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**IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT
STATE OF FLORIDA**

**DEP'T OF BUS. & PROF'L
REGULATION, DIVISION OF
REAL ESTATE,**

Appellant,

v.

CASE NO.: 5D13-2266

L.T. No.: 2011-018510

THERESIA MARIE HELTON,

Appellee.

**ON APPEAL FROM A FINAL ORDER
OF THE FLORIDA REAL ESTATE COMMISSION**

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Real Estate (“the Division”) appeals a Final Order rendered by the Florida Real Estate Commission (“the Commission”) on May 28, 2013 rejecting an Administrative Law Judge’s recommendation that Theresia Marie Helton’s real estate licenses be revoked. In lieu of revocation, the Commission suspended her licenses for five years, imposed fines totaling \$5,000, placed Ms. Helton on probation for 5 years, and required her to complete 28 hours of continuing education.

The Commission considered this matter during duly-noticed public meetings held on March 19, 2013 and April 16, 2013 in Orlando, Florida. The Division was the Petitioner during the proceedings below, and Ms. Helton was the Respondent.

References to the two-volume Record on Appeal will appear as (R volume # at page #.). References to the transcript from the October 29, 2012 formal administrative hearing will appear as (T1 at page #.). References to the Supplemental Record on Appeal will appear as (SR at page #.).

STATEMENT OF THE CASE AND FACTS

The Regulation of Real Estate Professionals in Florida

Chapter 475 of the Florida Statutes sets forth the laws governing real estate brokers, sales associates, and schools. §475.001, Fla. Stat. (2013). That Chapter also provides for the Commission which is responsible for regulating the real estate

profession and disciplining licensees. §§ 475.02(1), 475.05, & 475.25(1), Fla. Stat. (2013). The Commission consists of seven members who are appointed to four-year terms by the Governor and confirmed by the Senate. §475.02(1), Fla. Stat. (2013). Four of the Commission's members must be licensed real estate brokers who have held an active license for the five years preceding their appointment. Id. Of the three remaining members, one must be a licensed broker or sales associate who has held an active license for the two years preceding his or her appointment. Id. Finally, the remaining two members "must be persons who are not, and have never been, brokers or sales associates." Id.

The Division provides the Commission with recordkeeping, examination, legal, and investigative services, and the Division's operations are funded by fees and assessments imposed by the Commission. §475.021(1) & (2), Fla. Stat. (2013). Particularly relevant to the instant case is the Division's duty to prosecute administrative complaints against real estate professionals. (R1 at 1.)

Facts Specific to the Instant Case

At all times relevant to the instant case, Ms. Helton was a Florida-licensed real estate broker and the director of 1010 Apartments, Inc. (R1 at 1 & 177.) Leonard and Brenda Brown own two residential rental properties in Naples, Florida, and Ms. Helton provided property management services to them. (R1 at 177.)(T1 at 37-38.)

Because the Browns were satisfied with Ms. Helton's management of their rental property at 1225 Reserve Way, they engaged her to manage their other rental property at 193 Santa Clara Drive. (R1 at 178.)

The tenants in the Santa Clara property were soon evicted for failing to pay rent. (R1 at 178.) At this point, the Santa Clara property supposedly needed to be repaired, and Ms. Helton presented the Browns with a written estimate on September 2, 2010 indicating the repairs would cost \$3,500. (R1 at 178.) On September 7, 2010, the Browns gave Ms. Helton a \$3,500 check payable to 1010 Apartments, Inc. (R1 at 178.)

In October of 2010, the Browns agreed the Santa Clara property could be leased again on a short-term basis. (R1 at 178.) Because of their previous dealings with the Reserve Way property, Ms. Brown assumed Ms. Helton would contact her if a tenant had moved into the Santa Clara property. (T1 at 42-43.)

The Browns were visiting Florida in January of 2011 and arranged to meet Ms. Helton at the Santa Clara property on January 21, 2011. (R1 at 180.) However, Ms. Helton called the Browns on January 21st and told them she was unable to keep the appointment. (R1 at 180.) Nevertheless, Ms. Helton suggested they proceed to the property and meet the tenant. (R1 at 180.) Ms. Helton's statement surprised the Browns because they were unaware that the Santa Clara property had been rented. (R1 at 180.)

The Browns proceeded to the Santa Clara property and met the tenant, a nurse working in Naples on a temporary basis. (R1 at 180.) The agency employing the nurse was paying her rent. (R1 at 180.)

After unsuccessfully attempting to contact Ms. Helton via telephone, the Browns faxed a letter to her on January 23, 2011 requesting information about the Santa Clara rental and the rent that had been paid by the nurse's employer. (R1 at 180.) No response from Ms. Helton was forthcoming. (R1 at 180.)

The Browns then sought information from the nurse's employer and obtained copies of the lease and four rent checks that had been paid to Ms. Helton. (R1 at 180-181.) The Browns had received no portion of those rental payments. (T1 at 64.)

At that point, Mrs. Brown assumed responsibility for managing the Santa Clara property, and the nurse's employer began remitting the monthly rent directly to the Browns. (R1 at 181.)

The events described above prompted the Division to issue a two-count Administrative Complaint on November 28, 2011. (R1 at 1-7.) Count I alleged Ms. Helton violated section 475.25(1)(d)1, Florida Statutes (2010), which subjected real estate licensees to discipline for failing

to account or deliver to any person including a licensee under this chapter, at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery,

any personal property such as money, fund, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or other document or thing of value . . .

§475.25(1)(d)1, Fla. Stat. (2010). (R1 at 3.) Count II alleged Ms. Helton violated section 475.25(1)(b), Florida Statutes (2010), which prohibited real estate licensees from committing an act “of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction . . .” (R1 at 4.)

Ms. Helton failed to timely dispute any of the Administrative Complaint’s material allegations, and the Commission considered Ms. Helton’s case during an informal administrative hearing convened on February 21, 2012 in Orlando, Florida. (R1 at 8.) After considering the investigative file, the Commission elected to revoke Ms. Helton’s license and impose a \$5,000 fine. (R1 at 9.) The aforementioned discipline was memorialized in a Final Order rendered on March 22, 2012. (R1 at 8-11.)

However, on March 16, 2012, Ms. Helton filed a Petition asking the Commission to vacate the aforementioned Final Order and alleged in support thereof that the Administrative Complaint had been improperly served on her. (R1 at 115.)

The Commission granted Ms. Helton’s request and vacated the March 22, 2012 Final Order. (R1 at 12-13.) The Commission also directed that the case be

forwarded to the Division of Administrative Hearings for a formal administrative hearing. (R1 at 12-13.)

The Honorable William F. Quattlebaum (“ALJ Quattlebaum”) presided over the October 29, 2012 formal administrative hearing. (R1 at 175.) Ms. Helton testified that the Browns owed her money for the repairs made to the Santa Clara property after the prior tenant had been evicted. (R1 at 181.) Ms. Helton further testified that she retained the Browns’ share of the rent as reimbursement for her expenses. (R1 at 181.)

However, ALJ Quattlebaum found Ms. Helton’s testimony to be uncredible and made the following findings in his Recommended Order:

26. [Ms. Helton] offered no credible evidence in support of the testimony and no credible accounting of the funds she received for the Santa Clara property on behalf of the Browns.

27. At the hearing, [Ms. Helton] offered an invoice from “1010 Condo Cleaning” for \$2,134.50, dated September 8, 2010, which had a payment due date of September 8, 2010.

28. “1010 Condo Cleaning” is an entity operated by [Ms. Helton]’s sister.

29. A printed statement on the invoice declared that it had been paid by [Ms. Helton]’s company, 1010 Apartments, Inc., clearly indicating that the invoice had already been paid prior to the time the invoice was actually printed. However, notwithstanding the due and paid dates on the invoice, six of the 12 charges on the invoice were for charges allegedly incurred after the date of the invoice, one as late as October 31, 2010. Additionally, the invoice reflected charges for

repairs that had been listed on the September 2, 2010, estimate, which the Browns had already paid.

30. [Ms. Helton]'s testimony as to funds she allegedly spent to acquire furnishings or household items for the Santa Clara property lacked credibility, was otherwise unsupported by evidence, and has been rejected. [Ms. Helton] failed to account for the funds she received from the Santa Clara tenant's employer prior to January 21, 2011.

(R1 at 181-182.)

The aforementioned findings of fact led ALJ Quattlebaum to make the following conclusions of law:

34. The evidence clearly establishes that [Ms. Helton] leased the Santa Clara property to a tenant without advising the property owners that she had done so and that [Ms. Helton] collected rent from the tenant's employer without accounting to the property owners for the rental payments.

35. At the hearing, [Ms. Helton] asserted that she had expended funds on behalf of the property owners and that she was entitled to retain rental payments she collected from the tenant's employer. [Ms. Helton] offered no credible documentation of, or accounting for, her alleged expenditures, and her claim has been rejected.

(R1 at 184.)

ALJ Quattlebaum concluded that Ms. Helton committed both of the violations alleged in the Administrative Complaint and recommended that the Commission revoke her real estate licenses. (R1 at 185.) In doing so, ALJ Quattlebaum noted the 2010 version of the Commission's disciplinary guidelines

rule (Rule 61J2-24.001) provided that first violations of sections 475.25(1)(b) and 475.25(1)(d)1 were punishable by revocation. (R1 at 185.)

As discussed in more detail in the Argument Section of this Initial Brief, the 2010 version of Rule 61J2-24.001(4)(a) required Ms. Helton to present ALJ Quattlebaum with any evidence that could have persuaded him to recommend a lesser penalty. See Fla. Admin. Code R. 61J2-24.001(4)(a) (mandating that “[w]hen either the Petitioner or Respondent is able to demonstrate aggravating or mitigating circumstances to the Commission in a Section 120.57(2), F.S., hearing **or to a Division of Administrative Hearings hearing officer in a Section 120.57(1), F.S., hearing by clear and convincing evidence**, the Commission or hearing officer shall be entitled to deviate from the above guidelines in imposing or recommending discipline, respectively, upon a licensee.”).¹

Ms. Helton filed Exceptions to ALJ Quattlebaum’s Recommended Order. (R1 at 187-189.) However, she did not contest any of his findings of fact or conclusions of law. (R1 at 187-189.) Instead, she merely argued that the recommended penalty of licensure revocation was too harsh. (R1 at 188-189.) In

¹ Rule 61J2-24.001(4)(b) provided that aggravating or mitigating circumstances may include (but are not limited to): (1) the degree of harm to the consumer; (2) the number of counts charged in an administrative complaint; (3) the licensee’s disciplinary history; and (4) the degree of financial hardship that will result to the licensee because of a fine or licensure suspension.

support thereof, Ms. Helton presented the Commission with the following mitigating circumstances that were never argued to ALJ Quattlebaum:

In the present case there are several mitigating factors that justify [the Commission] reducing the ALJ's recommended penalty of permanent revocation of [Ms. Helton]'s Real Estate Broker License. There was no specific finding [of] harm to the public. The record is clear when [Ms. Helton] took over the management of the real property it was not furnished and that it was subsequently furnished by [Ms. Helton] in order to rent the property. The Browns only expecting \$600.00 a month in rent received \$1,155.00 in rent for March, 2011 and \$962.50 in April, 2011, and kept the furnishings [Ms. Helton] provided.

[Ms. Helton] has no prior disciplinary history with [the Commission]. Permanent revocation of [Ms. Helton]'s Real Estate Broker License will cause a devastating financial hardship on [Ms. Helton]. She is a single mother and her real estate business is her only means of income. Based on the mitigation evidence in the record [Ms. Helton] respectfully requests [the Commission] reduce the penalty recommended by the ALJ.

(R1 at 189.)

The Commission considered this case during a meeting convened on March 19, 2013. (R1 at 197.) After conceding that ALJ Quattlebaum found his client's testimony uncredible, Ms. Helton's attorney argued licensure revocation was too harsh in light of certain mitigating circumstances. (R2 at 208-209.) The Division's attorney vociferously objected because Ms. Helton's attorney did not present any mitigating circumstances to ALJ Quattlebaum. (R2 at 209-210, 219, & 236.) Also, the Commission's own counsel stated that Rule 61J2-24.001(4)(a) of

the Florida Administrative Code requires licensees who have a formal administrative hearing to present their mitigating circumstances to the administrative law judge. (R2 at 222 & 236.)

Nevertheless and against the advice of its counsel, the Commission violated its own rule, considered the mitigating circumstances offered by Ms. Helton's attorney, and rejected ALJ Quattlebaum's recommended penalty. (R2 at 208-254.) At the close of the March 19, 2013 meeting, the Commission voted to impose the following discipline: (a) a five-year suspension of Ms. Helton's real estate licenses; (b) \$5,000 of fines; (c) one year of probation; and (d) 28 additional hours of continuing education. (R2 at 249-254.)

Before the Commission rendered a Final Order memorializing the outcome of the March 19, 2013 meeting, the Division filed a Motion for Reconsideration on April 1, 2013 requesting that the Commission adopt ALJ Quattlebaum's Recommended Order and revoke Ms. Helton's licenses. (SR at 1-16.)²

The Commission convened on April 16, 2013 to consider the Division's Motion for Reconsideration. (R2 at 258.) Because Ms. Helton failed to comply with Rule 61J2-24.001(4)(a) by presenting her mitigating circumstances to ALJ

² The Supplemental Record on Appeal indicates the Division filed a Motion for Reconsideration on April 1, 2013 and a second Motion for Reconsideration on April 2, 2013. (SR at 1-16.) It is not readily apparent why two Motions for Reconsideration were filed, but they are virtually identical. (SR at 1-16.)

Quattlebaum, the Division's attorney argued the Division was denied an opportunity to rebut her assertions before a finder of fact. (R2 at 260-261, 286, & 293.) The Division's attorney also argued that revocation was appropriate given ALJ Quattlebaum's finding that Ms. Helton failed to account for a security deposit and four months of rental payments. (R2 at 262-263.) That lack of trustworthiness could result in other members of the public being defrauded. (R2 at 263-264.) Also, the Commission's counsel reiterated his previous argument that Rule 61J2-24.001(4)(a) required that all mitigating circumstances be presented to an administrative law judge when a licensee has a formal administrative hearing. (R2 at 287-288 & 298-306.) Nevertheless, the Commission voted to deny the Division's Motion for Reconsideration, and the Commission rendered an Order memorializing that result on May 9, 2013. (SR at 17-18.)

On May 28, 2013, the Commission rendered a Final Order granting Ms. Helton's Exception and rejecting ALJ Quattlebaum's recommendation that her license be revoked. (R2 at 317-318.) Instead, the Commission suspended her real estate licenses for five years, fined Ms. Helton \$5,000, imposed five years of probation, and required her to complete 28 hours of continuing education. (R2 at 318-319.)

The Division filed a timely Notice of Appeal on June 20, 2013. (R2 at 320-321.)

SUMMARY OF THE ARGUMENT

The instant case should be remanded with directions for the Florida Real Estate Commission to reconsider the penalty imposed on Ms. Helton while disregarding the mitigating circumstances that were previously presented to the Commission in violation of Rule 61J2-24.001(4)(a).

First of all, the Commission disregarded the advice of its own counsel and committed a premeditated violation of Rule 61J2-24.001(4)(a) by considering mitigating circumstances that were never heard by ALJ Quattlebaum. Rules have the force and effect of law, and the Commission displayed a cavalier disregard for its own rule.

By circumventing ALJ Quattlebaum and presenting her mitigating circumstances to the Commission, Ms. Helton avoided cross-examination by the Division and any possibility of the Division presenting rebuttal evidence and/or testimony. Thus, the Commission's blatant violation of Rule 61J2-24.001(4)(a) was a material error in procedure that deprived the Division of due process.

If the Commission is allowed to violate its own rule and consider mitigating circumstances never presented to an administrative law judge, then an administrative law judge's penalty recommendation will become a meaningless exercise. However, that is completely at odds with the intent of section 120.57(1)(I), Florida Statutes (2013), which mandates that an agency such as the

Commission may not reduce or increase an administrative law judge's penalty recommendation "without a review of the complete record and without stating with particularity its reasons therefore in the order . . ."

Finally, the findings of fact by an impartial administrative law judge demonstrate Ms. Helton abused the Browns' trust and stole money that belonged to them. Therefore, Ms. Helton lacks the moral character required of real estate professionals, and licensure revocation is the only action that will ensure she never uses a real estate license to defraud other unsuspecting clients.

STANDARD OF REVIEW

Section 120.68, Florida Statutes (2013), governs appellate review of final administrative agency action, and states in pertinent part that "[t]he court shall remand a case to the agency for further proceedings" if "[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." §120.68(7)(c), Fla. Stat. (2013). As explained below, the Commission's premeditated violation of Rule 61J2-24.001(4)(a) materially impacted the proceeding below by depriving the Division of due process.

ARGUMENT

I. THE COMMISSION MATERIALLY ERRED BY VIOLATING ITS OWN RULE.

After finding her testimony uncredible and concluding she defrauded the Browns, ALJ Quattlebaum recommended that the Commission revoke Ms. Helton's license. However, the Commission rejected that recommendation and imposed a lesser penalty after considering mitigating circumstances that were never presented to ALJ Quattlebaum. In the course of doing so, the Commission violated Rule 61J2-24.001(4)(a) which required Ms. Helton to present her mitigating circumstances to the ALJ. Because rules have the force of law, that error (in and of itself) requires that the instant case be remanded for further proceedings. Remand is also justified because the Commission's action deprived the Division of due process, established bad precedent, and made the ALJ's penalty recommendation meaningless.

A. The Commission Violated Its Own Rule Which Has the Force of Law.

After issuing an Administrative Complaint alleging Ms. Helton violated sections 475.25(1)(d)1 and 475.25(1)(b), Florida Statutes (2010), the Division referred the instant case to the Division of Administrative Hearings for a formal administrative hearing pursuant to section 120.57(1) of the Florida Statutes. Such hearings are conducted by administrative law judges who receive testimony and evidence, resolve material issues of disputed fact, and issue recommended orders

to the agency having final order authority. See §120.57(1), Fla. Stat. (2013). In licensure disciplinary cases, an administrative law judge also issues a recommended penalty. See §120.57(1)(*I*), Fla. Stat. (2013)(providing that “[t]he agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.”).³

The Commission promulgated Rule 61J2-24.001 in order “to give notice to licensees of the range of penalties which normally will be imposed for each count during a formal or an informal hearing.” See Fla. Admin. Code R. 61J2-24.001(1). Rule 61J2-24.001 also provided that

[w]hen either the Petitioner or Respondent is able to demonstrate aggravating or mitigating circumstances to the Commission in a Section 120.57(2), F.S., hearing or to a Division of Administrative Hearings hearing officer in a Section 120.57(1), F.S., hearing by clear and convincing evidence, the Commission or hearing officer shall be entitled to deviate from the above guidelines in imposing or recommending discipline, respectively, upon a licensee.

³ In contrast to formal administrative hearings in which an administrative law judge resolves disputed issues of material fact and issues a recommended order to the agency having final order authority, informal hearings pursuant to section 120.57(2), Florida Statutes (2013), are conducted exclusively by the agency having final order authority and do not involve disputed issues of material fact.

See Fla. Admin. Code R. 61J2-24.001(4)(a)(emphasis added). In addition, the Rule specified that aggravating or mitigating circumstances may include (but are not limited to): (1) the degree of harm to the consumer; (2) the number of counts charged in an administrative complaint; (3) the licensee's disciplinary history; and (4) the degree of financial hardship that will result to the licensee because of a fine or licensure suspension. See Fla. Admin. Code R. 61J2-24.001(4)(b).

With regard to the instant case, Ms. Helton proceeded through a complete formal administrative hearing before ALJ Quattlebaum without attempting to prove any of the mitigating circumstances allowed by Rule 61J2024.001(4). Instead, she presented her mitigating circumstances to the Commission **after the formal administrative hearing had concluded**. Over the vociferous objection of the Division's attorney and against the advice of its own counsel, the Commission committed a premeditated violation of Rule 61J2-24.001(4)(a) and considered Ms. Helton's mitigating circumstances even though they had not been presented to ALJ Quattlebaum. See Fla. Admin. Code R. 61J2-24.001(4)(a)(providing in pertinent part that a respondent in a section 120.57(1) proceeding must demonstrate mitigating circumstances to a hearing officer by clear and convincing evidence).

The Commission's premeditated violation of its own rule requires that this Court remand the instant case for additional proceedings. Rules have the force and effect of law, and there is no question that the Commission violated Rule 61J2-

24.001. See State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)(noting that “agency rules and regulations, duly promulgated under the authority of law, have the effect of law, and, therefore, violation of any agency rule or regulation could be grounds for the imposition of criminal sanctions . . .”)(internal citation omitted); Fla. Livestock Bd. v. Gladden, 76 So. 2d 291, 293 (Fla. 1954)(recognizing that “rules and regulations of an administrative agency, made under power conferred by the statute, have the force and effect of the statute . . .”); Health Options, Inc. v. Palmetto Pathology Serv., P.A., 983 So. 2d 608, note 7 (Fla. 3rd DCA 2008)(noting that rules such as 69O-191.049(2) “carry with them the force of law.”); Canal Ins. Co. v. Cont’l Casualty Co., 489 So. 2d 136, 137 (Fla. 2d DCA 1986)(stating that the rules of the Public Service Commission “have the force and effect of a statute.”).

As explained in the following sections, the Commission’s cavalier disregard of its own rule was a material error in procedure that deprived the Division of due process.

B. The Commission Deprived the Division of Due Process.

After the conclusion of the formal administrative hearing, Ms. Helton filed an Exception asserting mitigating circumstances justified a reduction of ALJ Quattlebaum’s recommended penalty of revocation. For example, Ms. Helton claimed that her violations did not result in harm to the Browns. She also claimed

that revocation of her licenses would amount to an undue financial hardship. As explained below, Ms. Helton avoided any risk of her mitigating circumstances being undermined by the Division. By allowing her to do so, the Commission deprived the Division of due process.

The Division and a licensee subject to discipline can disagree over the presence of aggravating or mitigating circumstances. Accordingly, Rule 61J2-24.001(4)(a) requires that if the Division and a licensee are in a formal administrative hearing, then aggravating and mitigating circumstances must be presented to the administrative law judge and proven by clear and convincing evidence. That requirement is eminently logical because agencies such as the Commission do not resolve factual disputes between parties. Instead, an administrative law judge acts as an agency's impartial finder of fact in formal administrative proceedings conducted pursuant to section 120.57(1) of the Florida Statutes.⁴

⁴ See Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)(noting that "[f]actual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact. It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.")(internal citation omitted).

By circumventing ALJ Quattlebaum and presenting her mitigating circumstances to the Commission, Ms. Helton avoided cross-examination by the Division and any possibility of the Division presenting rebuttal evidence and/or testimony. Moreover, the Commission's decision to allow this travesty materially prejudiced the Division. If the Division had been on notice that the Commission would violate Rule 61J2-24.001(4)(a) and entertain Ms. Helton's assertion that her admitted violations had not harmed the public, then the Division could have brought the Browns to the Commission meeting and elicited testimony about the amount of harm they suffered. As for Ms. Helton's assertion that revocation of her real estate licenses would amount to an undue financial hardship, the Division could have conducted discovery and ascertained if Ms. Helton has other sources of income. Indeed, it is quite likely Ms. Helton has other sources of income and that the Division could have undermined her financial hardship claim because Ms. Helton has not requested that the five-year suspension of her real estate licenses be stayed.

Administrative agencies such as the Division are entitled to due process. See generally Dep't of Fin. Serv. v. Mistretta, 946 So. 2d 79, 80 (Fla. 1st DCA 2006)(holding that "the ALJ, who *sua sponte* raised and decided the issue of default after the final hearing without giving the parties an opportunity to present evidence and/or argument, departed from the essential requirements of the law by

denying DFS due process, for which the remedy of appeal following the conclusion of the administrative proceedings will be inadequate.”)(emphasis in original). As demonstrated in this section, the Commission’s failure to follow the procedure prescribed in Rule 61J2-24.001(4)(a) was a material error that deprived the Division of due process.

If the Court has any doubt that the Division was denied due process, then it should consider what Ms. Helton would be arguing if the Division had presented aggravating circumstances to the Commission without proving them by clear and convincing evidence to ALJ Quattlebaum. Undoubtedly, she would be arguing that the Division and the Commission were conspiring to deprive her of due process and her livelihood.

In short, if the Division must follow Rule 61J2-24.001(4)(a), then due process and basic fairness require that licensees such as Ms. Helton should as well. Accordingly, this Court must remand for further proceedings. See §120.68(7)(c), Fla. Stat. (2013)(mandating that the Court “shall remand a case for further proceedings” if “[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure.”).

C. The Commission Rendered ALJ Quattlebaum's Penalty Recommendation Meaningless.

While agencies with final order authority generally have the final word on penalties, the Florida Legislature clearly intends for an administrative law judge's penalty recommendation to be meaningful. Indeed, an agency may not reduce or increase an administrative law judge's penalty recommendation "without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action." See §120.57(1)(I), Fla. Stat. (2013). If real estate licensees are allowed to circumvent Rule 61J2-24.001(4)(a) and present mitigating circumstances to the Commission with no prior review by an administrative law judge, then the administrative law judge's penalty recommendation will become a meaningless exercise, and that is clearly at odds with section 120.57(1)(I). See generally Greene v. Clemens, 98 So. 3d 791, 793 (Fla. 1st DCA 2012)(noting that "[i]t is a fundamental principle of statutory interpretation that legislative intent is the 'polestar' that guides a court's interpretation of a statute. Courts endeavor to construe statutes to effectuate the intent of the legislature.")(internal citations omitted).

D. ALJ Quattlebaum's Recommendation of Licensure Revocation Was Justified Under the Circumstances.

ALJ Quattlebaum's penalty recommendation was certainly justified given the circumstances of the instant case. For instance, the 2010 version of the Commission's disciplinary guidelines rule (Rule 61J2-24.001) provided that first violations of sections 475.25(1)(b) and 475.25(1)(d)1 were punishable by revocation. (R1 at 185.)

In addition, Ms. Helton's reprehensible conduct is completely at odds with the position of trust real estate professionals hold in our society. For instance, Ms. Helton claimed she withheld rental payments from the Browns because they owed her for money allegedly spent acquiring furnishings or household items for the property. However, the Browns gave her \$3,500 to repair the property. When Ms. Helton attempted to account for how she spent the aforementioned sum, ALJ Quattlebaum found that the invoice she provided had been fabricated and that her testimony was unbelievable:

31. [Ms. Helton] offered no credible evidence in support of the testimony and no credible accounting of the funds she received for the Santa Clara property on behalf of the Browns.

32. At the hearing, [Ms. Helton] offered an invoice from "1010 Condo Cleaning" for \$2,134.50, dated September 8, 2010, which had a payment due date of September 8, 2010.

33. "1010 Condo Cleaning" is an entity operated by [Ms. Helton]'s sister.

34. A printed statement on the invoice declared that it had been paid by [Ms. Helton]'s company, 1010 Apartments, Inc., clearly indicating that the invoice had already been paid prior to the time the invoice was actually printed. However, notwithstanding the due and paid dates on the invoice, six of the 12 charges on the invoice were for charges allegedly incurred after the date of the invoice, one as late as October 31, 2010. Additionally, the invoice reflected charges for repairs that had been listed on the September 2, 2010, estimate, which the Browns had already paid.

35. [Ms. Helton]'s testimony as to funds she allegedly spent to acquire furnishings or household items for the Santa Clara property lacked credibility, was otherwise unsupported by evidence, and has been rejected. [Ms. Helton] failed to account for the funds she received from the Santa Clara tenant's employer prior to January 21, 2011.

(R1 at 181-182.)

In all likelihood, Ms. Helton pocketed the Browns' \$3,500 and never spent a dime on the Santa Clara property.

Moreover, ALJ Quattlebaum found that Ms. Helton was leasing the Santa Clara property without the Browns' knowledge and pocketing the rental payments from the employment agency:

36. The evidence clearly establishes that [Ms. Helton] leased the Santa Clara property to a tenant without advising the property owners that she had done so and that [Ms. Helton] collected rent from the tenant's employer without accounting to the property owners for the rental payments.

37. At the hearing, [Ms. Helton] asserted that she had expended funds on behalf of the property owners and that she was entitled to retain rental payments she collected from the

tenant's employer. [Ms. Helton] offered no credible documentation of, or accounting for, her alleged expenditures, and her claim has been rejected.

(R1 at 184.)

Because they often handle their clients' money, real estate professionals must be trustworthy. See generally Dep't of Prof'l Regulation, Div. of Real Estate v. Weiss, 1993 WL 943720, *4 (DOAH 1993)(describing how the Respondent failed to maintain a sufficient balance in his escrow account after accepting a \$3,000 earnest money deposit and noting that "[t]he Respondent, as the real estate broker for the real estate transaction, was in a position of trust."). The findings of fact set forth above demonstrate Ms. Helton abused the Browns' trust and stole money that belonged to them. Therefore, she lacks the moral character required of real estate professionals, and licensure revocation is the only action that will ensure she never uses a real estate license to defraud other unsuspecting clients.

CONCLUSION

The Division requests that this Honorable Court remand the instant case and direct the Florida Real Estate Commission to reconsider the penalty imposed on Ms. Helton while disregarding the mitigating circumstances that were previously presented to the Commission in violation of Rule 61J2-24.001(4)(a).

Respectfully submitted on this the 27th day of November 2013.



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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to Daniel Villazon, Esquire; 1420 Celebration Boulevard, Suite 200 and dvillazon@yahoo.com via electronic mail on this the 27th day of November 2013.



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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).


Garnett W. Chisenhall

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