STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
233 RICHMOND STREET
PROVIDENCE, RHODE ISLAND 02903

RUSSELL GALLANT, **COMPLAINANT,**	:	
v.	:	**DBR No.: 04-L-0167**
WAYNE CONNETTI, **RESPONDENT.**	:	

DECISION ON REMAND

Hearing Officer: Catherine R. Warren, Esquire

Hearing Held: July 31 and November 9, 2006

Appearances:

For Russell Gallant, Complainant: David M. D'Agostino, Esquire

For Wayne Connetti, Respondent: Michael DiChiro, Jr., Esquire

I. INTRODUCTION

The above entitled matter came before the Department of Business Regulation ("Department") as a result a complaint filed on or about April 4, 2004 by Russell Gallant ("Complainant") with the Department against Wayne Connetti ("Respondent"). Respondent holds a Real Estate salesperson's license ("License") pursuant to R.I. Gen. Laws § 5-20.5-1 *et seq.* After an investigation by the Department, an Order appointing the undersigned as Hearing Officer was issued and a prehearing conference was held on November 30, 2004. A hearing was held on March 22, April 26, and May 18, 2005. Both parties were represented by counsel and both parties submitted written closing arguments. A decision ("Decision") was issued on July 27, 2005 that found that

Respondent did not violate R.I. Gen. Laws § 5-20.5-14(a)(1), (2), (15), (20) or Rule 20 of *Commercial Licensing Regulation 11-Real Estate Brokers and Salespersons* ("CLR11").

On or about August 26, 2005, the Complainant filed an appeal of the Decision with the Superior Court. By order dated December 16, 2005, the Superior Court allowed the Complainant/Petitioner additional time to present additional evidence to the Department. By order dated April 13, 2006, the Superior Court ordered the case remanded to the Department for "further hearings thereon included but not limited to the presentation of additional evidence as obtained under prior order of this Court dated December 16, 2005." The Department Director by order dated June 5, 2006 appointed the undersigned as substitute hearing officer for the initial hearing officer who had been appointed to hear this matter on remand.

A status conference was held on June 29, 2006. The hearing was held on July 31 and November 9, 2006. After the November 9, 2006 hearing, the parties were to inform the undersigned whether they would want to schedule another day for hearing for further testimony and/or oral argument or whether they would only submit written arguments. Because the undersigned did not hear from the parties, the undersigned by letter dated February 19, 2007 informed the parties that unless she heard otherwise, she would assume the parties did not want either a hearing for further testimony or oral arguments and therefore set a briefing schedule. The parties agreed to amend this briefing schedule. Complainant filed a timely brief. The parties agreed Respondent would have until October 19, 2007 to file a brief. Respondent did not file a brief by that date. By letter dated December 7, 2007, the undersigned informed the parties that she considered the record closed. On or about December 18, 2007, Respondent filed a brief. On or about

December 31, 2007, the undersigned contacted the parties to ascertain whether the Complainant objected to Respondent's late filing and requested any objection be filed by January 10, 2008. On or about January 25, 2008, the undersigned received a letter from Respondent's counsel confirming that the parties had agreed to the late filing of Respondent's brief. Said letter indicated that Complainant may file a reply brief. On January 30, 2008, the undersigned contacted the parties and set a date of February 11, 2008 for the submission of a reply brief. No reply brief was filed.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 5-20.5 -1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. ISSUES

Whether Respondent violated R.I. Gen. Laws § 5-20.5-14(a)(1), (2), (15), (20)[1] and/or Rule 20 of *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons* ("CLR11").[2]

---

[1] R.I. Gen. Laws § 5-20.5-14(a)(1), (2), (15), and (20) state as follows:

Revocation, suspension of license – Probationary period – Penalties. –

(a) The director may upon his or her own motion, and shall, upon the verified complaint, in writing, of any person initiating a cause under this section, ascertain the facts and, if warranted, hold a hearing for the suspension or revocation of a license. The director has power to refuse a license for cause or to suspend or revoke a license or place a licensee on probation for a period not to exceed one year where it has been obtained by false representation, or by fraudulent act or conduct, or where a licensee, in performing or attempting to perform any of the acts Revocation, suspension of license – Probationary period – Penalties. mentioned in this chapter, is found guilty of:

(1) Making any substantial misrepresentation

***

(2) Making any false promise of a character likely to influence, persuade or induce any person to enter into any contract or agreement when he or she could not or did not intend to keep that promise

***

(15) Violating any rule or regulation promulgated by the commission or the department in the interest of the public and consistent with the provisions of this chapter

***

IV. MATERIAL FACTS AND TESTIMONY

The material facts and testimony contained in the Decision are hereby referenced and incorporated into this decision. At the first hearing, the parties stipulated as follows:

> 1) Kevin Ball ("Ball") previously owned the property located at 1167 Danielson Pike, North Scituate, RI ("Property') and on January 25, 2003 he signed a purchase and sales agreement to sell the Property to Paul and Cariane Ruggieri ("Ruggieris"). The closing for the sale took place on February 21, 2003. During this transaction, Respondent represented Ball as a seller's agent and Debra Connetti (Respondent's wife) represented the Ruggieris as a buyers' agent.
>
> 2) On May 21, 2003, the Ruggieris listed the Property for sale with Respondent as the sellers' agent.
>
> 3) On August 27, 2003, Complainant signed a purchase and sales agreement with the Ruggieris.
>
> 4) On September 19, 2003, the closing on the Property took place. Decision, at 2.

During the course of the testimony at the initial hearing, there was testimony that before Ball sold the Property to the Ruggieris, a woman had decided not to purchase the Property because of concern over contamination. This woman was not identified at the first hearing. During the course of the Superior Court appeal, Complainant was able to identify this woman by subpoenaing Centerplace Realty where Respondent is employed.[3]

> (20) Any conduct in a real estate transaction, which demonstrates bad faith, dishonesty, untrustworthiness, or incompetency.

[2] Section 20(a) of CLR 11 provides that

> All Licensees are subject to and shall strictly comply with the laws of agency and the principals governing fiduciary relationships. Thus, in accepting employment as an agent, the Licensee pledges him/herself to protect and promote, as he/she would his own, the interests of the principal he/she has undertaken to represent. This obligation of absolute fidelity to the principal's interest is primary, but does not relieve the Licensee from the binding obligation of dealing fairly with all parties to the transaction.

[3] Complainant's attorney represented that he felt the identity of this potential buyer should have been produced through discovery of the initial matter at the Department. He stated during the discovery phase of the initial Department hearing, he propounded requests for production of documents and took testimony from the Respondent directly related to the production of documents. He stated that the Department issued a Super. R. Civ. P. 30(b)(6) subpoena to the broker of record, Anthony Caprio ("Caprio"), and any documents relative to the Property at issue. He stated that Caprio brought with him a file that was reviewed under oath and which was consistent with Respondent's file.

Robin Folkers ("Folkers") testified on behalf of the Complainant. She is the woman who decided not to purchase the Property from Ball. She testified that in 2002 she attempted to purchase the Property. She produced documents relating to her aborted attempts to purchase the Property. See Complainant's Supplemental Exhibit One (1).[4] She testified that she met Respondent for first time when she first saw the interior of the Property. She testified that Dale Misner ("Misner"), her broker-buyer, was present at this meeting but the owner was not. She testified that possible contamination was never discussed at this meeting.

Folkers testified that in December of 2002 she submitted a deposit for the Property. She testified that after she had made an offer to purchase the Property,

---

Complainant's counsel stated that in the course of the Superior Court appeal of this case, he obtained subpoena authority from the Superior Court and renewed his request for the same information from the Respondent. He stated that the information should have been provided for in response to the request for production of documents, the 30(b)(6) subpoena, and Respondent's and Caprio's testimony. He stated that under the appropriate provisions of R.I. Gen. Laws § 42-35-1 *et seq.*, he subpoenaed Centerplace Realty's bank records and ultimately identified the woman in question as Robin Folkers. He stated it was explained to him that the missing information had been mis-filed and only recently found filed under a different name, and that the file contained a substantial amount of the information to which Robin Folkers testified to at the Remand hearing, and which is contained in the Complainant's supplemental exhibits.

Complaint's counsel argued that the information he recently obtained through subpoena should have been obtained over a year ago, and that its recent revelation suggests a question regarding Respondent's credibility. He argued that it's disturbing that information so central to the case was not forthcoming either through direct questioning or through document requests, which he suggested may raise an issue of whether a fraud was perpetrated on the Department.

In response, Respondent's counsel argued that there was no intent to deceive the Department. He stated that when the subpoena for Centerplace Realty's bank records was served, Caprio reviewed all the records and located an additional file. He stated that Caprio submitted the additional file and the bank records to the Complainant. He stated that Caprio had his own attorney and that any involvement by himself would have created a conflict of interest with his own client, Respondent. He also stated that there was no testimony that the recently retrieved documents were under his client's control, but rather the testimony showed that they were under Caprio's control. He argued that there was no attempt to deceive the Department and there was no prejudice to the Complainant because the desired documents were ultimately received.

[4] This exhibit includes a letter dated January 8, 2003 from Folkers' broker to Respondent which references that the Property is within an Environmental Protection Agency superfund site. Respondent objected to the admission of this letter. However, the letter was not admitted for such proof of whether the Property was part of a superfund site but rather the letter relates to what information was conveyed by Folkers and/or her broker to Respondent regarding her decision not to purchase the Property.

submitted a deposit, and signed the purchase and sales agreement, she was in church when another member, whom she did not know, asked her if she was purchasing the Property. She testified that this individual told her that the "property is poisoned" and that she should do some "digging." She testified she went to the Environmental Protection Agency ("EPA") superfund website and discovered that a property named H&H Rack located near the Property was an EPA superfund site. She testified that she discovered, via the same method, an additional property included in the EPA superfund site, R&R Jewelers, that was either adjoining or near the Property.

Folkers testified that after learning this information, she called Misner the first week of January, 2003 and told him that she no longer wished to buy the Property. She testified she had no personal contact with Respondent or his wife regarding her discovery of this information but she authorized Misner to disclose her research to Respondent.

Folkers testified that she wanted her deposit back and that ultimately except for $1100 her deposit was returned to her. She testified that she had to engage the services of an attorney to obtain her deposit back. She testified that she decided she didn't want to purchase the Property because it was in the middle of an EPA superfund site, and she felt all the facts concerning the Property were not disclosed to her before she agreed to buy it.

Folkers testified that she secured her mortgage through Riverside Capitol Mortgage ("Riverside"). She testified that she had been approved for a mortgage but the company withdrew the mortgage financing after she submitted documents evidencing the EPA superfund site and contamination. She testified that Riverside said the Property was unappraisable, and that it was impossible to do a fair comparison of the Property.

Folkers testified that Ball was the seller at this time, and she never spoke with him regarding the contamination. She testified that Ball never explained why he was selling the Property, they never spoke about it, and it was none of her business. She testified that after receiving her deposit and up until the time she received the subpoena to come to this hearing, she did not have any contact with either Centerplace Realty or Respondent.

Folkers testified that she spoke with a Department of Environmental Management ("DEM") employee and obtained copies of a DEM letter regarding contaminants found in the groundwater of the property abutting the Property. She testified that she also received other documents from DEM, including Volatile Organic Analysis ("VOC") data sheets done on the groundwater of R&R Jewelers.[5] See Complainant's Supplemental Exhibit Two (2) (documents produced in response to subpoena). She testified she received these documents (e.g. VOC tests, DEM reports) prior to receiving a return of a portion of her deposit, and she provided copies of the DEM documents to Misner, who told her that he provided copies of them to Respondent. She testified she did not have any actual knowledge whether Misner gave them to Respondent.

On cross-examination, Folkers testified that she didn't know for a fact that Misner ever gave a copy of her EPA superfund and contamination research to Respondent, though he told her he did. She testified that she was not present when Misner contacted Respondent. She testified that after she decided to get out of the transaction and hired an attorney, she never personally spoke to Respondent. She testified she didn't have any knowledge that the DEM employee she spoke to spoke with Respondent after she,

[5] Folkers' testimony spoke of DEM providing this information. The exhibits show that DEM received information from the Department of Health ("DOH").

Folkers, contacted her. She testified she never spoke with Complainant or Ball after she discovered the information regarding the contamination.

A second day of hearing was held on November 9, 2006. Complainant offered an affidavit from Misner *in lieu* of live testimony because Misner currently lives in Colorado. See Complainant's Supplemental Exhibit Three (3).[6]

---

[6] The Respondent objected to the admission of the affidavit, citing hearsay concerns, the out-of-state nature of the affidavit, and the inability to cross-examine Misner as to its contents. Complainant responded by stating that to the extent that the affidavit contains testimony to which Folkers did not testify, Misner's affidavit had been signed, under seal of notary. Complainant also countered that to the extent that the Respondent had concerns regarding information in the affidavit, they could be developed through examination of Respondent.

The undersigned advised the parties of the following: 1) Rhode Island Rules of Evidence 804 regarding the hearsay exceptions for when a declarant is unavailable; 2) R.I. Gen. Laws § 42-35-1 *et seq.* the Administrative Procedures Act ("APA"), more specifically R.I. Gen. Law § 42-35-10, regarding the lower evidentiary standard for administrative hearings; and 3) the case *Foster-Glocester Regional School Committee v. Board of Review DLT*, 854 A.2d 1008 (R.I. 2004) which discussed the purpose of the hearsay exclusion, which is to prevent juries from rendering a verdict based on unreliable or confusing testimony, a danger which is not present in administrative hearings because the hearing officer is trained to be an expert in her capacity, unlike the lay person on a jury. The undersigned further discussed the ability of the hearing officer to judge whether the evidence offered is credible, trustworthy, and reliable. On that basis, the undersigned admitted Misner's affidavit.

Foster-Glocester held as follows:

> As this Court explained in *DePasquale* [*v. Harrington*, 599 A.2d 314 [R.I. 1991], 599 A.2d at 316, the purpose of the hearsay exclusion is to prevent juries from rendering a verdict based on "unreliable or confusing testimony." This danger is not present in administrative hearings because the hearing officer is trained to be an expert in his or her capacity, unlike the layperson on a jury; therefore, hearsay evidence is admissible in administrative hearings. Id. "Hearsay evidence may vary significantly in its credibility and probative value, depending on its source and its similarity to evidence that is intrinsically trustworthy." *Id.* Presumably, a hearing officer with "substantial expertise in matters falling within his or her agency's jurisdiction" should be able to judge whether the evidence offered is trustworthy, credible, and probative, regardless of whether it is hearsay. See id.
>
> Even though the [school] board is exempted from § 42-35-10(a), it does provide some evidentiary guidelines for administrative hearings. Section 42-35-10(a) provides that "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded." See, e.g., *DePasquale,* 599 A.2d at 315-16.

Paragraphs one (1) through six (6), eight (8), ten (10) through thirteen (13) of Misner's affidavit corresponded with Folkers' testimony that he was her buyer broker, she signed an agreement to purchase the Property, that she discovered contamination issues at properties abutting the Property, that she declined to purchase the Property, that she had to hire an attorney to obtain the return of her deposit, and that she received most of her deposit back.

Respondent's counsel orally moved that the hearing officer consider whether Respondent violated R.I. Gen. Laws § 5-20.5-14(a)(3)[7] in addition to those alleged statutory violations specified at the initial prehearing conference and order dated December 1, 2004. Respondent objected to the motion, arguing that the motion would amend the order and widen the scope of the case at a date too late in the hearing.

In response, the undersigned stated the usual practice at a prehearing conference is to narrow and establish the issues for hearing, but also commented that the hearing process is a fact-finding procedure that may produce results that fall under statutes that weren't originally in consideration. See *Davis v. Wood*, 427 A.2d 332 (R.I. 1981). The undersigned took the motion under advisement.

At this time, the record was left open in order for the Respondent to determine whether Respondent would testify. Respondent did not testify and the parties submitted written closing arguments.

Paragraph seven (7) indicates that Misner's staff performed similar research to Folkers. This is not relevant to the issues at hand.

In Paragraph Nine (9), Misner states that he spoke with Respondent several times regarding the situation at the Property and the fact that Riverside would not appraise the Property. Misner indicated that the conversations involved his attempt to obtain the return of Folkers' deposit. Obviously, Respondent's counsel was unable to cross-examine Misner regarding the substance of these conversations. However, based on the January 8, 2003 letter from Misner to Respondent that references EPA reports of water contamination and conversations between Misner and Respondent regarding those reports, it is clear that Misner and Respondent talked about the Property and contamination.

[7] R.I. Gen. Laws § 5-20.5-14(a)(3) states as follows:

> Revocation, suspension of license – Probationary period – Penalties. – (a) The director may upon his or her own motion, and shall, upon the verified complaint, in writing, of any person initiating a cause under this section, ascertain the facts and, if warranted, hold a hearing for the suspension or revocation of a license. The director has power to refuse a license for cause or to suspend or revoke a license or place a licensee on probation for a period not to exceed one year where it has been obtained by false representation, or by fraudulent act or conduct, or where a licensee, in performing or attempting to perform any of the acts mentioned in this chapter, is found guilty of:
>
> ****
>
> (3) Pursuing a continued and flagrant course of misrepresentation or making of false promises through salespersons, other persons, or any medium of advertising, or otherwise.

V. DISCUSSION

For ease of this decision, below is the summary of Respondent's testimony from the Decision from the first hearing:

> Respondent testified for the Complainant. Respondent testified that in November of 2002, he represented Ball as a seller's agent. Respondent testified that during the time he represented Ball, Respondent requested a test from ESS Laboratories. He testified that he requested the test because there was a woman who was interested in buying the Property but after finding out there were contaminants in the area, she decided not to buy the Property. Respondent testified that he asked Ball about the contamination, and Ball did not know anything about it.
>
> Respondent testified that he contacted the DOH and spoke to a Mr. Amirault ("Amirault"). This is the same individual that Complainant testified that he spoke to at DOH. Respondent testified that Amirault advised him to have a test done on the well water, which Respondent did. Respondent testified that Amirault specifically told Respondent that there were contaminants between the Property and Chopmist Hill. Respondent testified that he also talked to [David] Provonsil [town planner] in Scituate who said pretty much the same thing. Respondent testified that Provinsil said the contaminants were between, not that they started there, but that they were between the Property and Chopmist Hill. Based on what Provinsil said, Respondent testified that this meant the contaminants were "along the way" and not that they started at the Property. Respondent testified that Provonsil said Chopmist Hill, referring to the area, and that the Inn was never mentioned. Respondent testified that he guesses that his first conversation with Provonsil was probably around January [2003]. Respondent testified that it was due to learning about the contaminants that the ESS test was performed.
>
> Respondent testified that Ball claimed to be completely unaware that there were any contaminants. He testified that he did not share with his wife all the information about the previous buyer backing out of the purchase because of the contamination or that he had done research at the town hall and called DOH. He testified that he did not share that information because he represented the seller and she represented the buyer, and "married or not you don't disclose that information."
>
> Respondent testified that when he discussed with Paul [Ruggieri] and his disclosure form vis a vis the contaminants in the surrounding areas, he had already spoken to Monica Staaf ("Staaf"), legal counsel for the Rhode Island Association of Realtors ("Association"). He testified that Staaf had informed him that a seller does not have to disclose what is not on his property so that the seller is under no obligation to disclose if he chooses not to do so. He testified that Paul said that if it was not a legal obligation to check "Yes," to the question of offsite contaminants that he would check "No." Respondent

testified that he had never seen the Weston Solutions letter. See Complainant's Exhibit Six (6). Respondent testified that he never spoke to anyone from the DEM.

Respondent testified that after the first showing to Complainant, that Debra told Respondent that she did tell Complainant about the contamination. Respondent testified that he and Debra gave the well test (which Respondent had done for Ball during the previous transaction) to Complainant at the second showing. See Complainant's Exhibit Three (3).

Respondent testified that at the second showing, he told Complainant that he was told by the DOH that the contaminants were between the Property and Chopmist Hill. Respondent testified that he did not say specifically where the contamination started. Respondent testified that all he knew was that the area between the two (2) places was contaminated. He testified that he told Complainant exactly what he had been told by the DOH: that there had never been any proof that the Property had ever been contaminated. Respondent testified that at the time he explained this to Complainant, Respondent still did not know about R&R Jewelry or H&H Rack. Respondent testified that he has now learned that R&R Jewelry and H&H Rack are sites of contamination, and that they are on either side of the Property.

Respondent testified that at the third showing of the Property to the Complainant, that Complainant asked Respondent what Respondent knew about the building in the back of the lot and to the right. Respondent testified that he asked Complainant what building he was referring to. He testified that the Property was heavily treed and that one could not see the building. Respondent testified that Complainant told him that he (Complainant) had done some scouting and found a building back there. Respondent testified that he told Complainant he absolutely did not know anything about the building. Respondent testified that he had advised Complainant, both prior to that moment and at that moment, that if Complainant had any questions or concerns at all, Complainant should contact the DOH. Respondent testified that he phrased it in such a way that Complainant understood that his information came directly from the DOH. In addition, Complainant testified that he told Complainant that he could also contact the town hall and that he had already given the well report to Complainant.

Respondent testified that he did not tell Complainant that a buyer had backed out of the sale because of concern about the contamination, because it would not be in the best interest of the seller, and it was none of Complainant's business.

On cross-examination, Respondent testified that today he knows that there is contamination within one (1) mile of the Property. He testified that at the time of the preparation of the disclosure forms, he only knew what he was told by DOH which had informed him that the contaminants were between the Property and Chopmist Hill. Respondent testified that as a seller's agent, he

was compelled to tell anyone who looked at the Property that there were contaminants in the area.

With regard to Respondent not informing Complainant about the woman who had declined to buy the Property, Respondent testified that he never discusses with any customer or client the people who had previously looked at a house, and that he is not under an obligation to do that.

Upon questioning from the Hearing Officer, Respondent testified, to clarify, that while listing the Property for Ball he learned that there were contaminants in the area, called Staaf for advice about how to proceed, and Staaf told him how to proceed. He testified that when he sold the Property to the Ruggieris, he acted the same way he did when he sold the Property for the Ruggieris. Respondent testified that he spoke to Staaf after he had done his own research regarding the contamination. Respondent testified that it is not a law that a seller has to disclose what is not on one's property.

Upon re-examination, Respondent testified that at the time of the sale of the Property to Complainant, he understood that the contamination was between the Property and Chopmist Hill. He testified that he did not know it was a superfund site. He testified that he was told by Staaf that he did not have to say anything at all about this, but that he did. He testified that he thought it right to tell potential buyers that there were contaminants in the area, who told him about the contaminants, where they worked, and that if the potential buyers were interested in the Property they could look into it. Respondent testified that a prospective buyer has all kinds of time to look into contamination. He testified that under a purchase and sales agreement, one still has ten (10) days to look into it. Therefore, he testified that he did not think the Complainant should have been complaining five (5) months later after the sale.
July 27, 2005 Decision, at 9-13.

On the basis of the evidence at the first hearing, the Department's decision found as follows:

Respondent owed Complainant a duty of fair dealing. Arguably, Respondent fulfilled this by disclosing the issue of contamination that he felt he did not have to disclose. Part of the measure of fair dealing is whether the licensee treated the buyer or seller as if he would treat him or herself. See Rule 20(a) and *Gallo v. Smith*, DBR No. 98-L-0058 4/19/00 p. 12, *decision on reconsideration*, 5/7/01. Frankly, it was in Complainant's self interest to be upfront about the contamination or else there could be another situation like the prior buyer who decided not to purchase the Property after finding out on her own about the contamination. By telling a potential buyer about the contamination and providing the clean well report, Respondent blunted the

effect that a disclosure later on by someone else other than Respondent might have on a potential buyer.

It is hard to look at this transaction and not wonder if Respondent knew more. Complainant is credible when he testified he thought he was told the contamination was near the Inn. Perhaps it was just a miscommunication. It is puzzling that while both Complainant and Respondent contacted Scituate and DOH, both received different answers regarding the location of the contamination. Yet, it is hard to find on the evidence before the undersigned that Respondent knew that the adjacent buildings were where the contamination was located or at least had been designated contaminated areas. Perhaps Respondent could have told Complainant exactly who he spoke to at Scituate or DOH. But the issue is *substantial* misrepresentation. Respondent did not hide the fact that there were contamination issues involved with the Property. He may have downplayed such issues. He may have tried to use Staaf as a cover. But on the basis of the evidence, I cannot conclude that he engaged in a *substantial* misrepresentation regarding the contamination or that he violated his duty of fair dealing or engaged in conduct that demonstrated bad faith, dishonesty, untrustworthiness, or incompetency. Decision, at 21.

The issue is whether in light of the new evidence such a conclusion is still appropriate. Again, Respondent is right to argue that there is no general duty to disclose contamination on property that abuts a property for sale. However, that is not the issue here. The issue is whether when the Complainant specifically asked Respondent about the areas abutting the Property and the building next door what did Respondent know and how did he respond. Respondent did not have an obligation to perform research on the area. But he did have an obligation to treat the Complainant fairly.

The evidence before the undersigned is that Folkers chose not to purchase the Property because of her findings about H&H Rack and R&R Jewelers being EPA superfund sites and her findings from DEM and DOH about contamination. She testified that she gave that information to Misner. While Misner did not orally testify and was not subject to cross-examination, he obviously communicated information regarding Folkers' reason not to purchase the Property to Respondent. Folkers testified that Misner tried to

obtain the return of her deposit. See Complainant's Supplemental Exhibit One (1) (January 8, 2003 letter from Misner to Respondent). Misner stated in his affidavit that he told Respondent about the contamination.

At the first hearing, Respondent testified that after learning about the contamination from what is now known to be Folkers' aborted purchase he obtained a well test and spoke to DOH and the Town of Scituate regarding the contamination. He testified that he thought the contamination was near Chopmist Hill and that it did not start at the Property. Decision, at 9-10. Ball testified at the first hearing that he first learned about the contamination when selling the Property. Thus, it was on the basis of information received from Folkers (via Misner) that Respondent engaged in his own fact gathering regarding the contamination.

Respondent chose not to testify after Folkers testified. He chose not testify regarding what information Misner told him when Misner spoke to him regarding Folkers' decision not to purchase the Property and Misner's attempts to obtain the return of Folkers' deposit. Respondent argued in his brief that because Respondent and Ball knew that Folkers was wrong in her reason – her belief the Property was contaminated – not to purchase the Property they gave her a "difficult time in backing out of her P&S." There was no testimony from either Ball or Respondent about their reasons for disputing Folkers when she attempted to terminate her purchase agreement. Respondent argued that Folkers was wrong to say the Property was contaminated but again the issue isn't whether the Property was or was not contaminated but what information did the Respondent know when Complainant asked about the area adjacent to the Property.

Complainant credibly testified that he asked Respondent about the building next door. Indeed, at the first hearing Respondent testified that he told Complainant that he didn't know about the building and for Complainant to speak to DOH. At the first hearing, Complainant's testimony about the information that he received from the local town planner was different than the information that Respondent testified he received from the town planner. At the first hearing, Complainant testified that the local town planner told him about H&H Rack and R&R Jewelers but Respondent testified that he understood from the local town planner that the contamination was between the Property and Chopmist Hill. Respondent testified at the first hearing that he did not know about H&H Rack or R&R Jewelers at the time he spoke to Complainant.

At the second hearing, Respondent chose not to testify regarding Folkers' testimony and the information that she found and what was communicated by her to Misner and from Misner to him (Respondent). Folkers identified both buildings next door. She identified a superfund site. Respondent's lack of testimony regarding what Misner told him about Folkers' decision not to purchase the Property along with Folkers' testimony leads to the conclusion that Respondent knew more than he disclosed to Complainant. At the first hearing, the Complainant and Respondent both agreed that Complainant asked Respondent about the building next door.

In light of Folkers' testimony and Respondent's lack of testimony regarding Folkers' possible purchase of the Property and the fact that it is known that Respondent spoke with Misner and conducted his own research, Respondent's testimony at the first hearing regarding his knowledge of the contamination is no longer credible. It is not credible that Respondent did not know about H&H Rack or R&R Jewelers. It is not

credible that he didn't realize the contamination was on property next to the Property. It is not credible that he did not know about the EPA superfund sites. By Respondent's own admission at the first hearing, he looked into the contamination issue and knew about nearby contamination and he disclosed general information. In light of the new evidence, the information that Respondent disclosed was not enough because he knew more than he disclosed.

A. R.I. Gen. Laws § 5-20.4-14(a)(1)

The pertinent analysis regarding this statutory obligation is contained in the Decision as follows:

> Previous Department decisions have addressed the issue of substantial misrepresentation. *Altomari v. Clark and Shirley*, DBR No.: 01-L-0160 (1/8/03) found as follows:
>
> Since the term "substantial misrepresentation" is not defined in the statute at issue, it is necessary to define the elements necessary in order to support a finding of substantial misrepresentation as envisioned in R.I. Gen. Laws §5-20.5-1 *et seq*.
>
> *Black's Law Dictionary*, Fifth Edition, defines "misrepresentation" as:
>
> > Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead.
> >
> > See also *Restatement of Contracts*, §470 at 890-891. Since the statutory requirements deal with real estate licensees involved in real estate transactions, it is reasonable to infer that the "substantial misrepresentation" applies to real estate licensee actions or real estate transactions. It is reasonable to interpret that substantial misrepresentation as envisioned in R.I. Gen. Laws §5-20.5-14(a)(1) applies to the conduct of the licensees and its effect on the transaction at issue. Thus, the requirement that the misrepresentation be substantial in order to support a finding of a violation of R.I. Gen. Laws §5-20.5-14(a)(1) infers that it is necessary for the misrepresentation to

> be made knowingly by the real estate licensee and affect the real estate transaction at issue. (internal citation omitted). *Altomari*, at 27-28.

> For the Complainant to show that Respondent made a substantial misrepresentation, he needs to show that Respondent knew information about the contamination and the well at the time of the sale of the house and misrepresented or failed to disclose said condition to the Complainants. See *Beaudet v. Anderson-Sparn*, DBR No. 99-L-0099 (7/28/99). Decision, at 16-17.

As discussed in the Decision, there is no statutory duty to disclose offsite contamination but there is also a statutory prohibition against substantial misrepresentation. Both the Complainant and Respondent agreed that the Complainant asked about the building next door. Complainant sought specific information. As opposed to evidence before the undersigned at the first hearing, the evidence now demonstrates that the Respondent knew what the building was next door to the Property and the superfund sites. *Infra*. This was not a minor failure but was substantial as Complainant was concerned about contamination and specifically wanted to know about the adjacent property. Respondent did not fully inform Complainant what he knew.

In his brief, Respondent argued that Folkers did not buy the Property because of fear of contamination of well water and there is no evidence that the well was contaminated. This may have been Folkers' reason not to buy the Property but Folkers' testimony related to what she found out about the area adjacent to the Property and what was told to Respondent. The issue is not whether the well water was contaminated but what Respondent told Complainant upon Complainant asking about the property adjacent to the Property.

Respondent also argued that he had no duty to disclose the condition of the property adjacent to the Property. This is true. But Respondent had a duty not to make

any substantial misrepresentations to Complainant upon being questioned by Complainant. Thus, Respondent violated R.I. Gen. Laws § 5-20.5-14(a)(1).

B. R.I. Gen. Laws § 5-20.5-14(a)(2)

There was no evidence that Respondent made any promises to Complainant to induce him to enter into a contract when Respondent did not intend to keep that promise. Therefore, based on the forgoing and the evidence before the undersigned, the undersigned finds that the actions by Respondent did not rise to the level of a violation of R.I. Gen. Laws § 5-20.5-14(a)(2) and recommends that claim be dismissed.

C. R.I. Gen. Laws § 5-20.5-14(a)(20) and Rule 20 of CLR11

The Decision found as follows:

> In terms of fair dealing, honesty, trustworthiness, and integrity, as held in a Department decision,
>
> > A [real estate] licensee's honesty, trustworthiness, integrity and reputation affect his or her ability to conduct all real estate transactions fairly. If one of these character traits are compromised, then the stability and integrity of the transaction is compromised. *D'Orsi v. Santilli*, DBR No. 99-L-0086 7/18/00 p. 12.

The Decision also discussed *Altomari v. Clark and Shirley*, DBR No.: 01-L-0160 (1/8/03) as follows.

> The statutory and regulatory scheme of licensing real estate salespersons and brokers ensures a system where consumers can rely on licensed professionals to handle real estate sales in a trustworthy and competent manner. Part of this regulatory scheme includes that real estate salespersons owe a duty of fair dealing to all parties in a transaction.
> . . .
>
> It is also instructive to turn to Black's Law dictionary (sic) for a definition. Fair play is defined as "[e]quity, justice and decency in dealings with another." *Black's Law Dictionary* (5th Edition 1979). Respondents argue that Altomari was not duped and that "Respondents did not engage in conduct in any way detrimental

> to Ms. Altomari, such as actions designed to devalue her property, scare off other potential buyers, or some other improper purpose." See Respondents' Memorandum, p. 2. In addition, Respondents argue that they kept Kishkovich's name from Altomari due to a duty of confidentiality and loyalty to him. Pursuant to Rule 20 of CLR11, Respondents have a fiduciary duty to Kishkovich, though in this matter, only Shirley was Kishkovich's realtor of record.
>
> . . .
>
> Fair dealing constitutes more than just being honest about a property's value or prohibiting scaring off prospective buyers. In order to have a regulatory system that commands the confidence of the consumers, consumers must be able to rely on the professionalism of the realtors involved in a transaction. Such professionalism includes honesty, good faith, and a lack of trickery (e.g. equity) by the realtors involved in the transaction. See also *D'Orsi v. Santilli*, DBR No. 99-L-0086 7/18/00. This is part of the duty of fair dealing. *Altomari*, at 23-25.
>
> Respondent owed Complainant a duty of fair dealing. Arguably, Respondent fulfilled this by disclosing the issue of contamination that he felt he did not have to disclose. Part of the measure of fair dealing is whether the licensee treated the buyer or seller as if he would treat him or herself. See Rule 20(a) and *Gallo v. Smith*, DBR No. 98-L-0058 4/19/00 p. 12, *decision on reconsideration*, 5/7/01. Decision, at 20-21.

Respondent owed the Complainant a duty of fair dealing. In light of the new evidence, Respondent violated Rule 20 of CLR11 by failing to disclose information that he knew. He did not treat the Complainant as he would wish to be treated. His actions also demonstrates bad faith, dishonest, and untrustworthiness in violation of R.I. Gen. Laws § 5-20-14(a)(20).

D. R.I. Gen. Laws § 5-20.5-14(a)(15)

Respondent violated this statutory provision by violating Rule 20 of CLR11.

E. R.I. Gen. Laws § 5-20.5-14(a)(3)

As discussed above, Complainant moved to add this statutory violation. Respondent represented Ball when Ball sold the Property to the Ruggieris. It was during

this transaction that Respondent learned about the contamination. Respondent then represented the Ruggieris when they sold the Property to Complainant. There was some discussion regarding how Ball filled out his disclosure form and whether he properly filled out said form. However, there was no evidence that Respondent made misrepresentations to the Ruggieris regarding this Property. There is not enough evidence to show that Complainant pursued a continued and flagrant course of misrepresentation.

F. Late Production

Rule 10 of CLR11[8] requires that a principal broker keep records for three (3) years from the date of receipt of funds for any property. Respondent explains that the failure to produce documents until after the Superior Court remand was due to a misfiling in Respondent's office. Complainant further argues that Respondent violated Section Twelve (12) of *Central Management Regulation 2 - Rules of Procedure for Administrative Hearings* ("CMR2")[9] by failing to promptly disclose Folkers' identity and

---

[8] Rule 10 of CLR 11 states as follows:

(A) Every Principal Broker shall keep records of all funds and property of others received by him/her for not less than three (3) years from the date of receipt of any such funds or property.

(B) These records shall clearly indicate: the date, amount and from whom received, specifying property and reason for holding monies, date of deposit of such funds and name of depository bank, date of disbursement, amounts forwarded, together with the name of the recipient, and any other pertinent information concerning the transaction.

[9] Section Twelve (12) of CMR2 states in part as follows:

(A) General. The Department favors prompt and complete disclosure and exchange of information and encourages informal arrangements among the Parties for this exchange. It is the Department's policy to encourage the timely use of discovery as a means toward effective presentations at hearing and avoidance of the use of cross-examination at hearing for discovery purposes.

requests that the undersigned impose sanctions pursuant to Section Eleven (11) of CMR2.[10]

The failure to fully produce documents responsive to document requests served by the Complainant on the Respondent is extremely troubling and Respondent should take greater care in the filing and maintaining records. However, the undersigned declines at this time to impose sanctions for such a discovery lapse.

G. Sanctions

The seriousness of these statutory and regulatory violations as detailed above warrants the imposition of a penalty. Essentially, Respondent purposely misled Complainant regarding substantive information that Complainant specifically requested. R.I. Gen. Laws § 5-20.5-14(b) allows the Department to levy an administrative penalty not exceeding $1,000 for any statutory or regulatory violation. R.I. Gen. Laws § 5-20.5-14 and R.I. Gen. Laws § 5-20.5-15 allow the Department to suspend or revoke a real estate salesperson or broker license upon hearing and notice.

In *Marcella v. Williams*, DBR No. 99-L-0087 (6/28/01), Respondent was found to have violated R.I. Gen. Laws § 5-20.5-14(a)(12), (19), (20), and R.I. Gen. Laws § 5-20.5-26. The *Marcella* matter arose out of the real estate salesperson licensee depositing a commission check in his personal checking account. The licensee in *Marcella* demonstrated his remorse and realization of wrong-doing. Despite the finding of mitigating factors in *Marcella*, due to the seriousness of the violations, an administrative penalty of $1,500 and a ten (10) day suspension of the licensee's license were imposed.

---

[10] Section Eleven (11) of CMR2 states in part as follows:

> (A) General. Any Party may request that the Hearing Officer enter any order or action not inconsistent with law or these Rules. The types of motions made shall be those which are permissible under these Rules and the Rhode Island Superior Court Rules of Civil Procedure ("Super. R. Civ. P.").

I recommend the following: the imposition of an administrative penalty in the amount of $4,000 for Respondent and the suspension of Respondent's License for a two (2) week period beginning thirty (30) days from the execution of the decision by the Department. The fine shall be paid within thirty (30) days of the execution of the decision by the Department. See *Altomari* (Department decision imposed two (2) week suspension and $4,000 administrative penalty for violations of Rule 20 of CLR11 and R.I. Gen. Laws § 5-20.5-14(a)(1), (7), and (20)). See also *Parenti v. McConaghy*, 2006 R.I. Super. LEXIS 49 (Superior Court decision upholding Department sanction of $2,000 administrative penalty and ten (10) day suspension for violating Section 20 of CLR11 and R.I. Gen. Laws § 5-20.5-14(a)(15) and (20)).

Pursuant to Section Eighteen (18) of CMR2, Respondent's suspension of License shall be published in the *Providence Journal* once and Respondent shall bear the cost. Respondent shall contact the Department within twenty (20) days of execution of this decision to arrange for the payment of the suspension notice. See *Parenti*.

VI. FINDINGS OF FACTS

1. On or about April 4, 2004, Complainant filed a complaint with the Department against Respondent.

2. After an investigation by the Department, an order appointing the undersigned as Hearing Officer was issued and a prehearing conference was held in this matter on November 30, 2004.

3. A hearing in this matter was held on March 22, April 26, and May 18, 2005.

4. A Decision was issued on July 27, 2005.

5. On or about August 26, 2005, the Complainant filed an appeal of the Decision to the Superior Court.

6. By order dated December 16, 2005, the Superior Court allowed the Complainant/Petitioner additional time to present additional evidence to the Department.

7. By order dated April 13, 2006, the Superior Court ordered the case remanded to the Department for "further hearings thereon included but not limited to the presentation of additional evidence as obtained under prior order of this Court dated December 16, 2005."

8. The Department Director by order dated June 5, 2006 appointed the undersigned as substitute hearing officer for the initial hearing officer that had been appointed to hear this matter on remand.

9. The hearing on remand was held on July 31 and November 9, 2006.

10. Complainant and Respondent filed briefs. Respondent's brief was filed on December 18, 2007.

11. Complainant presented new evidence as discussed above that warranted the finding of statutory and regulatory violations by Respondent.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 5-20.5-1 *et seq*., R.I. Gen. Laws § 42-14-1 *et seq*., and R.I. Gen. Laws § 42-35-1 *et seq*.

2. Respondent violated R.I. Gen. Laws § 5-20.5-14(a)(1), (15), and (20) and Rule 20 of CLR11.

3. Respondent did not violate R.I. Gen. Laws § 5-20.5-14(a)(2) and (3).

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends the following: the imposition of an administrative penalty in the amount of $4,000 for Respondent and the suspension of Respondent's License for a two (2) week beginning thirty (30) days from the execution of the decision by the Department. The fine shall be paid within thirty (30) days of the execution of the decision by the Department. Furthermore, pursuant to Section Eighteen (18) of CMR2, Respondent's suspension of License shall be published in the *Providence Journal* once and Respondent shall bear the cost. Respondent shall contact the Department within twenty (20) days of execution of this decision to arrange for the payment of the suspension notice. Respondent shall forward his real estate broker license to the Department for the term of his suspension.

Dated: March 3, 2008

Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

__✓__ ADOPT
_____ REJECT
_____ MODIFY

Dated: 03-05-2008

A. Michael Marques
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 4th day of ~~February~~ March, 2008 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid to David D'Agostino, Esquire, Gorham & Gorham, 25 Danielson Pike, North Scituate, RI 02857 and Michael DiChiro, Esquire, 1405 Plainfield Pike, Johnston, RI 02919 and by hand delivery to Valerie Voccio, Administrator – Real Estate, Department of Business Regulation, 233 Richmond Street, Providence, RI 02903.

A B Ellison