

NEW JERSEY REAL ESTATE COMMISSION

OAL DOCKET NO. BKI 01591-20
AGENCY DKT. NO. CAM-16-018
NJREC Ref. No. 10001204 & 10002096

NEW JERSEY)
REAL ESTATE COMMISSION,)
)
Petitioner,)
)
v.)
)
RICHARD A. KARPf AND)
JOSEPH THOMAS, with RESPECT TO)
RICHARD A. KARPf ONLY,)
Respondent.)

FINAL DECISION AND ORDER

This matter comes before the Real Estate Commission (“Commission”) pursuant to the authority of the Real Estate Brokers and Salesperson Act, N.J.S.A. 45:15-1 to -42 (“Act”) and N.J.A.C. 11:5-1.1 to -12.18, and all powers expressed or implied therein, for the purpose of reviewing the Initial Decision of Administrative Law Judge Hon. Tama B. Hughes (“ALJ”).

In the Initial Decision, the ALJ found Respondent Richard A. Karpf (“Respondent” or “Karpf”) liable for the violations alleged in Count III of the OTSC. In addition, the ALJ recommended a two year suspension of the Respondent’s broker license and the imposition of a \$2,500 penalty.

The Respondent was represented by Mario Iavicoli, Esq. The Real Estate Commission staff (“REC”) was represented by Deputy Attorney General William B. Puskas, Jr. (“DAG”).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated October 12, 2016, pursuant to N.J.S.A. 45:15-17, 45:15-18, and N.J.A.C. 11:5-1.1 to -12.18. In the OTSC, the REC sought to revoke and/or suspend the real estate license of the

Respondent and to impose civil penalties and costs for alleged violations of N.J.A.C. 11:5-4.4(a) for failing to maintain and supervise his licensed real estate office on a full time basis and failing to have his real estate office open to the public during regular business hours and of N.J.S.A. 45:15-17(e), in that this conduct demonstrates unworthiness, incompetency, bad faith or dishonesty.¹

On November 4, 2016, the Respondent filed an Answer to the OTSC, wherein the Respondent denied certain allegations set forth in the OTSC and requested a hearing. On September 26, 2017, a hearing commenced before the Commission at which time Count I and Count II were dismissed. The matter was scheduled for a hearing on March 26, 2019 before the Commission to address the remaining violations by Karpf alleged in the OTSC.² On January 14, 2020, the matter was transferred to the Office of Administrative Law (“OAL”), pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. See Order Transferring Matter to the Office of Administrative Law as to Richard A. Karpf Only.

After several adjournments, hearings were conducted before the ALJ on September 14 and September 30, 2021. At the close of testimony on September 30, 2021, the record remained open to allow the parties to obtain transcripts and submit summation briefs. Upon receipt of the parties’ summation briefs on February 15, 2022, the record was closed.

On March 30, 2022, the ALJ issued the Initial Decision, wherein the ALJ found that the Respondent was liable for the violations as set forth in Count III of the OTSC. In addition, the

¹ The OTSC alleged certain statutory and regulatory violations by Karpf and his employee, Joseph Thomas (“Thomas”), a licensed real estate salesperson. Count I alleged violations by both Karpf and Thomas, Counts II and III alleged violations by Karpf only and Count IV alleged violations by Thomas only. On February 1, 2018, Thomas entered into a Consent Order, resolving all violations pending against him that were asserted in the OTSC.

² Count III of the OTSC alleged the Respondent’s conduct was in violation of N.J.A.C. 11:5-4.4(a) and N.J.S.A. 45:15-17(e) and remained the sole count to be adjudicated by the ALJ.

ALJ addressed the imposition of the appropriate penalty and recommended a two year suspension of the Respondent's broker license and a civil penalty totaling \$2,500.

On April 12, 2022, both the REC and the Respondent filed timely Exceptions to the Initial Decision. By letter dated April 19, 2022, the REC filed its Reply to the Respondent's Exceptions. The Respondent did not file a reply to the REC's Exceptions.

ALJ'S FINDING OF FACT, LEGAL ANALYSIS AND CONCLUSIONS

In the Initial Decision, the ALJ summarized the testimony of the following witnesses: Dana Tatarek ("Tatarek"), Investigator 2 for the REC; Lauren Glantzberg, Supervisor of Investigations for the REC; Respondent Richard A. Karpf; Deborah Ann Harris-Karpf, a real estate licensee and the Respondent's wife; Arthur Karpf, a real estate licensee and the Respondent's father; William Toner, a part-time sales representative who worked out of the Respondent's office; William Harnish, a real estate licensee who worked part-time out of the Respondent's office; Michael Delaura, a real estate licensee who is employed part-time as an agent with the Respondent's office; and Jared Karpf, a licensed real estate agent and the Respondent's son.

After hearing testimony and considering the documentary evidence, the ALJ found the following facts. The Respondent has been licensed as a real estate broker since 1979 and owns and operates a real estate office located in Cherry Hill, New Jersey. Respondent is the licensed broker of record for his Cherry Hill office and there is no broker-salesperson licensed in Respondent's employ. Initial Decision at 15 (citing Exhibit P-2)³. The Respondent was continuously employed full time by the Philadelphia School District as a social studies teacher from September 1, 2001 until October 2, 2014. *Ibid.* The ALJ found that school hours run Monday

³ The Initial Decision erroneously indicated that Exhibit P-2 was not admitted into evidence. However, the transcript of the September 30, 2021 hearing confirms that Exhibit P-2 was, in fact, admitted into evidence.

to Friday, from 8:00 a.m. to 3:00 p.m., September to June. Id. at 15. The ALJ further found that while teaching in Philadelphia, the Respondent was not physically at the real estate office in Cherry Hill and could not be reached by his staff or clients. Ibid.

The ALJ found that the REC had received an anonymous complaint reporting that the Respondent was employed full time as a teacher and that his office was not open to the public during normal business hours. Id. at 16. The ALJ found that Tatarek was assigned to investigate the complaint, and that in the summer and fall of 2014, conducted several unannounced visits to the Respondent's real estate office in Cherry Hill at various times of day. Ibid. Tatarek determined that on each visit, the real estate office was closed to the public. Ibid. Tatarek obtained employment records verifying that the Respondent was employed full time as a teacher in the School District of Philadelphia. Ibid. The ALJ also found that at no time during any of Tatarek's unannounced visits did anyone answer the door and/or let her into the office, despite testimony by Arthur Karpf that he was there all day during most weekdays and Deborah Ann Harris-Karpf's testimony that she was in the office at some point every afternoon during the week and that she worked on weekends. Ibid.

The ALJ addressed the legal arguments of the parties. Initial Decision at 17. The ALJ noted that it was the REC's contention that by working full time as a teacher in the Philadelphia school system for over 12 years, the Respondent violated N.J.A.C. 11:5-4.4(a) by failing to maintain the direct full time supervision of his office; was not employed a real estate broker on a full time basis; failed to physically be in his office for reasons unrelated to the business of the office; and was otherwise employed during the time period relevant to this matter. Ibid. In addition, the REC contended that Respondent was in violation of N.J.S.A. 45:15-17(e) based upon

his ongoing flagrant violation of N.J.A.C. 11:5-4.4(a) and his continued assertion that his employment by the Philadelphia school district was on a part-time basis. Ibid.

The ALJ noted that in his defense, the Respondent made the following arguments: the continuing prosecution of this matter was barred by the doctrine of res judicata; his employment as a teacher was only part time; the testimony of Tatarek was inconsistent and lacked credibility; that at all times he supervised his real estate office and was accessible to his clients and sales representatives; and that N.J.A.C. 11:5-4.4 was antiquated, vague and confusing. Id. at 18.

Regarding the Respondent's argument that the matter is barred under the doctrine of res judicata, the ALJ, upon reviewing the relevant caselaw and procedural history of this matter, determined that the Respondent's argument was without merit. Id. at 19.

With regard to Respondent's assertion that at all times he maintained a designated main office that was open to the public during "his" usual business hours, the ALJ found the Respondent's argument to be self-serving and contrary to the credible evidence presented in this matter. Ibid. The ALJ also determined that the hours Respondent spent in the office after he was done teaching did not satisfy N.J.A.C. 11.5-4.4. Initial Decision at 22. Regarding the Respondent's argument that his office was open during the weekdays when he was teaching, the ALJ also concluded that said argument was equally as specious. Ibid.

For guidance as to what constitutes "full time" employment and "hours of operation," the ALJ looked to N.J.A.C. 11:5-3.8, which addresses how an applicant seeking licensure as a broker based on their experience must provide evidence of their involvement in the real estate brokerage business on a full time basis. Id. at 20. Pursuant to N.J.A.C. 11:5-3.8, full time employment as a broker can be demonstrated by a showing that the applicant worked at least 40 hours a week from the hours of approximately 10:00 a.m. to 8:00 p.m.; that the aforementioned work was performed

during any five days in each week over a three year period; and if the applicant is employed in any other occupation during these three years, it was on a part-time basis and did not exceed 25 hours per calendar week. Id. at 20 (citing N.J.A.C. 11:5-3.8). The ALJ also relied on In re Pipes, 329 N.J. Super 391 (App. Div. 2000) where the Court affirmed the Commission's denial of licensure as a broker based on the experience requirement set forth under N.J.A.C. 11:5-3.8, after the applicant failed to work on a full time basis under the authority of a broker during the hours of 10:00 a.m. to 8:00 p.m., five days each week during the prior three years, recognizing "that a full time commitment to the real estate brokerage business insures greater protection to the public." Id. at 22 (citing In re Pipes at 397).

The ALJ rejected the Respondent's contention that he was a full-time broker who, at all times, supervised his real estate office and was accessible to his clients and sales representatives. The ALJ found this contention to be undermined by the uncontroverted proofs and the Respondent's own testimony that he was a salaried employee of the Philadelphia school system and worked on a weekly basis—a minimum of thirty-five hours a week—and therefore could not have simultaneously complied with his obligation to be employed as a broker on a full-time basis at a main real estate office and, unless away for real estate business reasons, emergencies or vacation, be physically present at that office during usual business hours at least five days per calendar week and not otherwise be employed during such time. Id. at 19-23.

Next, the ALJ rejected the Respondent's argument that testimony provided by Tatarek should be disregarded because she lacked credibility and was inconsistent. Id. at 23. The ALJ found this argument speculative and self-serving, finding that Tatarek's testimony was candid and credible. Ibid.

The ALJ rejected the Respondent's argument that N.J.A.C. 11:5-4.4 serves no legitimate purpose, is antiquated, and is vague and confusing. The ALJ found that the Respondent failed to show by a preponderance of credible evidence that the regulation is arbitrary, unreasonable or noncompliant with the legislative mandate. Id. at 23-24.

In conclusion, based upon the testimonial and documentary evidence presented in the matter, the ALJ concluded that Respondent's conduct, which has spanned years, was in direct and blatant violation of N.J.A.C. 11:5-4.4, and demonstrated unworthiness, incompetence and bad faith in violation of N.J.S.A. 45:15-17(e). Id. at 24-25.

Penalties Recommended by the ALJ

As to the appropriate penalty, the ALJ stated that N.J.S.A. 45:15-17 permits action against the Respondent's license for violations of N.J.S.A. 45:15-17(e).⁴ Id. at 25. In addition, the ALJ notes that a penalty of not more than \$5,000 for the first violation, and a penalty of not more than \$10,000 for any subsequent violation may be imposed, and that the REC has requested the imposition of a \$5,000 fine and the revocation of the Respondent's broker license. Ibid.

The ALJ applied the seven factors for determining the appropriate penalty set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Ibid. These factors include: (1) the good faith or bad faith of the Respondent; (2) the Respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) the injury to the public; (5) the duration of the illegal activity or conspiracy; (6) the existence of criminal actions; and (7) any past violations (collectively, the "Kimmelman factors"). Ibid.

⁴ In discussing the violations that gave rise to penalties being imposed against the Respondent, the ALJ referred to a violation of N.J.S.A. 45:15-17(t). Id. at 25. No violation of N.J.S.A. 45:15-17(t) was alleged in the OTSC nor found by the ALJ.

As to the first factor in Kimmelman, the ALJ stated that the Respondent's actions demonstrated bad faith because the Respondent was "well aware of his responsibilities under the Act," including the requirement to have his office open to the public during usual business hours at least five calendar days a week. Id. at 27. Additionally, the ALJ noted that the Respondent worked full time as a teacher when such employment is prohibited, finding the Respondent's argument that he was available by phone for his staff or clients at all times or that he could properly oversee the operations of his real estate office when he was otherwise employed to be disingenuous. Ibid.

As to the second factor in Kimmelman, the ALJ found that there was insufficient evidence to make an informed decision regarding the Respondent's ability to pay fines assessed, and determined that this was an aggravating factor. Id. at 28.

As to the third factor, the profits obtained, the ALJ stated that for over ten years the Respondent was employed full time as a teacher while operating a real estate business. Ibid. The ALJ noted that for this period, the Respondent continued to transact business, therefore, this factor weighs in favor of a monetary penalty. Ibid.

As to the fourth factor, injury to the public, the ALJ found that the Respondent violated the public trust by failing to demonstrate a full time commitment to the real estate brokerage business, which affords greater protection to the public. Id. at 28 (citing In re Pipes at 397).

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ found that the Respondent's conduct went on for "well over a decade"; therefore, this weighs in favor of a monetary penalty. Id. at 28.

Regarding the sixth factor, the existence of criminal charges related to the matter, the ALJ noted that no parallel proceedings or penalties have arisen from the conduct at issue, however, in

light of unclear evidence regarding the Respondent's ability to pay, the ALJ found this factor does not weigh in favor of a monetary penalty. Ibid.

For the final factor in Kimmelman, previous relevant regulatory and statutory violations, the ALJ noted that the Respondent has held a real estate broker license since 1979 and has no history of any regulatory or statutory violations. Id. at 29. The ALJ noted that this is a mitigating factor. Ibid.

Having found that the Respondent violated the Act, and based upon the above analysis, the ALJ gave great weight to the sole mitigating factor. Ibid. The ALJ recommended a civil monetary penalty of \$2,500 and a two year loss of license. Ibid.

EXCEPTIONS

Under N.J.A.C. 1:1-18.4(a), the Parties' Exceptions were due on April 12, 2022. On April 12, 2022, both the REC and the Respondent filed timely Exceptions to the Initial Decision. By letter dated April 19, 2022, the REC filed its Reply to the Respondent's Exceptions ("REC Reply Exceptions"). The Respondent did not file a reply.

REC Exceptions

By letter dated April 12, 2022, the REC submitted its Exceptions to the Initial Decision ("REC Exceptions") wherein the REC asserted that modifications of the Initial Decision are necessary in that several technical corrections⁵ are required. In addition, the REC argued that two substantive modifications related to the penalty should be made. As it relates to Kimmelman factor

⁵ The technical corrections noted by the REC are as follows: a reference to "Count IV" appearing on page 2, n.1 of the Initial Decision should be changed to refer to "Count III"; a reference to Tatarek's broker license on page 3 of the Initial Decision should be changed to refer to a broker-salesperson license; a reference the employment verification letter provided by the School District of Philadelphia entered into evidence as "P-6" on page 4 should be changed to refer to "P-5"; and the citation appearing on page 24 to Goodley v. New Jersey Real Estate Comm'n should be corrected to read "Id. at 181-82." REC Exceptions at 1-2.

seven, the REC argues that because no penalties have been assessed against the Respondent in a criminal or civil action, this factor should weigh in favor of a monetary penalty. REC Exceptions at 2. In addition, the REC seeks a modification of the \$2,500 monetary penalty recommended by the ALJ. Ibid. The REC asserts that undue weight was given by the ALJ to the fact that the Respondent had no history of prior violations, and that greater weight should be given to the Respondent's bad faith, the duration of the activity, and injury to the public; therefore, a \$5,000 monetary penalty is appropriate. Ibid.

Respondent's Exceptions and the REC's Reply

By letter dated April 12, 2022, the Respondent submitted Exceptions to the Initial Decision ("Resp. Exceptions") by email. That same day, the REC received a hard copy submission ("Resp. Exceptions 2") of the exceptions, which included an additional seventh exception.⁶

The Respondent raises several issues regarding the credibility of the REC's witness, Investigator Tatarek. First, the Respondent argues that certain testimony provided by Tatarek was not substantiated by the documents admitted into evidence. Specifically, Tatarek's trip records marked as Exhibit R-1 show that Tatarek made four visits to the Respondent's office over a period of six months, whereas Tatarek testified that she visited the office on ten to twelve occasions. Resp. Exceptions at 1-2. The Respondent argues that this constitutes "false" testimony which was then used to undermine the credibility of the Respondent's other witness testimony. Id. at 5-6. Lastly, the Respondent asserts that Tatarek produced notes about purportedly nonexistent visits to the Respondent's office which were then placed in the investigative file. Id. at 6-7.

⁶ The exceptions raised in the hard copy submission were otherwise identical to the email submission, with the addition of the seventh exception appearing on a separate additional page.

In response, the REC argues that the record does not support overturning the ALJ's credibility determination and the record supports the ALJ's findings. REC Reply Exceptions at 1-2.

Next, the Respondent argues that his due process rights were violated when the ALJ relied on N.J.A.C. 11:5-3.8 in arriving at the conclusions in the Initial Decision. Id. at 7. The Respondent asserts that N.J.A.C. 11:5-3.8 was not charged in the OTSC; therefore, the entire matter should be dismissed. Ibid. Further, the Respondent notes that N.J.A.C. 11:5-3.8 is applicable to licensed salespersons and not brokers. Id. at 8. However, the Respondent also argues that N.J.A.C. 11:5-3.8 supports his position, in that the cited regulation provides that a salesperson must work 40 hours per week, during the hours of approximately 10:00 a.m. to 8:00 p.m., any five days in each week, and not 9:00 a.m. to 5:00 p.m., during business days, as indicated by the ALJ in the Initial Decision. Id. at 8-9. The Respondent argues that his employment as a teacher was part time, which computes to an average of 21.5 hours per week over a 52 week year. Id. at 9. The Respondent argues that although reliance on N.J.A.C. 11:5-3.8 violates his due process, N.J.A.C. 11:5-3.8 also "works in his favor by exonerating him as being in compliance with his broker full time employment." Ibid.

In response, the REC notes that the Respondent was not found to have violated N.J.A.C. 11:5-3.8; therefore, the Respondent's argument is without foundation. Id. at 2.

The Respondent argues that the penalty assessed is too severe as the Respondent did not demonstrate bad faith because he reasonably believed that his position as a teacher was not full time and was not in violation of any applicable regulations. Id. at 11. The Respondent argues that the recommended suspension of his broker license would result in loss of livelihood and this loss should be given more weight. Id. at 12. In addition, the Respondent argues that no penalties

should be imposed because no profits were obtained by illegal activity, no injury to the public occurred, no conspiracy existed, and there are no past violations. Id. at 12 – 13. Furthermore, the Respondent asserts that the violations found are de minimus in nature, the Respondent did not believe he was in violation of any State regulations, the office was open seven days a week, and the Respondent taught only part time. Id. at 13-14. Lastly, the Respondent takes exception to the ALJ's characterization of certain testimony made to sound as though the Respondent was never present at his office because he went to Whole Foods and to see a show every night. Resp. Exceptions 2.

In response, the REC argues that the Respondent's position related to the Kimmelman factors further demonstrates his disregard for the statutory and regulatory responsibilities of a licensee. Ibid. The REC reiterates that the Respondent continues to obfuscate that he was obligated to be employed as a broker on a full time basis, who was to be physically present when not required to be away from the office for reasons related to the business of that office, during usual business hours, five days a week. Ibid. The REC requested that the Respondent's Exceptions be given no weight. Id. at 3.

LEGAL DISCUSSION

The REC bears the burden of proving the allegations in the OTSC by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 67 N.J. 47, 49 (1975).

In light of the above findings of fact and the evidence in the record, the Commission ADOPTS the ALJ's findings related to the Respondent's violations of N.J.A.C. 11:5-4.4(a) and N.J.S.A. 45:15-17(e).

Allegations Against the Respondent

The OTSC charged, and the ALJ found, the Respondent's conduct violated N.J.A.C. 11:5-4.4(a) in that he failed to maintain and supervise his licensed real estate office on a full time basis and failed to have it open to the public during regular business hours and that said conduct also demonstrates unworthiness, incompetence, and bad faith in violation of N.J.S.A. 45:15-17(e). Initial Decision at 24- 25. The ALJ's findings were based both on the documentary evidence and the testimony presented at the hearing, including the testimony of Tatarek regarding her surveillance of the Respondent's office and the uncontroverted evidence that the Respondent was employed full-time as a teacher by the School District of Philadelphia during normal business hours.

N.J.A.C. 11:5-4.4(a) provides that a broker shall maintain a main office, which shall be open to the public during usual business hours and maintained on a full time basis.⁷ Reviewing

⁷ Specifically, N.J.A.C. 11:5-4.4(a) provides: "Every resident real estate broker not licensed as a broker-salesperson shall maintain a main office for the transaction of business in the State of New Jersey, which shall be open to the public during usual business hours. This main office and the activities of the licensees working from it shall be under the direct supervision of either the broker himself or herself, or of a person licensed as a broker-salesperson. Such supervision shall be maintained on a full time basis. Maintaining full-time supervision shall not be construed as requiring the person performing the supervisory functions to be present at the office location continuously during usual business hours. However, the person performing the supervisory functions shall provide sufficient information so as to allow the personnel at the main office to make communication with that person at all times. Further, the licensee supervising the main office shall be so employed on a full-time basis and, when not required to be away from the office for reasons related to the business of the office, shall be physically present at that office during usual business hours at least five days per calendar week (excluding vacations and emergencies) and shall not be otherwise employed during such time."

N.J.A.C. 11:5-4.4(a), In re Pipes, 329 N.J. Super. 391 (App. Div. 2000), and N.J.A.C. 11:5-3.8 (the experience requirement for licensure as a broker), the ALJ determined that the Respondent failed to maintain his office full time during usual business hours. Initial Decision at 19-22. Of note, the ALJ found that “usual business hours” are defined as “those hours of the day during which, in a given community, commercial, banking, professional, public, or other kinds of business are ordinarily carried on...this phrase is declared to mean not the time during which a principal requires an employee’s services, but the business hours of the community generally.” Id. at 21.

Moreover, N.J.A.C. 11:5-4.4 was substantially updated in 1988 in an attempt to “eliminate any misunderstanding by employing brokers and brokers of record as to their responsibility concerning office management during normal business hours.” 20 N.J.R. 1160(a). During the process of updating the law, the Commission was expressly asked to contemplate and address a scenario closely analogous to the circumstances here. A commenter had expressed concerns that the amended regulations would preclude a broker who also teaches real estate prelicensure courses from teaching those courses during normal business hours, to which the Commission provided the following salient response:

Such a broker can continue to teach during those hours so long as the broker’s main office is supervised by a licensed broker-salesperson during his or her absence. The Commission determined that if such an arrangement cannot be made, such a broker would have to choose whether they wanted to keep their brokerage as their primary occupation, and therefore, relegate their instructional activities to a part-time status, or make education their primary endeavor, in which case they would work as a broker-salesperson for another broker on a part-time basis.

See 21 N.J.R. 2523.

The issue raised in that public comment and response thereto by the Commission are instructive and applicable to the instant matter. The ALJ correctly found that “it is undisputed that respondent was a full-time teacher who worked five days a week in the Philadelphia school system throughout

the school year which runs from September to June.” Initial Decision at 15. The documentary evidence clearly demonstrates that Karpf had been employed by the School District of Philadelphia since September 1, 2001. Exhibit P-5. This fact is uncontested by Karpf. Exhibit P-3. To be in compliance with N.J.A.C. 11:5-4.4(a), the Respondent faced the exact choice presented by the commenter above: he could hire a licensed broker-salesperson to supervise his brokerage office during usual business hours and provide the supervisory safeguards contemplated by N.J.A.C. 11:5-4.4(a) or maintain the brokerage office as his primary occupation and discontinue teaching. The Respondent did neither and instead elected to intentionally misrepresent and mischaracterize his teaching position—which required a minimum commitment of 35 hours per week from 8:00 a.m. to 3:00 p.m. for the duration of the school year, from approximately September to June—as “part time” employment. Exhibit P-3. Indeed, Respondent relied upon a thinly veiled attempt at mathematical manipulation to justify his position and repeatedly asserted:

The teacher position was part time wherein he taught 5 classes per day at one hour or less each class, for 32 weeks per year, which is 25 hours per week for 32 weeks. Even if one were to include the lunch hour and break hours that would be less than 35 hours per week. Even using the 35 hours per week for 32 weeks, 1120 hours per year, based on a full 52 year work year that computes to an average of 21.5 hours per week which is part time employment under the Regulation or by any other definition.

Resp. Exceptions at 9.

This characterization is self-serving, disingenuous, and contrary to common sense. Moreover, the fact that Respondent purports to have relied on his indefensible and self-servicing perspective for several years as justification of his conduct is a flagrant violation of the regulations enacted by this Commission. The Respondent’s conduct is also blatantly contrary to the intention of N.J.A.C. 11:5-4.4(a), which is “to ensure that employing brokers and brokers of record are aware of their obligation to directly supervise their primary office location.” 20 N.J.R. 1160. We agree with the

ALJ's conclusion that the uncontroverted evidence supports a finding that the Respondent was unavailable during "usual business hours" as he could not be in two places at once nor could his sales staff or clients reach him when he was teaching, in violation of N.J.A.C. 11:5-4.4(a). Initial Decision at 19-21.

In addition, we note that the Respondent raised several meritless exceptions to Tatarek's testimony, alleging that Tatarek "LIED, LIED, LIED, LIED" about how many times she visited the Respondent's office during her investigation and that Tatarek placed falsified notes in the investigative file about nonexistent trips to Cherry Hill. Resp. Exceptions at 1, 6-7. The ALJ deemed Tatarek to be credible and found that, "Over the summer and fall of 2014, Taratek conducted several unannounced visits to the respondent's real estate office at various times of day. On each visit, the real estate office was closed to the public." Initial Decision at 16.

The ALJ's findings are fully supported by the evidence. See Exhibit R-1. Credibility determinations by an ALJ may be rejected or modified only upon a finding that the ALJ's findings were "arbitrary, capricious or unreasonable, or not supported by sufficient competent and credible evidence in the record." N.J.A.C. 1:1-18.6(c). The Respondent provides no basis upon which the Commission may make such a determination, and thus we do not make such finding here. The Respondent offers no proof to support his allegation that falsified records were included in the investigation file or relied upon. Further, the uncontroverted fact remains that the Respondent was employed full time during normal business hours in the Philadelphia school district when he had the responsibility to ensure his broker's office in Cherry Hill was open to public and being properly supervised full time, in violation of N.J.A.C. 11:5-4.4(a).

The Respondent argues that Tatarek's "false" testimony was then used to impeach the testimony of Arthur Karpf, who was presented at the hearing to support the Respondent's assertion

that the office was open to the public, under the supervision of his father from 9:00 a.m. to 5:00 p.m. on weekdays. This argument carries little weight. If Arthur Karpf's testimony was presented as evidence that staff and clients could reach the Respondent at all times of day, it fails as the Respondent was not available by phone to receive any messages while teaching. Further, as discussed above, N.J.A.C. 11:5-4.4(a) provides that the office may be supervised by a licensed broker-salesperson in the absence of the broker. If Arthur Karpf's testimony was offered to demonstrate that the office was properly supervised in this regard, this argument also fails, as Arthur Karpf stated that "while he holds a real estate license, he has never really used it." Initial Decision at 10. Further still, the licensing history provided reflects that there were no broker-salespersons in the Respondent's employ under his license to properly oversee the office during his absence during normal business hours, when he was unreachable by staff and clients. *Id.* at 5.

Next, the Respondent asserts that this matter should be dismissed as his due process rights were violated when the ALJ relied on N.J.A.C. 11:5-3-8. We agree with the REC that since the Respondent was not found to have violated N.J.A.C. 11:5-3.8, this argument is without foundation. Similarly, the Respondent's argument that an examination of N.J.A.C. 11:5-3-8 supports his position is also without merit. As discussed above, his arguments that mischaracterize and misrepresent his teaching position as part-time is self-serving and disingenuous, and thus are rejected.

The Respondent's exception that certain characterizations by the ALJ of the Respondent's testimony seem to portray the Respondent as never being present at his office because he went to Whole Foods and to see a show every night is noted, but has no impact on our analysis herein. Resp. Exceptions 2.

Finally, the OTSC charged, and the ALJ found, that the Respondent's conduct was in violation of N.J.S.A. 45:15-17(e), which generally states that any conduct demonstrating unworthiness, incompetency, bad faith or dishonesty may subject a real estate licensee to suspension, revocation, or probation. The Appellate Court in Div. of New Jersey Real Estate Commission v. Ponsi, contemplated the definition of "unworthiness" in the context of N.J.S.A. 45:15-17(e) and found the word was synonymous with "not fit," "undeserving" or "unsuitable." 39 N.J. Super. 526, 532 (App. Div. 1956). Further, "unworthiness" is defined as "a lack of those ethical qualities that befit the vocation." Goodley v. New Jersey Real Estate Commission, 29 N.J. Super. 178, 181 (App. Div. 1954).

As discussed above, the Respondent violated N.J.A.C. 11:5-4.4(a) for a period of several years. The conduct at issue is directly related to his status as a licensee. The Respondent fails to realize the import of his conduct and continues to maintain that he supervised his office in compliance with relevant regulations when, in reality, his office was not open to the public during "usual business hours" while he was employed as a teacher in Philadelphia. Further still, the Respondent continues to maintain that his employment was part time. The evidence provided clearly shows that his contention is meritless and blatantly disingenuous. I CONCUR with the ALJ that the Respondent's conduct demonstrates unworthiness, incompetence, and bad faith in violation of N.J.S.A. 45:15-17(e).

PENALTIES

The Act charges the Commission with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]" in order to protect New Jersey real estate consumers. Goodley, 29 N.J. Super. at 181-182. Courts have long recognized that the real estate sales industry should exclude individuals who are incompetent, unworthy, and unscrupulous, in

order to protect the public interest. See Ponsi, 39 N.J. Super. at 532-533. The Commission is empowered to suspend and revoke the licenses of, and impose fines against, brokers and salespersons that violate any of the offenses enumerated in N.J.S.A. 45:15-17 or the real estate regulations. Maple Hill Farms, Inc. v. New Jersey Real Estate Commission, 67 N.J. Super. 223, 232 (App. Div. 1961); Ponsi, 39 N.J. Super. at 527. N.J.S.A. 45:15-17 provides that suspension of a license may be ordered for a time less than the unexpired portion of the license period and revocation of a license is permitted without limitation.

The uncontested facts in this matter demonstrate that the Respondent failed to maintain and supervise his licensed real estate office on a full time basis; failed to have the office open to the public during regular business hours; was not employed as a real estate broker on a full time basis; failed to be physically present in his office during usual business hours at least five calendar days a week—being away from the office for reasons unrelated to the business of the office, in violation of N.J.A.C. 11:5-4.4. Not only was the Respondent’s conduct in violation of N.J.A.C. 11:5-4.4, but the conduct, which continued unabated for years and was based upon dubious reasoning, demonstrates unworthiness, incompetence, and bad faith, in violation of N.J.S.A. 45:15-17(e), warranting action against the Respondent’s real estate license.

As discussed above, the Respondent made several disingenuous and self-serving arguments, demonstrating that he does not appreciate the seriousness of his misconduct, further demonstrating his unworthiness for licensure. The ALJ noted, “throughout cross-examination, respondent was intentionally obtuse, refused to answer questions, would make a jab at petitioner’s counsel or would intentionally add commentary that was self-serving and nonresponsive to the question.” Initial Decision at 9, n.5. In addition, when confronted with the undisputable fact of his full time employment as a teacher, the Respondent continued to assert that this employment

was part time. Given the seriousness of the Respondent's actions, the Commission MODIFIES the ALJ's recommendation of a two year suspension of the Respondent's broker license and ORDERS the revocation of the Respondent's broker license for a period of three years.

Monetary Penalties Against the Respondent

Pursuant to N.J.S.A. 45:15-17, the Commission may impose a penalty of not more than \$5,000 for the first violation of the Act, and a penalty of not more than \$10,000 for any subsequent violation.

As noted by the ALJ, pursuant to Kimmelman, certain factors are to be examined when assessing administrative monetary penalties such as those that may be imposed under N.J.S.A. 45:15-17. No one Kimmelman factor is dispositive for or against the imposition of fines and penalties. See Kimmelman, 108 N.J. at 139 (“[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case”). The ALJ contemplated both the appropriate licensure action and adequate monetary penalty in tandem and gave great weight to sole mitigating factor –no past history of violations. Initial Decision at 29. The ALJ therefore recommended a two year loss of license and a fine of \$2,500. Ibid.

The REC argues that because no penalties have been assessed against the Respondent in a criminal or civil action, this factor should weigh in favor of a monetary penalty. REC Exceptions at 2. The Respondent objected to the imposition of any penalties in this matter and asserted that there was no bad faith, no profit, no injury to the public, no criminal conduct, no past violations and indeed therefore no regulatory violation at all since he believed that he was in compliance with all relevant regulations. Resp. Exceptions at 10. The REC argues the Respondent's position

regarding his conduct further demonstrates his disregard for the statutory and regulatory responsibilities of a licensee. REC Reply Exceptions at 2.

The first Kimmelman factor addresses the good faith or bad faith of the Respondent. We concur with the ALJ's finding that the Respondent's actions demonstrated bad faith because the Respondent was and should have been "well aware of his responsibilities under the Act" including the requirement to have his office open to the public during usual business hours at least five calendar days a week. Initial Decision at 27. Additionally, we agree with the ALJ's characterization of the Respondent's arguments as disingenuous, self-serving and specious, and constitute further evidence of the Respondent's bad faith. We find this factor favors a higher monetary penalty.

The second factor in Kimmelman is the Respondent's ability to pay. The ALJ found that there was insufficient evidence to make an informed decision regarding the Respondent's ability to pay fines assessed, and determined that this was an aggravating factor. Initial Decision at 28. We agree with the ALJ's statement that respondents who claim an inability to pay have the burden of proving same. NJREC v. Cortese, Final Order of Determination, (08/09/17) (citing Goldman v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08)). The Respondent has offered no evidence regarding his ability to pay any fines, and thus has not met that burden. This factor is neutral.

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. The profits obtained by the Respondent in this matter are unclear, however, the ALJ stated that for over ten years the Respondent was employed full time as a teacher

during normal business hours while operating a real estate brokerage. Initial Decision at 26. We agree with the ALJ's finding. This factor favors a monetary penalty. Ibid.

The fourth factor of the Kimmelman analysis is to determine whether the licensee's conduct caused injury to the public. In order to protect consumers, the Commission is charged with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]." Goodley, 29 N.J. Super. at 182. Therefore, the public is harmed when licensees fail to comply with Commission regulations. When a licensee is unable to conduct himself in accordance with the high standards expected of him and his profession, the public's confidence in the real estate industry is eroded. The Respondent violated the public trust by failing to fulfill his obligation to commit full time to the real estate brokerage business and properly supervise his brokerage office, which affords greater protection to the public. In re Pipes at 397. This factor weighs in favor of a higher monetary penalty.

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the Commission concurs with the ALJ and finds that the Respondent's conduct went on for "well over a decade." Initial Decision at 28. Therefore, this weighs in favor of a higher monetary penalty.

The existence of criminal punishment and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor under the Kimmelman analysis. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. The ALJ notes that while there are no parallel proceedings in this matter, the Respondent's ability to pay fines imposed is unclear and therefore, this factor does not weigh in favor of a monetary penalty. Initial Decision at 28. We disagree with this finding. The Respondent has not suffered any punishment or treble damages

relating to his willful misrepresentation and mischaracterization of his outside employment, which resulted in a ten year period wherein his brokerage office was not properly supervised and not open to the public during usual business hours. Therefore, we MODIFY the Initial Decision and find that this factor favors a higher monetary penalty.

The final factor examined in Kimmelman is previous relevant regulatory and statutory violations of the Respondent. We concur with the ALJ that the Respondent has held a real estate broker's license since 1979 and has no history of any regulatory or statutory violations. Initial Decision at 29. We find this is a mitigating factor and it does not weigh in favor of a monetary penalty.

In light of the above Kimmelman analysis, which weighed heavily in favor of a penalty and based on the seriousness of the violations found herein, the Commission MODIFIES the recommendation of the ALJ and imposes a civil monetary penalty in the amount of \$5,000. The ALJ noted that the decision to impose a \$2,500 penalty was reached because great weight was afforded to the sole mitigating factor that the Respondent has no other history of regulatory or statutory violations since first licensed in 1979. Initial Decision at 29. The Commission, however, finds this analysis to be unbalanced and a \$5,000 penalty is appropriate given the bad faith demonstrated by the Respondent in his flagrant disregard for the regulatory requirements set forth in N.J.A.C. 11:5-4.4(a), the duration of the violation, the injury to the public, and the lack of criminal or treble damages.

CONCLUSION

Having carefully reviewed the Initial Decision, the REC's Exceptions, the Respondent's Exceptions, the REC's Reply Exceptions, and the entire record herein, the Commission hereby ADOPTS the findings of fact and conclusions of law as set forth in the Initial Decision, except as

modified herein, and holds that the Respondent violated the Act as alleged in Count III of the OTSC.

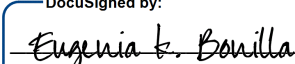
The Commission MODIFIES the Initial Decision as follows:

- A reference to “Count IV” appearing on page 2, n.1 of the Initial Decision is hereby changed to refer to “Count III.”
- A reference to Tatarek’s “broker license” on page 3 of the Initial Decision is hereby changed to refer to a “broker-salesperson license.”
- A reference the employment verification letter provided by the School District of Philadelphia entered into evidence as “Exhibit P-6” on page 4 is hereby changed to refer to “Exhibit P-5.”
- A legal citation to Goodley v. New Jersey Real Estate Comm’n appearing on page 24 is hereby changed to “Id. at 181-82.”
- A reference to “Exhibit P-2” as being “Not in Evidence” is hereby changed to “P-2 REC Certified Licensing Record for Richard Karpf.”

The Commission further MODIFIES the ALJ’s recommendation as to the imposition of penalties against the Respondent and ORDERS the revocation of the Respondent’s real estate license for a period of three years. No license shall be issued until the monetary penalty imposed herein is paid in full. The Commission further MODIFIES the Initial Decision and ORDERS that a fine totaling \$5,000 be imposed against the Respondent.

SO ORDERED this 14th day of June, 2022.

By: Eugenia K. Bonilla, President
William J. Hanley, Vice President
Christina Banasiak, Commissioner
Darlene Bandazian, Commissioner
Jacob Elkes, Commissioner
Denise M. Illes, Commissioner

DocuSigned by:

Eugenia K. Bonilla, President
New Jersey Real Estate Commission

06/15/22 | 8:24 AM EDT

Final Orders – REC/AR Karpf FO