

1994

In the Matter of the License of T. Morris Ostler to Act as a Real Estate Broker : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE LICENSE	:	Case No. 94-0713-CA
OF T. MORRIS OSTLER TO ACT AS	:	
A REAL ESTATE BROKER	:	Priority No. 14
	:	

PETITIONER'S BRIEF

JUDICIAL REVIEW OF A FINAL ACTION
OF THE UTAH DEPARTMENT OF COMMERCE
CONSTANCE B. WHITE, EXECUTIVE DIRECTOR

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PETITIONER'S BRIEF

JURISDICTION

This Petition for judicial review of a final agency action is within the jurisdiction of the Utah Court of Appeals and said jurisdiction is conferred upon the Utah Court of Appeals by Utah Code Annotated, §63-46b-16 (1953, as amended).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

The issues for review in this Petition, and their accompanying standards of review, are as follows:

1. Whether or not the Division of Real Estate erred in finding that Petitioner had induced Gidalthi O. Ojeda D (herein "Buyer") to request reimbursement of earnest money through dishonesty.

2. Whether or not the Division of Real Estate violated prior practice in revoking Petitioner's real estate license.

The standard of review for findings of fact is set forth in Utah Code Annotated §63-46b-16(4)(g). The statute requires that

an agency's findings will be affirmed "only if they are supported by substantial evidence when viewed in light of the whole record before the court." Kennecott Corp. v. State Tax Comm'n., 858 P.2d 1381, 1385 (Utah 1983); Hales Sand & Gravel, Inc. v. Audit Div., 842 P.2d 887, 890 (Utah 1992); Zissi v. State Tax Comm'n., 842 P.2d 848, 852 (Utah 1992); Tasters Ltd., Inc. v. Department of Emp. Sec., 863 P.2d 12, 18 (1993), cert. denied, -P.2d- (Utah 1994).

The standard of review in challenging an agency's action for being contrary to prior practice is set out in Utah Code Annotated §63-46b-16(4)(h)(iii). The statute requires that the Court review whether the agency's action is contrary to the agency's prior practice and whether the inconsistency has a fair and rational basis. SEMECO Indus., Inc. v. Auditing Div., 849 P.2d 1167, 1174 (Utah 1993); B.J. Titan Servs. v. State Tax Comm'n, 842 P.2d 822, 831 (Utah 1992); Pickett v. Utah Dep't of Commerce, 858 P.2d 187, 191 (Utah App. 1993).

DETERMINATIVE STATUTES

The following statute is dispositive of the issues herein:

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency;

Utah Code Annotated §63-46b-16 (1953, as amended).

STATEMENT OF THE CASE

This case involves the revocation of Petitioner's license to operate as a real estate broker by the Utah Division of Real Estate. The Utah Division of Real Estate revoked Petitioner's license as a result of Petitioner's violation of Utah Code Annotated §61-2-11.

Appellant alleges that the Division's revocation of his real estate license was improper. The Division's decision to revoke was based upon a finding that Petitioner had dishonestly induced a buyer to make statements to Petitioner's former employer that a closing had not taken place on a particular piece of property, when in fact it had, in order to recover \$500.00. Appellant asserts that this finding by the Division was improper and not properly supported by the record.

In addition, appellant alleges that the decision of the Utah Division of Real Estate to revoke his license for his violation of U.C.A. §61-2-11 ran contrary to the previous practice of the Division in dealing with similar matters. The Division of Real Estate's treatment of Petitioner, therefore, was unreasonable, unfair and prejudicial to Petitioner.

COURSE OF PROCEEDINGS

This matter was initial heard by Administrative Law Judge, J. Steven Eklund before the Division of Real Estate of the Department of Commerce of the State of Utah and acted upon by the Utah Real Estate Commission. Subsequently, at Petitioner's request, this matter was subject to an agency review by the Executive Director of the Utah Department of Commerce of the State of Utah, Constance B. White.

DISPOSITION BY AGENCY

1. The Administrative Law Judge held that Petitioner had admitted to violating U.C.A. §61-2-11(6) by commingling funds of a seller with his own monies. The Judge also found that Petitioner admitted to violating U.C.A. §61-1-11(15) by operating as a real estate agent while his license was suspended and receiving a commission while his broker's license was inactive. Finally, the Administrative Law Judge held that Petitioner violated U.C.A. §61-2-11(17) by engaging in a dishonest dealing. More specifically, the Judge found that Petitioner encouraged a buyer to improperly seek a release of earnest money. The Judge recommended that as a result of the afore-mentioned violations Petitioner's real estate broker license be revoked. Said recommendation was confirmed and adopted by the Utah Real Estate Commission.

Upon request of the Petitioner, the matter was reviewed by the Utah Department of Commerce. The Executive Director of the

Department, Constance B. White, found that the Division's decision was based on fact and entered according to law. The Division's decision, therefore, was upheld.

STATEMENT OF FACTS

The relevant and material facts concerning the background and Appeal of this matter are as follows:

1. Petitioner was licensed to practice as a real estate broker in Utah. He was initially licensed as a sales agent in 1975. Petitioner became a licensed broker in October 1987 and he was affiliated with Help-U-Sell of Utah County from at least November 1989 to January 18, 1990. During that time, Petitioner's principal broker was Shane Luck.

2. On November 28, 1989, Petitioner prepared an earnest money sales agreement, whereby Gidalthi O. Ojeda D offered to purchase a Provo, Utah home owned by a Robert and Alice Skankey. Petitioner received \$500.00 earnest money, which he deposited to the Help-U-Sell real estate trust account. The Skankeys accepted the offer. Help-U-Sell was to be paid a fee totalling \$2,450 on the sale of the home. Petitioner's commission, payable from that amount, would total \$1,110.00.

3. Help-U-Sell had full control of the \$500.00 earnest money deposited in its trust account and ultimately delivered the same back to the Skankeys. The Petitioner tendered the balance of Help-U-Sell's commission to Help-U-Sell, which tender was refused.

4. Petitioner's affiliation with Help-U-Sell was

terminated on January 18, 1990. The Ojeda-Skankey transaction was not closed as of that date.

5. Prior to terminating Petitioner's affiliation with the Help-U-Sell brokerage, Mr. Luck inquired if Petitioner had any transactions which were still pending. At that time the Skankey-Ojeda transaction appeared as though it would not close. This information was given to Mr. Luck.

6. Petitioner's license was inactivated January 18, 1990 and remained in that status for approximately three (3) weeks. The license was then suspended for one (1) year, effective February 10, 1990, pursuant to an order entered by the Commission (Case No. E89-06-10).

7. On January 20, 1990 the Skankeys executed a warranty deed, whereby they conveyed the property to the Ojedas. On January 22, 1990 an all-inclusive trust deed was executed by the Ojedas and notarized by the Petitioner. The Administrative Law Judge found that the closing occurred on January 22, 1990, some four days after the Petitioner's license was inactivated.

8. On or about February 16, 1990, Petitioner tendered an \$840.00 check to Help-U-Sell. The February 16, 1990 check represented the selling fee which would have been retained by the brokerage less the earnest money still on deposit. By letter, dated February 22, 1990, Mr. Luck returned the closing documents to Petitioner, advised Petitioner that the Skankeys had been informed Petitioner would have the closing documents and informed Petitioner that the Skankeys wanted "their closing documents and

money immediately" and a "settlement on the January rent prorations with Ojeda."

9. Help-U-Sell was unwilling to close this transaction. The Skankeys (sellers) and the Ojedas (buyers) were extremely anxious to cause the sale to go forward. In the absence of the sale the Skankeys believed they would be significantly damaged. Indeed, Dr. Skankey testified in his deposition conducted on Friday, June 4, 1993 at page 31, lines 12 through 16:

Q: So, Dr. Skankey, our question is, is that if you assume for a minute that the Ojeda sale didn't take place, and no one followed through on it, would that have been harmful to you?

A: Yes.

10. The Respondent disbursed all funds due the Skankeys (sellers) on February 16, 1990. Mr. Luck subsequently sent the earnest money deposit to the Skankeys.

11. Neither the Skankeys nor the Ojedas suffered any damaged by reason of the Petitioner's action in closing this transaction.

12. The Petitioner was motivated to close this sale as a result of his desire to assist both the Ojedas and the Skankeys in their desire to complete this transaction.

13. In light of the determination by the Administrative Law Judge (J. Steven Eklund) that the closing occurred on January 22, 1990, four (4) days after the Petitioner's associate broker's license was inactivated, the

Petitioner could have re-activated his own principal broker's license, prior to the closing date, and completed this transaction. The transaction would have been no different had this license been reactivated, but rather, would have been consummated in the identical manner it was in fact consummated.

14. The only person or entity claiming any damage in this matter is a claim by Mr. Luck on behalf of Help-U-Sell for lost business. The broker's portion of the commission was either controlled by Help-U-Sell (in the form of the \$500.00 Help-U-Sell earnest money deposit) or tendered to Help-U-Sell (in the form of a check in the amount of \$840.00 delivered by Petitioner to Help-U-Sell).

15. The recommended order as prepared by the Administrative Law Judge was that the Petitioner's license as a real estate broker be revoked. The Utah Real Estate Commission confirmed and adopted the Findings of Fact and Conclusions of Law and Recommended Order as prepared by the Administrative Law Judge.

16. Petitioner has complied with all administrative remedies in attempting to rescind the Order.

17. On November, 28, 1994 Petitioner filed with the Utah Court of Appeals a request for judicial review of the Division of Real Estate's decision to revoke his real estate license.

SUMMARY OF ARGUMENT

The Division of Real Estate erred in finding that Petitioner had engaged in dishonest dealings. The Administrative Law Judge found that Petitioner implicitly encouraged Buyer to improperly seek release of earnest money held by the Help-U-Sell brokerage. Said finding was improper inasmuch as it was not supported by substantial evidence within the record.

The record demonstrates that Petitioner provided the Buyer with different options as to how to recover the earnest money from Help-U-Sale. One of the options presented by Petitioner was that Buyer could state to Help-U-Sale that the Sale had not closed (it, in fact, had closed). This in no way signifies that Petitioner supported such an approach, nor encouraged it. Further, any additional testimony concerning Petitioner's conduct is hearsay and unreliable.

The Division further erred in its decision to revoke Petitioner's real estate license since its decision runs contrary to prior practice of the Division in similar cases. The Division does not typically revoke a real estate broker's license for violations similar to those of Petitioner. This is particularly true when, as in Petitioner's case, substantial and numerous mitigating factors exist.

ARGUMENT

POINT I: THE DIVISION OF REAL ESTATE IMPROPERLY CONCLUDED

THAT PETITIONER HAD ENGAGED IN AND ENCOURAGED DISHONEST BEHAVIOR.

The Administrative Law Judge's findings of fact concluded that, "Respondent...disingenuously and implicitly encouraged Mr. Ojeda to improperly seek the release of the earnest monies held by the brokerage." (Ruling, pg. 4). This finding was improper as it was not supported by the weight of the evidence contained in the record. Inasmuch as the Division's decision to revoke Petitioner's real estate license was strongly weighted by this conclusion, the Court should reinstate Petitioner's license.

An order of an administrative agency may be challenged if the, "agency action is base upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the Court." U.C.A. §63-46b-16(4)(g). The record in this matter, therefore, must contain substantial evidence that Petitioner engaged in dishonest behavior.

Substantial evidence is more than minor comments and hearsay testimony. Substantial evidence is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Grace Drilling v. Board of Review, 776 P.2d 63 (Ut App. 1989) (quoting Idaho State Ins. Fund v. Hunicutt, 110 Idaho 257, 715 P.2d 927, 930 (1985)). Substantial evidence is "more than a mere 'scintilla' of evidence...though 'something less than the weight of the evidence.'" Id.

The Court should consider both the quantity and quality of the evidence pointing to the finding of facts in question in order to determine if they can properly be supported. In the present case, neither the quantity nor the quality of the evidence supports a finding by the Administrative Law Judge that the Petitioner had conducted himself dishonestly.

Evidence, in the record, of Petitioner's alleged dishonesty is limited to the testimony of two individuals: 1) the Petitioner; and 2) Shane Luck.

Petitioner's testimony regarding his alleged dishonesty is set forth in the hearing transcript at follows (see Hearing Transcript pgs. 41-45):

Q. Now, Mr. Ojeda came to Shane Luck and tried to collect his \$500?

A. I said: "If you want to have credit for that in your closing, somebody has got to happen there. And if in fact we close it through Help-U-Sell, fine, they keep the \$500. If you close at other places, if Help-U-Sale doesn't close it, frankly, it should go somewhere else. If Help-U-Sell doesn't want anything to do with this transaction, then it shouldn't come out of their place."

Q. Sure. But Mr. Ojeda attempted to go to Mr. Luck to collect the \$500 earnest money. Now--

A. That's because I gave him some options. I said: "You can do this and this and this." And that's one of the options that he had.

Q. You told Mr. Ojeda he could go in and try to collect the \$500 from Help-U-Sell?

A. I said that was an option.

Q. Well, isn't the only way that he would be able to collect the \$500 is if the deal had in fact not closed?

A. Essentially so. Of course, if it had not

closed through Help-U-Sell, he could have collected-- supposedly collected that. If Help-U-Sell was going to close it, then I wanted Help-U-Sell to close it.

Q. So you told Mr. Ojeda to instruct Mr. Luck that -- tell Mr. Luck that the deal had not closed, had failed, and to return the \$500 to the Ojedas, right?

A. Well that was an option, Paul. Like I said, I said: "You could close it. you don't have t close it. And you can do what you want. If you are not going to close it, then you ought to get your \$500 back."

Q. Okay. So you told them to tell Mr. Luck that the deal had not closed, correct?

A. Well, at that point, it had not closed.

Q. The deal had not closed?

A. The transaction had not closed. When I say "closing," the closing doesn't take place until its funded.

Q. But the -- you filled out a trust deed. They paid you -- they paid a down -- the Ojedas had paid a down payment, correct?

A. They had.

Q. And you had paid --- sent that money to the --

A. The money had not been sent, no.

* * *

Q. So this deal was, in fact, on the railroad track, if you will?

A. It was moving towards closure.

Q. It was moving towards closure?

A. That's correct.

Q. yet you told Mr. Ojeda that he could tell the broker, Shane Luck, that the deal had not closed and -- correct?

A. Well, you --

Q. Let me rephrase it.

A. Okay.

Q. You told him that he had the option to tell the --

A. I can't tell him what to say.

Q. You told Mr. Ojeda he had the option to tell Mr. Luck the deal had not closed?

A. That's correct. I let him make his own decision there.

Q. But you utilized your expertise in these areas and shared the that expertise with the Ojedas, correct?

A. I felt like if he wanted credit for that \$500 earnest money then he had to get that credit, whatever he wanted to do.

* * *

Q. So you utilized your expertise to educate the Ojedas on how to obtain the \$500 that they would then pay you for the commission, right?

A. Well, you're trying to structure something here that isn't quite right. I said, "This is" -- "This is your options, Mr. Ojeda: If you want to use that for your credit, that's fine. If you don't, leave it alone.

Shane Luck's testimony regarding Petitioner's alleged dishonesty is set forth in the trial transcript as follows (Hearing Transcript, pgs. 68-70):

Q. Mr. Luck, did one of the Ojedas come into your office in 19 -- probably, February of 1990.

A. Yes.

Q. And did this --

MR. SEILER: Your Honor, I recognize that the rules are relaxed, but I would object to the basic hearsay. It's just to get it on the record.

THE COURT: That's understood and noted. Go ahead Mr. Grant.

MR. GRANT: And did this individual request that the earnest money agreement -- or the earnest money deposit be returned to him?

A. Yes.

Q. And why did He request that the money be returned to him?

A. He said that the sale had failed. It was not closing and he wanted his earnest money back.

Q. Did you have a question -- did you have an opportunity to question him further regarding this?

A. Yes.

Q. And what did you learn from your questioning?

A. We had an active file and I knew there were problems with closing it. I did not know that it had closed at that stage. I pursued that with him and asked him what was happening. He was quite nervous, and probably 15 minutes into the conversation, he finally said, "Well, Morris asked me to come and get the earnest money because we had closed the transaction."

Q. But he earlier had told you that the deal had, in fact, not closed?

A. That's right and he admitted to lying to me.

Q. He admitted to lying to you?

A. Yes.

Q. Did he tell you that Morris had instructed him to lie to you?

A. I don't recall at that conversation. I know that he said to me that Morris asked me to com and get the earnest money.

Q. Do you recall if he told you that -- that Morris instructed you that -- that Morris instructed him to tell you that the deal had not closed?

A. That's right, he did say that.

Q. So then, in fact--

A. I didn't know it was a lie at that point but he

told me that.

Q. But since the deal had not -- was, in fact, had closed and since -- and, in fact, that Morris had asked Mr. Ojeda to tell you that it had failed to close, it was a lie, right?

A. I believe (Inaudible), yes.

The Petitioners testimony at the hearing clearly demonstrates that he made no overt effort to deceive Mr. Luck or Help-U-Sell. Petitioner's comments to Mr. Ojeda were strictly a list of options available to Mr. Ojeda which he could choose to follow or ignore. The record makes no reference that Petitioner gave any instruction to Mr. Ojeda as to which option was best nor does it suggest Petitioner encourage him to deceive Mr. Luck or Help-U-Sale.

Included in Petitioner's options was Mr. Ojeda informing Help-U-Sell the deal had not closed in order to recover their earnest money. Petitioner felt this option was reasonable for a number of reasons. The sale had, in fact, not been completed. Also, Help-U-Sell, and Mr. Luck, refused to assist the parties in closing the real estate transaction.

The testimony of Shane Luck, with regard to Petitioner's encouragement to Mr. Ojeda to recover the earnest money by deceit, should be disregarded as it is entirely based upon hearsay. Rule 802, Utah Rules of Evidence. The testimony of Mr. Luck is untrustworthy inasmuch as the individual who initially alleged Petitioner's dishonesty, Mr. Ojeda, did not assert said

allegations under oath. Likewise, Petitioner was not afforded an opportunity to cross examine Mr. Ojeda with reference to his allegations. State v. Sibert, 6 Utah 2d 198, 310 P.2d 388 (1957) State v. Lory, 721 P.2d 483 (Utah 1986). The credibility of Mr. Luck's testimony concerning Petitioners's dishonesty is further diminished by the fact that Mr. Luck admits that Mr. Ojeda had lied to him immediately prior to alleging misconduct by Petitioner. (Hearing Transcript pg. 69).

The record contains no credible evidence that Petitioner has requested or encouraged Mr. Ojeda to lie to Mr. Luck. The lack of substantial evidence removes the possibility of the Administrative Law Judge, and subsequently the division, finding that Petitioner had engaged in dishonest behavior.

The findings of the Commission, and subsequently the Department of Commerce, that Petitioner had engaged in dishonest behavior was the major factor in their decision to revoke Petitioner's real estate broker's license. In her Order on Review, the Executive Director of the Department of Commerce concluded as follows:

[T]he Commission made a finding regarding the most egregious conduct leading to Petitioner's license revocation, the dishonest dealing resulting from his inducement of Mr. Ojeda to request reimbursement of earnest monies through dishonesty in violation of Utah Code §61-2-11(17). While Petitioner urges certain facts in mitigation of his conduct, none of them outweigh the gravity of this fact. I find the Commission properly considered all facts mitigating in Petitioner's

favor and all aggravating facts weighing against him. Consequently, the revocation order was based on fact and entered according to law (Order on Review pg. 3-4).

The Commission's conclusion that Petitioner had engaged in dishonest conduct is not supported by substantial evidence within the record.

Therefore, the Commission's and Department's decision to revoke Petitioner's real estate brokers license, primarily as a result of his alleged dishonest behavior, was without basis. This Court should, therefore, reinstate Petitioner's real estate broker's license.

POINT II THE DIVISION OF REAL ESTATE'S DECISION TO REVOKE PETITIONER'S REAL ESTATE BROKER'S LICENSE WAS CONTRARY TO ITS PRIOR PRACTICE IN SIMILAR CIRCUMSTANCES.

Petitioner has been substantially prejudiced by the real estate Division's decision to revoke his real estate license because the Division's decision was inconsistent with prior decisions with facts and circumstances of a similar nature. This Court is entitled to provide relief if a petitioner is substantially prejudiced by an agency action which is "contrary to the agency's prior practice." U.C.A. §63-46b-16(4)(h)(iii).

Petitioner was found in violation of U.C.A. §61-2-11 for closing a real estate transaction while his license was inactive commingling funds and engaging in dishonest behavior. Violations of a similar nature are typically punished by the Division Real Estate with either a fine, a

suspension of a license, or both. The revocation of Petitioner's Real Estate Brokers License, therefore, is excessive and clearly beyond the prior practice of the division. See, Pickett v. Utah Dept. of Commerce 858 P.2d 157 (Utah 1993).

The Division of Real Estate's decision to revoke Petitioner's license is particularly excessive and contrary to prior practice considering the Divisions's improper finding that Petitioner had engaged in dishonest conduct. See, Point I, Supra. Properly considering only Petitioner's violations of U.C.A. §§61-2-11(6) and (15) the Division's decision to revoke Petitioner's license moves even further beyond the penalties typically ordered by the Division. This is particularly true considering the numerous mitigating circumstances in this matter.

The mitigating circumstances of this case augment the excessiveness of the Division's penalties in comparison to previous decisions by the Division. Petitioner's motivation in closing the real estate transaction was that the buyers who were from Peru, would have no place to live. Furthermore, failure to close would have resulted in a negative cash flow for the Sellers of the property. In his testimony, Petitioner stated as follows (hearing Transcript pgs. 21-22)

Q. How come you closed this deal after you were no longer licensed?

A. Because I felt it was urgent enough to close. I

felt -- I felt really bad for both parties, the one that was anxious to buy, the one was anxious to sell. And, granted, in retrospect, I would have done it a different way. But it would have -- it would have hurt the buyers. They would have not had a place to live. They were in fact planning on getting moved in and so forth in part of the property. And, ultimately, it have probably hurt the sellers because it would have gone and been a detriment cash-wise for them.

The record clearly demonstrates that both buyer and seller. Considered the closing on the property as critical. Neither buyer nor seller suffered any damaged as a result of any conduct or violation of Petitioner.

Petitioner's assistance in the closing, although improper, was further prompted by the failure of the brokerage to close the transaction. The testimony of both Petitioner and Shane Luck demonstrates that the brokerage Help-U-Sell had no intention of closing the deal notwithstanding it had the \$500.00 of earnest money. While the forementioned circumstances don't negate Petitioner's violations of U.C.A. §61-2-11 his motivation in proceeding with the closing certainly should be considered as mitigating factors when structuring an appropriate penalty. Considering the foregoing mitigating circumstances and the nature of the violations, the Division's decision to revoke Petitioner's license certainly exceeded customary penalties ordered by the Division in similar circumstances.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully moves this Court for an Order reversing the Division of Real Estate's decision that Petitioner had

engaged in dishonest behavior. Petitioner further requests that this Court find that the Utah Division of Real Estate exceeded its customary practice in revoking Petitioner's real estate broker's license considering the facts and circumstances of this case.

Accordingly, Petitioner respectfully moves this Court for an Order reinstating Petitioner's real estate brokers license or, in the alternative, remanding this case back to the Utah Division of Real Estate for reconsideration in light of the Court's new findings.

Respectfully submitted,

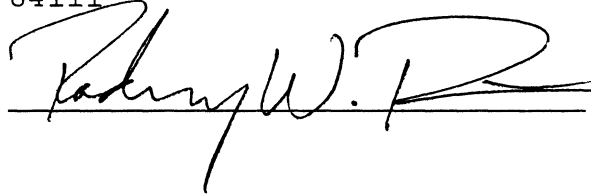
ROBINSON, SEILER & GLAZIER, LC


THOMAS W. SEILER
Attorney for Petitioner *Thomas W. Seiler*

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing to the following, postage prepaid, this 24th day of April, 1995:

Lynn Nicholas
Utah Attorney General
Consumer Rights Division
330 South 300 East
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Rodney W. P.", is written over a horizontal line.

G \RIVERS\LITIGATI\OSTLER BRI

ADDENDUM

**BEFORE THE DIVISION OF REAL ESTATE
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

In the Matter of the License	: FINDINGS OF FACT, CONCLUSIONS OF LAW,
of T. Morris Ostler to Act as a	: AND RECOMMENDED ORDER
Real Estate Broker	: RE90-10-01

Appearances:

Thomas W. Seiler for Respondent

Paul M. Grant for the Division of Real Estate

By the Administrative Law Judge:

An April 18, 1994 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of the Commerce. The parties initially submitted a stipulation of undisputed facts. Therefore, evidence was offered and received.

The Administrative Law Judge, being fully advised in the premises, now submits the following Findings of Fact, Conclusions of Law and Recommended Order for review and action by the Real Estate Commission and the Director of the Division of Real Estate:

FINDINGS OF FACT

1. Respondent is presently licensed to practice as a real estate broker in Utah. He was initially licensed as a sales agent in 1975. Respondent became a licensed broker in October 1987 and he was affiliated with Help-U-Sell of Utah County from at least November 1989 to January 18, 1990. During that time, Respondent's principal broker was Shane Luck.
2. On November 28, 1989, Respondent prepared an earnest money sales agreement, whereby Gidalthi O. Ojeda D offered to purchase a Provo, Utah home owned by a Robert and Alice Skankey. Respondent received \$500 earnest money, which he deposited to the Help-U-Sell real estate trust account. The Skankeys accepted the offer. Help-U-Sell was to be paid a fee totalling \$2,450 on the sale of the home. Respondent's commission, payable from that amount, would total \$1,110.
3. Respondent's affiliation with Help-U-Sell was terminated January 18, 1990. The Ojeda-Skankey transaction had not closed as of that date. Prior to terminating Respondent's affiliation with the Help-U-Sell brokerage, Mr. Luck inquired if Respondent had any transactions which were still

pending. Respondent stated no outstanding transactions existed. The Ojeda-Skankey transaction was scheduled to close on or about January 20, 1990.

4. Respondent's license was inactivated January 18, 1990 and remained in that status for approximately three (3) weeks. The license was then suspended for one (1) year, effective February 10, 1990, pursuant to an order entered by the Commission (Case No. RE89-06-10). The suspension was prompted by Respondent's conviction for the possession of a forged document, relative to a real estate transaction.

5. On January 20, 1990, the Skankeys executed a warranty deed, whereby they conveyed the property to the Ojedas. On January 22, 1990, an all-inclusive trust deed was executed by the Ojedas and notarized by Respondent. The parties have stipulated the closing on the transaction occurred during February 1990. However, both the buyers and sellers statements reflect the taxes and mortgage interest payments were prorated as of January 22, 1990. Notwithstanding the parties' stipulation, the more substantial evidence establishes the closing occurred January 22, 1990. When Respondent closed the transaction, he knew his license was inactive and that the license would be suspended in the immediate future.

6. Mr. Luck had informed Respondent not to close the transaction because the Skankeys had a non-assumable loan on the property and title insurance could not thus be obtained. Mr. Luck further declined to close the transaction through Help-U-Sell due to the existence of that loan, which included a due-on-sale clause, and Mr. Luck's belief the Ojedas did not understand the possibility the loan could be called due on the sale of the property. Moreover, Mr. Luck did not desire to expose Help-U-Sell to any liability under those circumstances.

7. Mr. Luck was not aware Respondent had closed the transaction on January 22, 1990. Respondent received \$1,950 at closing as the balance of the selling fee and he deposited those funds in his own checking account. Respondent also received funds payable to the Skankeys and deposited those monies in his checking account. Respondent told Mr. Ojeda that he (the latter) could inform Mr. Luck the transaction had failed to obtain the \$500 earnest money still held in the Help-U-Sell trust account.

8. Prior to February 16, 1990, Mr. Ojeda contacted Mr. Luck and informed the latter that the transaction had failed. Mr. Ojeda thus requested the return of the earnest money deposit. Mr. Luck made further inquiry and Mr. Ojeda then admitted the transaction had closed. Mr. Luck

requested all closing documents be delivered to Help-U-Sell.

9. On or about February 16, 1990, Respondent tendered an \$840 check to Help-U-Sell. The February 16, 1990 check represented the selling fee which would have been payable to the brokerage less the earnest money still on deposit. By letter, dated February 22, 1990, Mr. Luck returned the closing documents to Respondent, advised Respondent that the Skankeys had been informed Respondent would have the closing documents and informed Respondent that the Skankeys wanted "their closing documents and money immediately" and a "settlement on the January rent prorations with Ojeda".

10. Mr. Luck also informed Respondent that he assumed Respondent would provide "the appropriate documents concerning this transaction to the Ojedas". Mr. Luck further stated Help-U-Sell would notify Respondent of "a fee due to us from you for the loss of business to us as a result of your actions". Based on the advice of legal counsel that the closing should remain Respondent's responsibility, Help-U-Sell did not accept the February 16, 1990 check. Respondent disbursed the funds due to the Skankeys on February 16, 1990 and Mr. Luck subsequently sent the earnest money deposit to the Skankeys. The Ojedas eventually defaulted on their purchase of the property.

CONCLUSIONS OF LAW

Utah Code Ann. Section 61-2-11 provides a civil penalty not to exceed \$500 may be imposed and a real estate license may be placed on probationary status, suspended or revoked if the licensee, whether acting as an agent or on his own account, is found guilty of:

- (6) failing, within a reasonable time, to account for or to remit any monies coming into his possession that belong to others, or commingling those funds with his own, or diverting those funds from the purpose for which they were received.
...
- (15) violating or disregarding this chapter, an order of the commission or the rules adopted by the commission and the division;
...
- (17) any other conduct which constitutes dishonest dealing.

Section 61-2-1 provides it is unlawful for any person to act as a principal broker without a license. Section 61-2-2 further provides a principal broker's license is required to receive valuable consideration for negotiating or closing a sale of real estate. Moreover, Section 61-2-10 provides it is unlawful for any associate broker to accept a commission from any person except the principal

broker with whom he is affiliated and that an inactive licensee is not authorized to conduct real estate transactions.

Respondent acknowledges he received funds owed to the Skankeys on the closing of the transaction, he deposited those funds into his personal account and thus commingled those funds with his own monies. Respondent closed the transaction January 22, 1990, but he failed to remit monies due to the Skankeys within a reasonable time after the closing of the transaction. Respondent thus violated Section 61-2-11(6) in both instances.

Respondent also acknowledges he received a commission from the sale of the property when he was not affiliated with a principal broker and his license was inactive. Respondent paid himself a sales commission and fees for closing the transaction, although he was not licensed as a principal broker and was thus not entitled to receive consideration directly from the parties. Further, Respondent violated the order previously entered by the Commission when he disbursed funds from the closing of the transaction while his license was suspended by reason of that order. Respondent thus engaged in multiple instances of misconduct violative of Section 61-2-11(15).

Respondent also suggested Mr. Ojeda erroneously inform Mr. Luck the transaction had closed as the means whereby Mr. Ojeda might obtain the earnest money held on deposit through the Help-U-Sell brokerage. Respondent thus disingenuously and implicitly encouraged Mr. Ojeda to improperly seek the release of the earnest monies held by the brokerage. Given the foregoing, Respondent clearly engaged in dishonest dealing violative of Section 61-2-11(17). A proper factual and legal basis clearly exists to enter a disciplinary sanction as to Respondent's license.

Respondent urges certain mitigating factors should be considered with regard to any disciplinary action taken on his license. Specifically, Respondent contends the Ojedas and the Skankeys were highly motivated to close the transaction because the Ojedas would have no place to live and the Skankeys would incur a negative cash flow if the transaction did not close. Respondent also asserts neither party suffered any damage because the transaction was closed, the brokerage unreasonably refused to close the transaction and Respondent merely desired to assist the Ojedas and the Skankeys as to promote their interests.

The parties to this transaction obviously desired a sale be completed. It is unclear from this record whether either party suffered any damage by reason of Respondent's unilateral decision to close the transaction without the knowledge of and participation by his brokerage. There is no

sufficient evidence to find and conclude either the Ojedas or the Skankeys did not understand the significance of the non-assumable loan or the existence of the due-on-sale clause. Respondent may have been somewhat motivated by his desire to assist both the Ojedas and the Skankeys in their desire to complete this transaction.

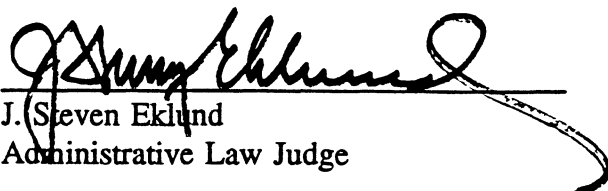
However, various aggravating factors exist as to Respondent's misconduct. The Court finds and concludes Respondent expended substantial efforts to realize the sale of the property, prompt the closing of this transaction and that he thus anticipated receiving compensation for those efforts. Significantly, Respondent ignored the consequences of his licensure status as he proceeded to close the transaction when his license was inactive and later disbursed funds from the transaction while his license was suspended. The Court is further disturbed by Respondent's characterization of the suspension of his license as a mere "technicality" which would preclude his ability to close the transaction. Simply put, Respondent cavalierly continued to act as a broker without any regard for the fact his license was inactivated and later suspended.

The Court duly acknowledges the Division has received no complaints of any misconduct undertaken by Respondent during the three years since his license was reinstated. Nevertheless, Respondent willingly disregarded those statutes which govern his licensure, particularly when partially influenced by the prospect of financial gain. The Court further finds and concludes Respondent lacks any genuine acknowledgement of--or significant remorse for--his misconduct. To the contrary, Respondent has basically questioned the reluctance of the brokerage to close the transaction, minimized his role in Mr. Ojeda's attempt to improperly obtain the earnest money deposit and characterized his actions as well-intentioned efforts designed to merely promote the interests of the Ojedas and the Skankeys. The serious nature of Respondent's misconduct, coupled with his misguided and questionable attitude, compels the conclusion a severe sanction should be entered as to his license.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED Respondent's license as a real estate broker be revoked.

Dated this 6th day of July, 1994.


J. Steven Eklund
Administrative Law Judge

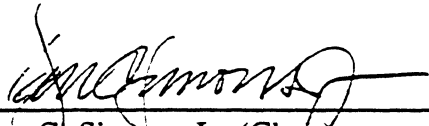
BEFORE THE DIVISION OF REAL ESTATE
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

In the Matter of the License	:	ORDER
of T. Morris Ostler to Practice as a	:	
Real Estate Broker	:	RE90-10-01

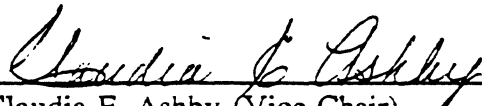
The foregoing Findings of Fact, Conclusions of Law and Recommended Order is hereby confirmed and adopted. The real estate broker license of T. Morris Ostler is hereby revoked, effective August 8, 1994.

Dated this 6th day of July, 1994.


UTAH REAL ESTATE COMMISSION:



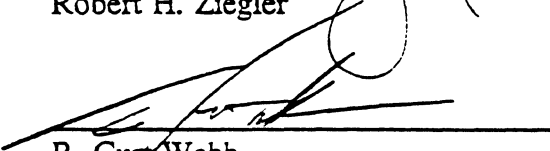
Dan C. Simons, Jr. (Chair)



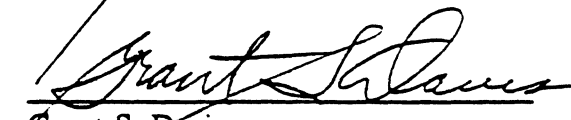
Claudia E. Ashby (Vice Chair)



Robert H. Ziegler



R. Curt Webb



Grant S. Davis

The above Order is confirmed and adopted by the undersigned this 6th day of July, 1994.



Steven H. Stewart, Director
Division of Real Estate

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSE OF
T. MORRIS OSTLER TO ACT AS A
REAL ESTATE BROKER

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ORDER ON REVIEW
Case No. RE90-10-01

INTRODUCTION

This matter comes before the Executive Director on the request for agency review filed by T. Morris Ostler ("Petitioner") following the revocation of his license to act as a real estate broker by the Real Estate Division ("Division"). *The Division entered an order revoking Petitioner's license on July 6, 1994, to become effective August 8, 1994. Petitioner originally requested reconsideration from the Division following entry of the revocation order, and the Attorney General's office moved for dismissal of that request. The Division forwarded Petitioner's request for reconsideration to the executive director for treatment as a request for agency review. Petitioner subsequently filed a timely request for agency review with the Department and requested oral argument. This matter is properly before me as a request for agency review; the request for oral argument is denied however, because the issues appear to be adequately developed in the pleadings filed herein.*

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-13 of the Utah Administrative Code.

ISSUES REVIEWED

Whether the Division, in revoking Petitioner's license, has properly interpreted and applied the relevant statutory and regulatory provisions relating to Petitioner's conduct.

FINDINGS OF FACT

1. The Division commenced this proceeding by filing a notice of agency action on July 23, 1991. A hearing was conducted in this matter on April 18, 1994. On July 6, 1994, the Division adopted the Findings of Fact and Conclusions of Law submitted by the Real Estate Commission ("Commission") following the April hearing and thereby revoked Petitioner real estate broker's license. Those Findings and Conclusions are adopted for purposes of this review. In addition, Petitioner entered into a stipulation with the Division, by which he expressly admitted as true certain allegations made by the Division.

2. In his request for agency review Petitioner contends that the sanction imposed is too severe under the circumstances. He cites, as mitigating against the sanction imposed, the fact that Petitioner readily admitted to the Division his error in closing the transaction that gave rise to the administrative action at a time when his license was inactive, that Petitioner's motivation regarding the transaction was the protection of the parties to the transaction, and that no complaints have been received by the Division regarding Petitioner since the petition was filed in 1991.

In place of the Division's order of revocation, Petitioner requests a three month suspension and a fine up to \$1000, or as an alternative, suspension of the Division's order of revocation for some probationary period determined by the Commission.

3. In response, the Division reasserts its position that the severity of the Petitioner's

misconduct mandates the revocation. It also states that at least one complaint against Petitioner has been received by the Division since the hearing. I note also that this is the second action against Petitioner's license. During 1990 and 1991, Petitioner's license had been suspended in Case No. RE89-06-10.

CONCLUSIONS OF LAW

1. Under Department Rule R151-46b-13(3) the Division's order is stayed pending completion agency review.

2. The conclusions of law adopted by the Division following the April hearing accurately apply the law to the facts in this case. Utah Code Subsection 61-2-11(6) states that the Division may revoke the license of a licensee if the licensee is found guilty of:

(6) failing, within a reasonable time, to account for or to remit any monies coming into his possession that belong to others, or commingling those funds with his own, or diverting those funds from the purpose for which they were received;

Petitioner admitted violating this provision by commingling funds he received after closing the Skanky-Ojeda transaction. In addition Petitioner admitted violating Utah Code Section 61-2-1 (prohibiting unlicensed activity) in closing the Skanky-Ojeda transaction and accepting a sales commission while his license was inactive.

The Commission made a finding regarding the most egregious conduct leading to Petitioner's license revocation, the dishonest dealing resulting from his inducement of Mr. Ojeda to request reimbursement of earnest money through dishonesty, in violation of Utah Code Subsection 61-2-11(17). While Petitioner urges certain facts in mitigation of his conduct, none of them outweigh the gravity of this fact. I find that the Commission properly considered all facts mitigating in Petitioner's favor and all aggravating facts weighing against him. Consequently, the

revocation order was based on fact and entered according to law. The Division's order is therefore upheld in its entirety.

ORDER

Consistent with the preceding analysis, the Division's revocation of Petitioner's license is upheld in its entirety. Consistent with Department Rule R151-46b-13(5), the revocation of Petitioner's license is effective November 28, 1994.

Dated this 28 day of October 1994.



Constance B. White, Executive Director
Department of Commerce

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the Court of Appeals within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-16 Utah Code Annotated.

CERTIFICATE OF MAILING

I certify that on the 28 day of October 1994, I caused to be mailed a true and correct copy of the foregoing Order on Review, properly addressed, postage prepaid, to:

Thomas W. Seiler
Attorney for Petitioner
80 North 100 East
P.O. Box
Provo, Utah 84603-1266

and caused a copy to be hand-delivered to:

Steven Stewart, Director
Division of Real Estate
160 East 300 South
Salt Lake City, Utah 84145

A handwritten signature in cursive script, appearing to read "George D. Smith", is written over a horizontal line.