithstanding the lower court's reasoning, the Commission may delegate to an ALJ a case which alleges "being unworthy or incompetent" as a violation. Utah Code Ann. § 61-2-12 (1953 as amended) repeatedly states that the Commission may delegate its authority to hear a case to an ALJ. Relevant hereto, § 61-2-12 states:

> (1)(a) Before revoking, [or] suspending . . . any license, the Division shall schedule a hearing before the Commission or an Administrative Law Judge designated by it . . . . The hearing of the charges shall be at a time and place as the Division prescribes, and shall be heard by the Commission or an administrative law judge designated by it. . . .

(Emphasis added). Section 61-2-12 does not limit the cases an ALJ may hear to those alleging a specific disciplinary violation. Section 61-2-12 clearly grants authority to the Commission to delegate any case. Moreover, even absent express authority to delegate the physical hearing function, the Commission, as would any other administrative adjudicatory body, has implied to power to delegate the task to a hearing examiner. See Morgan v. United States, 298 U.S. 468 (1936) (hereinafter "Morgan I"); United States v. Morgan, 313 U.S. 409 (1941) (hereinafter "Morgan IV").

B. Although the Hearing of a Case Alleging Violation of a General Disciplinary Standard May Be Delegated To An ALJ, the Ultimate Decision Remains With The Commission and with the Executive Director of the Department of Business Regulations.

Section 61-2-12 specifically states that the Commission and the Executive Director of the Department of Business Regulations remain ultimately responsible for the decision. Section 61-2-12(1) (b) in part states:

> The Commission or the Administrative Law Judge shall render a decision within 60 days after the completion of any hearing. The executive Director and the Commission concurrently shall make the final decision and shall promptly notify the parties to the proceedings, in writing, of the ruling, order, or decision.

(Emphasis added); see also, Board of Education of Sevier County School District v. Board of Review of the Department of Employment Security, 701 P.2d 1064, (Utah 1985).

Moreover, it is well recognized in administrative law that, unless otherwise indicated by statute, ALJ decisions are advisory in nature and consequently are not binding on the ultimate decision maker. St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 53 (1935); Federal Radio Comm. v. Nelsen Bros. Bond & Mort. Co., 289 U.S. 266, 285 (1933); Heitmeyer v. F.C.C., 68 App.DC. 180, 95 F.2d 91, (1937). Indeed, the ultimate decision maker may accept or reject the findings of the ALJ or augment them where they are considered lacking. Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266; NLRB v. Oregon Worsted Co., 94 F.2d 671 (9th Cir. 1938).

C. The Commission Carefully Considered the Recommended Decision of the ALJ and Based Upon The Consideration Affirmed The Decision of the ALJ, Concluding That Respondent Had Engaged In Acts Which Constituted "Being Unworthy or Incompetent."

Notwithstanding the Commission's authority to accept, reject, augment or modify the decision of the ALJ, the "one who hears must decide." Morgan I at 481. Such, however, does not preclude the delegation of authority to an examiner to conduct the physical hearing, but indicates that the ultimate decision maker must carefully consider the evidence and take responsibility for the ultimate decision. See Morgan IV at 422.

To carefully consider the evidence and make an enlightened decision one need not personally witness the evidence nor read the testimony of witnesses; it is enough that the decision maker address the decision "not unlike the practice of judges in similar situations." Id.

The Commission carefully considered the recommended decision of the ALJ at issue in this case. The usual procedure followed by the Commission in reviewing ALJ decisions of the complexity of the one at issue in this case is as follows: The Division sends each member of the Commission a copy of the ALJ's recommended decision approximately one to two weeks before the Commission is to hold a meeting to consider it and other issues. Each Commission member is expected to come prepared to the Commission meeting. At the meeting, the commissioners discuss the findings of fact, conclusions of law and, if sanctions have been recommended by the ALJ, the proportionality of those sanctions. The Commission rarely disputes the ALJ's recommended findings of fact. Frequently, the Commission disagrees with the recommended order, and somewhat less frequently, with the conclusions of law. If the Commission finds the ALJ's recommended decision satisfactory, it is affirmed.

The review process of the Commission is not a "rubber stamping" process. Such can be demonstrated by numerous cases in which the Commission has modified the recommended decision. For

example, the Commission has recently overturned an ALJ decision. In Case No. RE85-03-16, In the Matter of the License of Larry Lloyd to Act as a Real Estate Principal Broker, the Commission reversed an ALJ recommended order of dismissal. The Division therein alleged that Lloyd, the respondent, had violated several statutory provisions regulating brokers. The respondent moved to dismiss for lack of subject matter jurisdiction. The Commission in a twelve page decision reversed the ALJ and remanded the action back to him for hearing.

After reviewing the ALJ's recommended decision in the present case, the Commission affirmed. The commissioners, based upon their knowledge of the profession, "[c]onfirmed, approved and adopted" the recommended decision. At that instant, the decision became the decision of the Commission; it lost its character as a recommended decision of the ALJ. It, therefore should be reviewed as a decision of the Commission and not as that of the ALJ.

D. "Being Unworthy or Incompetent" as Applied in the Case is not overly Broad nor Ambiguous under Vance v. Fordham.

Vance v. Fordham, supra, involved a challenge, inter alia, to the license revocation of Dr. Vance to practice as an osteopath. The constitutionality of Utah Code Ann. §§ 58-1-13(6) and (7) was at issue. Those sections granted authority to the Division of Registration to revoke or suspend licenses for

"unprofessional conduct." Justice Oakes, writing for the Court, held that the Physicians' Licensing Board could "define unprofessional conduct," "on a case by case basis by drawing on the statutory standards . . . and on its own knowledge of the patient-care standards of the profession." Justice Oakes reasoned that "once a professional is certified," three justifications support the use of a general statutory standard such as "unprofessional conduct," namely; "(1) [t]he subject of professional performance is too comprehensive to be codified in detail,; (2) [m]embers of a profession can be properly held to understand the standards of performance; [and,] (3) [s]tandards of performance will be interpreted by members of the profession in the process of administrative adjudication." Vance at 129.

The only issue of concern herein which was not addressed by Vance is whether the adoption of the ALJ's recommended decision satisfies Vance. In other words is the third justification given in Vance satisfied when the Commission adopts as its own the recommended decision of an ALJ.

The third justification of Vance is satisfied in this case because of the Commission's review procedures and because of the substantial experience and knowlege the Commission applies when making a decision.

The Commission pursuant to Utah Code Ann. § 61-2-5.5 (1953 as amended) consists of five members, four of whom "have at

least five years' experience in the real estate business and shall hold an active principal broker, associate broker or sales agent license." Currently, three members are principal brokers and one is an associate broker. At the time this case was decided by the Commission, collectively, the members had over eighty years of experience in real estate and real estate related businesses.

The past Chairman of the Commission, William Saari, who was chairman at the time the decision was considered, is somewhat legendary. Mr. Saari is the past president of the Salt Lake Board of Realtors, has served on several ethics committees, has served two terms on the Commission and has been a broker for forty-three years.

The present Commission Chairman, John A. Kerr (also present on the Commission at the time the ALJ's decision herein was considered) has been a principal broker for ten years, has held a real estate license for thirteen years, taught real estate education at Utah State University for two years and has been on the Commission for three years.

C. Patrick Wyman, another member of the Commission which considered Respondent's case, has been on the Commission for three years as well. Mr. Wyman has over thirty one years of experience in real estate. Mr. Wyman was a licensed broker in Hawaii for sixteen years. He came to Utah in 1971 and has been a

principal broker in good standing since then. Additionally, Mr. Wyman has served on the Professional Standards Committee for the Utah Association of Realtors.

Jerald S. Hawley, another member of the decision-rendering Commission, has been in the business of real estate for ten years and has been the President of the Central Utah Board of Realtors for the last three years. Mr. Hawley has likewise been a principal broker for the last three years.

Marvin L. Hendrickson, the newest member of the Commission, was not on the Commission when the Topik decision was rendered. Nonetheless, he like the other members, is eminently qualified. Mr. Hendrickson has been in real estate for twenty-three years, and has been a principal broker for fifteen years.

POINT II

THE DISTRICT COURT ERRED IN DECIDING THAT THE COMMISSION'S DECISION WAS UNSUPPORTED BY THE RECORD

Utah Code Ann. § 61-2-12(d) (1953 as amended) limits the scope of review of the District Court to determining whether "the executive director and the Commission have regularly pursued their authority and have not acted arbitrarily . . .."

This Court in Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983), explained a similar review standard. Concededly, Administrative Services dealt with the review standards of the Public Service

Commission and not that of the Real Estate Commission. Nonetheless, the Court has recognized the general applicability of the review standards elucidated in Administrative Services. See Board of Education of Sevier County School District v. Board of Review of the Department of Employment Security, 701 P.2d 1064 (Utah 1985); Administrative Services, 658 P.2d at 608, n.7.

The Court enumerated three standards of review; (1) "general law - correction of error," (2) "findings of fact - evidence of any substance whatever," (3) "other decisions - reasonableness or rationality." Administrative Services at 608.

The "general law -correction of error" standard "include[s] interpretation[s] of the United States Constitution and the acts of the Legislature (except those defined below as special laws)." Id.

The "findings of fact - evidence of any substance whatever" standard extends to the "findings on questions of basic fact (which do not include 'ultimate facts' in the application of legal rules to basic facts. . .)." Id. With respect thereto, a court may overturn administrative findings "only where they are 'so without foundation in fact' that they 'must be deemed capricious and arbitrary.'" Id. (emphasis in original).

Finally, the "other decisions--reasonableness or rationality" standard includes "what has been described as 'mixed questions of law and fact' or the 'application of findings of

basic facts' (e.g., what happened) to the legal rules governing the case . . . and what can be called questions of 'special law.'" Id. at 610. Special law involves "interpretations of the operative provisions of the statutory law it [the administrative body] is empowered to administer, especially those generalized terms that bespeak a legislative intent to delegate their interpretation to the responsible agency." Id. In reviewing "agency decisions of this type . . . a court should afford great deference to the technical expertise or more extensive experience of the responsible agency." Id. Agency decisions in this category "must fall within the limits of reasonableness or rationality." Id.

The District Court reversed the Commission's decision with respect to most of the Conclusions of Law, namely all the Conclusions which were adverse to Respondent. With respect to Conclusion numbers 4, 6, 7 and 9, the court ruled that the standard provided by § 61-2-11(8) "being unworthy or incompetent" could not be found by an ALJ except and unless a more specific disciplinary violation could be found as well. See Point I, above.

The Court concluded with respect to Conclusion Number 1 as follows:

> As to the first finding [Conclusion] that the broker had failed to furnish copies pursuant to subsection (9) [§ 61-2-11(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.

Memorandum Decision at 3.

The foregoing attack on the conclusion of the Commission normally requires application of the intermediate standard of review which requires that the conclusions under consideration be reasonable or rational (taking into account the agency's greater expertise in the profession). However, the court attacks not only the conclusion but the basic facts upon which it rests.

To reach the decision stated above, the court had to refute ¶¶ 4 and 5 of the Findings of Fact. Such are supported, however, by substantial evidence. Respondent's own testimony at the hearing indicates that he took the signed copy of the listing agreement back to his office to fill it out based upon the prior listing from the multiple listing book and that he did not remember ever giving a copy of the agreement, after it had been filled out, to Ms. Tsosie. Transcript at 38.

The court then goes further and reasons that the Conclusion is defective because the essentials of the contract were not altered and the public was not endangered. Such reasoning flies in the face of the intermediate standard of review. The Commission (who possesses the expertise) concluded that Respondent violated § 61-2-11(9). The Legislature determined that such had the proclivity to endanger the public. By concluding as it did, the court, in essence overruled the Legislature and substituted its expertise for that of the Commission.

With respect to the second Conclusion the court stated:

> As to the finding [Conclusion No. 2] 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.

Memorandum Decision at 3, 4.

Again with respect the foregoing, the court substituted its expertise for that the of Commission. The Commission concluded, based upon the basic facts, i.e., that Ms. Tsosie entered into a listing agreement on May 5, 1982 with a term of six months, that the listing agreement was extended to January 5, 1983, that notice of the extension appeared in the October 29,

1982 "hot sheet," that respondent listed the property on November 5, or 6, 1982, that Respondent did not ask whether the prior listing had been extended, and that Respondent placed his sign on the property even though the sign for Century 21--Mountain Aire Realty was still there, that Ms. Tsosie had been subjected to a double commission by respondent. The fact that Topik removed his sign the next week (after being informed by the other broker) does not excuse the fact that two brokers, had the home been sold between November 5, or 6, 1982 and January 5, 1983, could have claimed a commission on the sale. The Commission's conclusion was thus reasonable.

The court also by inference suggested that, at least under its reasoning, that the Commission could have found Respondent guilty of violating § 61-2-11(8) with respect to Fact Situation Number Four, had Respondent been charged and found guilty of violating § 61-2-11(7). Such is irrelevant if Appellants' position as described in Point I, above, is accepted.

The court clearly substituted its expertise for that of the Commission. Such is not allowed under a proper scope of review. Therefore, the court's decision must be overturned.

Furthermore, the court's ruling relative to the vagueness of § 61-2-11(8) seriously erodes the professional standards of the profession. Most of Respondent's activity as outlined in the fact situations above and not discussed by the

lower court are more than innocuous. If such acts are allowed to go unchecked, the public will suffer.

CONCLUSION

The Commission summarized rather succinctly why Respondent is a threat to the public. According to the Commission:

> Respondent's conduct in subjecting sellers to double commissions, failing to furnish copies of documents to parties executing 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.

Findings of Fact, Conclusions of Law and Order at 15, 16.

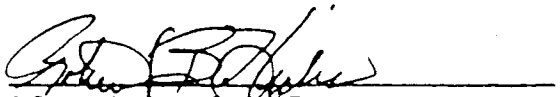
Respondent's conduct as presented herein is one of many examples of why a general disciplinary standard is necessary. It allows a responsible decision maker, such as the Commission, to protect the public by determining whether a licensee has failed to comport himself in accordance with the accepted standards of the profession.

Likewise the review standard applicable to courts reviewing such decisions is skewed in favor of the professional decision maker and its considerable expertise in the profession.

Wherefore, Appellants respectfully request that the decision rendered by the District Court be reversed.

RESPECTFULLY submitted this 2nd day of May, 1986

DAVID L. WILKINSON
Attorney General of Utah

By: 
ROBERT B. HICKS
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing "Brief of Appellants" this 2nd day of May, 1986, with postage prepaid thereon, at Salt Lake City, Utah to the following:

ROBERT A. ECHARD
Attorney for Nick Topik
635 - 25th Street
Ogden, Utah 84401

A D D E N D U M

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

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,

> 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 ne application of the Vance interpretation to the case at bar and herefore rejects the findings of the ALJ of violations of 61-2-11 (8), xcept and unless the broker's conduct also violated one or more of he other seventeen listed proscribed activities. As was pointed out n one of the Division's cited cases, competence is not perfection nd 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

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

As to the ALJ's finding of violation of 61-2-11 (8) by offering o pay a finder's fee to an unlicensed person, it would appear that f such were the case the broker had violated subsection 61-2-11 (7), hat 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 10th day of January, 1986.

BY THE COURT:

OMER J. CALL-DISTRICT JUDGE

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

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

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

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.

Fact Situation #3

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

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).

Fact Situation #4

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 or one referred by you" (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

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.

at least two other real property transactions since this one) agreed verbally to purchase the home as follows: Total purchase price: $45,800; Terms: Mayne to pay $30,000 cash ($5000 down and $25,000 at closing) 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;

(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

transaction on the day of closing. Subsequently, however, Mayne's children discovered that Mayne had invested $25,600 at 9% interest over 36 years and cried foul.

34. We are not convinced that the Division's tendency to portray Mayne as a naive elderly gentleman who was duped by the Respondent is wholly accurate. Mayne can still read without the help of glasses. Those 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

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