

FILED 10/28/14 (Date)
IA Real Estate Commission
Board / Commission
Joni A. Bright
Signature, Executive Officer

BEFORE THE REAL ESTATE COMMISSION
OF THE STATE OF IOWA

IN THE MATTER OF

CASE NO. 13-279

ROBERT J. BEMBENEK
Broker (B36418000)

DIA NO. 14REC004

Creative Consulting Real Estate, LLC
210 2nd Street SE #222
Cedar Rapids, IA 52401

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DECISION AND ORDER

Respondent

On September 5, 2014, the Iowa Real Estate Commission (Commission) found probable cause to file a Notice of Hearing and Statement of Charges against Robert J. Bembenek (Respondent). The Statement of Charges alleged that Respondent engaged in practices harmful or detrimental to the public, failed to diligently exercise reasonable skill and care in providing brokerage services to all parties, and/or failed to disclose to each party all material adverse facts known, in violation of Iowa Code sections 543B.29(1)(c)&(d), 543B.34, 543.56 (1)(a)-(c)(2013) and 193E IAC 12.4(2) and 18.14(5)(s).

The hearing was held on October 2, 2014. Respondent Robert J. Bembenek appeared and was represented by attorney James Affeldt. Assistant Attorney General John Lundquist represented the state of Iowa. The following Commission members presided at the hearing: Terry Duggan, Broker, Chairperson; John Goede, Broker; Janet DeMott, Salesperson; and Michael Telford and Carol Haines, public members. Administrative Law Judge Margaret LaMarche assisted the Commission in conducting the hearing. A certified court reporter recorded the proceedings. The hearing was closed to the public at Respondent's request, pursuant to Iowa Code section 272C.6(1)(2013).

After hearing the testimony and examining the exhibits, the Commission convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f)(2013), to deliberate its decision. The Commission instructed the administrative law judge to draft Findings of Fact, Conclusions of Law, Decision and Order, in conformance with their deliberations.

THE RECORD

The record includes the state's Prehearing Conference Report; the testimony of Investigator Sandy Malek; Robert Bembenek; John Stark; Megan Hart Fernandez; Manuel Montelongo; State Exhibits 1-13 and Respondent Exhibits A-W (See Exhibit Indexes for description).

FINDINGS OF FACT

Respondent's Licensing and Disciplinary History

Respondent was initially licensed in Iowa as a real estate salesperson in September 1995, and he has been licensed as a real estate broker associate (B36418000) since July 8, 2009. At all times relevant to this matter, Respondent was a licensed real estate broker associate assigned to Creative Consulting Real Estate, LLCA-1 Real Estate Services, a licensed real estate firm (F06548000) in Cedar Rapids, Iowa. Respondent's supervising broker is Jennifer Moen. Respondent was previously disciplined by the Commission (Case No. 08-135) for entering into a property management agreement without the written authorization of his employing broker. (Testimony of Sandy Malek; Respondent; State Exhibits 2-4)

Respondent's Involvement as a Broker Associate in the Sale/Purchase of 2622 Westwood Drive in Cedar Rapids

This disciplinary case concerns Respondent's involvement as a broker associate in the sale of a home located at 2622 Westwood Drive NW in Cedar Rapids, Iowa. The home was jointly owned by Megan Hart-Fernandez (a/k/a Megan Hart and Megan Fernandez) and Nicholas O'Toole. Ms. Hart-Fernandez and Mr. O'Toole have been divorced since February 9, 2010. Their divorce decree required them to sell the home, with the net proceeds (or debts) from the sale of the property to be equally divided between the two of them. Ms. Hart-Fernandez was allowed to remain in the home pending its sale so long as she made the necessary mortgage, utility and insurance payments. If Ms. Hart-Fernandez moved out of the home, then Mr. O'Toole would have the option to reside there so long as he paid the home's expenses. (Testimony of Sandy Malek; State Exhibits 3-5; Respondent Exhibit A).

Prior to Respondent's involvement, the home had been listed for sale for \$164,900 with another realtor off and on for a period of two years. The prior listing expired without the house being sold. (Respondent testimony; State Exhibit 5; Respondent Exhibits A,

B) In late fall of 2012, Megan Hart-Fernandez contacted Respondent to request his assistance in the sale of the home. Ms. Hart-Fernandez was referred to Respondent by her father, who knew Respondent because they had served together on an Advisory Board. (State Exhibit 5; Respondent Exhibit B; Testimony of Respondent, Megan Hart-Fernandez)

Purchase/Sale Contract with Edgar Barrios

Megan Hart-Fernandez explained to Respondent that she wanted to be able to keep the home because she had been making all of the payments for the mortgage, insurance, taxes, and maintenance for the home since the time of the divorce. Nevertheless, Ms. Hart-Fernandez also told Respondent that she had someone, Edgar Barrios, who was now interested in purchasing the home. Hart-Fernandez asked Respondent if he would be willing to prepare the necessary documents for Mr. Barrios to purchase the home. Respondent agreed to do so for a flat fee of \$1000. Ms. Hart-Fernandez then told Respondent that she would run it past Mr. O'Toole, who was represented by his own attorney. (State Exhibit 5; Testimony of Respondent; Megan Hart-Fernandez)

At hearing, Respondent explained that he knew Edgar Barrios as a business owner in Cedar Rapids and had previously assisted Mr. Barrios with a business lease. It was Respondent's understanding that Mr. Barrios intended to purchase the home in order to rent it out. (Respondent testimony)

On January 7, 2013, Respondent prepared a Purchase/Sale Contract for Edgar Barrios to purchase the home for a sale price of \$144,900, with a \$500 earnest money payment and a closing date of January 31, 2013. The purchase agreement also included a provision for the sellers to pay Mr. Barrios \$1800 for repairs. Both Mr. Barrios and Megan Hart-Fernandez signed the Purchase/Sale Contract on January 8, 2013. Megan Hart-Fernandez signed the contract as "Megan Hart," but she also wrote "Megan Hart-Fernandez" on the line designated for her legal name. (State Exhibit 6; Respondent Exhibit D)

Nicholas O'Toole, through his attorney Yara Halloush, responded to the Barrios offer with a counter-offer. Mr. O'Toole's counter offer included a purchase price of \$153,000 with the buyer to pay half of the closing costs of \$1,650. Mr. O'Toole refused to pay Barrios \$1800 for repairs unless Barrios provided third-party cost estimates for the necessary repairs. (Respondent Exhibits D, E)

After some further negotiations, the parties eventually agreed on a purchase price of \$151,500, with Barrios to pay half of the closing costs up to \$900. The Purchase/Sale Contract later fell through, however, after Mr. Barrios had a change in his personal circumstances. After this purchase agreement fell through, Ms. Hart Fernandez told Respondent that she was still interested in selling the property. Respondent suggested to her that she should sell the house as a For Sale By Owner (FSBO). (Testimony of Respondent, Megan Hart-Fernandez; State Exhibits 5, 6; Respondent Exhibits D-F)

Purchase/Sale Contract with Manuel Montelongo

Megan Hart-Fernandez and Manuel Montelongo were married in Mexico on May 22, 2010. In September 2011, they filed paperwork for their marriage to be recognized in the United States. Manuel Montelongo's legal name is Manuel Fernandez Montelongo, but he is also known by the names of Manuel Fernandez, Manuel F. Montelongo, and Manuel Montelongo. After they were married, Megan began using "Fernandez" as her last name. She primarily went by "Megan Hart" in her work as a nurse practitioner, however, because her nursing licenses are still in that name. (Testimony of Respondent, Megan Hart-Fernandez, Manuel Montelongo)

According to Manuel Montelongo and Megan Hart-Fernandez, Nicholas O'Toole had been uncooperative with Megan's prior attempts to sell or refinance the home. Ms. Hart-Fernandez testified that Mr. O'Toole had refused her offer to give him a quit claim deed to the property or to pay him \$7500 to sign a quit claim deed. Mr. Montelongo testified that Edgar Barrios was a friend of his who was going to buy the house "just to get it over with." Since Mr. O'Toole had been willing to sell the home to Mr. Barrios for \$151,500 before the deal fell through, Mr. Montelongo decided that he should try to purchase the home. Mr. Montelongo owns other rental properties. (Testimony of Megan Hart-Fernandez, Manuel Montelongo)

Respondent reports that Manuel Montelongo contacted him in March 2013 and expressed his interest in buying the home on Westwood Drive NW. According to Respondent, Edgar Barrios introduced him to Mr. Montelongo. Respondent has denied that he knew that Montelongo's marriage was married to Megan Hart-Fernandez until the first part of May 2013. Mr. Montelongo did testify, however, that it was Megan who introduced him to Respondent. Megan Hart-Fernandez testified that she did not tell Respondent that she was married to Manuel Montelongo, and she believes that he did not know they were married until May 2013. (Testimony of Respondent; Manuel Montelongo; Megan Hart-Fernandez; State Exhibit 5)

Ms. Hart-Fernandez further testified that Mr. Montelongo was going to be the buyer of the property and she did not initially plan to have any involvement with the loan. Mr. Montelongo contacted the University of Iowa Community Credit Union (UICCU) to arrange his financing. Felisha Junge was the mortgage loan officer and contact person at UICCU. After Ms. Junge had conducted the background check for the loan, however, she asked Megan if she was married to Mr. Montelongo. Ms. Hart-Fernandez admitted to Ms. Junge that they were married. Ms. Hart-Fernandez then agreed to co-sign the loan for the property when Manuel was unable to qualify for the loan on his own. (Testimony of Megan Hart-Fernandez)

On March 4, 2013, Respondent prepared a Purchase/Sale Contract for the property at 2622 Westwood Drive NW. The contract indicated that Respondent was only representing the buyer, who intended to take title to the property "as a single person." The contract provided for a purchase price of \$151,000, with \$500 in earnest money. The contract also stated that the buyer(s) has credit approved at UICCU with Felisha Junge as the loan originator. The initial contract had a closing date of March 28, 2013. The sellers were to pay up to \$900 toward buyers closing costs and "prepaids." (State Exhibit 8; Respondent Exhibit G)

On March 6, 2013, Respondent sent an email to Felisha Junge at UICCU and asked:

Can you provide me a letter of pre-approval for Mr. Mobtelongo (sic) and Megan to purchase the subject property. I need something to "prove" to the seller(s), one represented by an attorney, that we are legit.

I need to submit it along with the new purchase contract. I do not have signed copies yet, but hope to have them today. See attached details for now.

(State Exhibit 9-3, 9-4; Respondent Exhibit W)

Manuel Montelongo signed the March 4, 2013 Purchase/Sale Contract as the Buyer on March 9, 2013. On March 10, 2013, "Megan Hart" signed the Purchase/Sale Contract as one of the Sellers. Right below her signature, she wrote "Megan Renee Hart" on the line designated for her legal name. Although Respondent knew that her name was now Fernandez, he did not question the manner in which she signed the contract. (State Exhibit 8; Respondent Exhibit G; Testimony of Respondent)

Respondent also prepared an "Agency Disclosure and Acknowledgment Form," which was signed by Manuel Montelongo as the Buyer on March 9, 2013 and was then signed by "Megan Hart" as the Seller on March 10, 2013. (Exhibits H, I) Respondent also prepared a Consensual/Dual Agency Agreement, which was signed by Manuel Montelongo on March 9, 2013 and by "Megan Hart" on March 10, 2013.¹ Respondent testified that after Megan signed the Dual Agency Agreement on March 10, 2013, he was representing both Manuel as the buyer and Megan as one of the sellers. Item A on the Agency Disclosure and Acknowledgment Form states that in a Consensual/Dual Agency "Our Company will not aggressively represent the interest of either the Buyer or the Seller to the detriment of the other." Item C states "...Our company must disclose other matters as required by law...or other matters affecting property value or desirability." (State Exhibit 7, Respondent Exhibit J; Testimony of Respondent; Megan Hart-Fernandez).

On March 15, 2013, Respondent sent a follow-up to his March 6th email asking Felisha Junge for a "letter of pre-approval for Mr. Mobtelongo (sic) and Megan to purchase the property." Respondent's follow-up email simply asked "Anything yet??" Ms. Junge responded "Yes they are fine. So I will get everything submitted and start working on getting to closing. Thank you!" (State Exhibit 9-3; Respondent Exhibit W)

On March 18, 2013, Respondent forwarded the emails between himself and Felicia Junge to O'Toole's attorney, Yarra Halloush with the following message:

Hello Yarra, here is the status from the Buyers Lender. Looks like we're ready to proceed for closing this month yet...Can you please get Mr. O'Toole's signed documents back to me asap?

(State Exhibit 9-2 to 9-3; Respondent Exhibit W)

On March 19, 2013, Ms. Halloush replied to Respondent. Her email states, in relevant part:

Before my client will agree (sic) to sign any documents he has a few questions...The initial purchase offer was from a "Mr Barrios". The current offer seems to be from a completely different individual, "Mr. Mobtelegro." Your email below indicates that "Megan and Mr. Mobtelegro" are the buyers...My client will not proceed with a sale that is

¹ Nicholas O'Toole did not sign the Purchase/Sale contract or the Consensual Dual Agency Agreement until May 1, 2013. (Exhibits 7, 8)

clouded by secrecy. Please fully disclose the identity of the proposed purchaser of the house including whether such purchaser has any relationship to Megan, including through marriage.

Please also clarify which parties you personally represent, and the nature of such representation...I will forward your responses to my client upon receipt of same.

(State Exhibit 9-2; Respondent Exhibit W)

At hearing, Respondent testified that at the time he received Ms. Halloush's email on March 19, 2013, he did not know if Manuel and Megan were married, and he did not ask them. Respondent testified that in his opinion, he had no professional obligation to find out if they were married or to report this type of information to Nicholas O'Toole and his attorney. Respondent testified that he considered this to be an illegal question, similar to asking the race or sexual orientation of a buyer. (Testimony of Respondent)

Megan Hart-Fernandez testified that Respondent forwarded the email to her from her ex-husband's attorney, who wanted to know the nature of her relationship with Manuel Montelongo. Ms. Hart-Fernandez testified that she told Respondent that she preferred not to say and that she did not think that it was relevant. She also testified that she told the Respondent that her ex-husband had stalked her and she did not want him to know "anything about anybody that I have anything to do with."² (Testimony of Megan Hart-Fernandez)

Respondent replied to Yarra Halloush by email on March 19, 2013. Respondent's email states in relevant part:

... I apologize if I've created a misunderstanding...Let me explain. Megan Hart-Fernandez is NOT one of the buyers. I misstated that earlier...The original buyer, Edgar Barrios, ultimately could not qualify....Meanwhile, another Buyer, referred by Mr. Barrios, was interested in, became willing and able to purchase and qualified for same...All this took time. So now, the only legitimate Buyer is Mr. Mobtelongo...Feel free to contact the Lender for further clarification if needed...Again I am sorry for the confusion. I had been from time to time myself on this transaction, but

² At hearing, Ms. Hart-Fernandez also testified that she believed that her ex-husband knew about her marriage prior to March 2013 from reviewing public records and Facebook. She did not testify that she shared this belief with Respondent, however. (Testimony of Megan Hart-Fernandez)

now seem to have all sorted out to proceed to closing...Can I assume Mr. O'Toole is interested in selling and getting this chapter behind him?

(State Exhibit 9-1; Respondent Exhibit W)

Respondent then sent Ms. Halloush another email on March 20, 2013, which states:

Hello again, in reading further I understand you are asking which parties I represent...I am representing Mrs. Fernandez as part of the Seller as you are representing Mr. O'Toole as the other Seller...I am also representing Mr. Montelongo as the Buyer who replaced Mr. Barrios. Mr. Montelongo was referred to me once he realized that he was no longer qualified to purchase himself. Thus the need for the Dual Agency Disclosure in this matter. Thus the mention of both in reference to the Lender. Let me reassure you that only Mr. Montelongo is the only qualified Buyer in this matter...

Respondent's email also included further explanation of the broker's fee that he was requesting for himself and the closing costs. Respondent initially requested a 4% broker fee, which was later reduced to a \$2500 flat commission. Respondent suggested that if Ms. Halloush was willing to prepare the deed, then the lender's fees could be further reduced. (State Exhibits 5, 10; Respondent Exhibit W)

On April 29, 2013, a \$500 earnest money check was written to Creative Consulting on the account of Manuel Fernandez. (State Exhibit 8-5) Respondent testified that this earnest money check went straight to the broker's account, and he did not get a copy of the check for his file until the time of the closing. (Testimony of Respondent)

Nicholas O'Toole signed the Purchase/Sale Agreement and the Consensual Dual Agency Agreement on May 1, 2013. (State Exhibit 8; Respondent Exhibit G) Respondent admits that he knew that Megan and Manuel were married after O'Toole signed the contract but prior to the closing. When asked about this at hearing, Respondent testified that he found out that they were married in the "first part of May" when he spoke to Felisha Junge about the financing and found out that Manuel had to have the loan co-signed by his wife. In his written response to the Commission's investigator, Respondent stated that by the time he found out they were married, Ms. Fernandez was extremely fearful that her ex-husband would "somehow sabotage" the purchase/sale contract. Respondent admits that he never told Nicholas O'Toole or his

attorney that Megan and Manuel were married. (State Exhibits 5, 6; Testimony of Respondent)

The sale of the property closed on May 29, 2013. Yara Halloush prepared the Warranty Deed for the property, which was dated May 29, 2013. The Warranty Deed described the sellers as Nicholas O'Toole (a/k/a/ Nicholas L. O'Toole & Nicholas Lee O'Toole) and Megan Renee Hart Fernandez (f/k/a Megan Renee Hart and Megan Renee O'Toole). The buyer was described as "Manuel Montelongo, A Single Person." (State Exhibits 8, 11; Respondent Exhibits Q, R, S, T, U, V)

Manuel Montelongo and Megan Renee Hart-Fernandez were named as the borrowers on the HUD-1 Acknowledgment and HUD-1 Settlement Statement, which were dated May 29, 2013. The Settlement Statement provided the same address (2622 Westwood Dr. NW in Cedar Rapids, Iowa) for both Megan and Manuel. Respondent testified that he did not see the HUD-1 Acknowledgment and Settlement Statement until the day of the closing. (Respondent Exhibit U; Testimony of Respondent)

At hearing, Ms. Fernandez-Hart explained that she is currently working as a nurse practitioner in Cedar Rapids and in Ottumwa. When she is in Cedar Rapids, Ms. Hart-Fernandez lives in the house on at 2622 Westwood Drive NW. (Testimony of Megan Hart-Fernandez)

Peer Review Report

John Stark is a licensed real estate broker who has been a peer reviewer for the Commission for the past four years. Mr. Stark is a Managing Broker with Coldwell Banker and has personally handled 250 real estate sales transactions in the last ten years. In conducting the peer review for this case, Mr. Stark reviewed the correspondence and documents gathered by the Commission's investigator concerning the sale of 2622 Westwood Drive NW in Cedar Rapids. Mr. Stark spoke briefly to Nicholas O'Toole's attorney and asked when she received the HUD-1 Settlement Statement. Ms. Halloush told Mr. Stark that she had to ask Respondent for the HUD-1 several times after the closing. (Testimony of John Stark; State Exhibit 12)

John Stark prepared a Peer Reviewer Report, which is dated August 6, 2014. In the opinion of Mr. Stark, Respondent failed to provide brokerage services to all parties honestly and in good faith and failed to diligently exercise reasonable skill and care in providing brokerage services to all parties. In his opinion, the fact that Megan Hart-Fernandez was married to Manuel Montelongo was a material adverse fact, which

Respondent should have disclosed to Nicholas O'Toole. The marriage was a material adverse fact because ultimately Ms. Hart-Fernandez would benefit from either a higher sales price, which she would split with Mr. O'Toole, or from a lower price, which would benefit her and her current husband. (Testimony of John Stark; State Exhibit 12)

Based on the information that he reviewed, John Stark was skeptical of Respondent's claim that he did not know that his clients were married to each other when O'Toole's attorney requested information about their relationship. He points out that it is a standard of practice to ask about marital status when writing an offer and to explain joint tenancy law in Iowa. Nevertheless, even if Respondent had not known that they were married, Mr. Stark concluded that Respondent was ethically obligated to ask them about the nature of their relationship after Mr. O'Toole's attorney specifically requested this information. Ms. Hart-Fernandez' statement to Respondent that she did not want the sale "sabotaged" should have alerted Respondent to a heightened sense of diligence. Mr. Stark also concluded that Respondent failed to diligently exercise reasonable skill and care in providing brokerage services when he failed to deliver a signed HUD-1 in a timely manner. (Testimony of John Stark; State Exhibit 12)

CONCLUSIONS OF LAW

Respondent is charged with engaging in practices harmful or detrimental to the public, with failing to diligently exercise reasonable skill and care in providing brokerage services to all parties, and/or with failing to disclose to each party all material adverse facts known, in violation of Iowa Code sections 543B.29(1)(c)&(d), 543B.34, 543.56 (1)(a)-(c)(2013) and 193E IAC 12.4(2) and 18.14(5)(s). Specifically, it was alleged that Respondent failed to disclose to the seller and the seller's attorney information known by him relating to the person(s) purchasing the subject property, despite a specific inquiry by the seller's attorney before the time of entering into the purchase agreement.

Iowa Code section 543B.29 provides, in relevant part:

A license to practice the profession of real estate broker or salesperson may be revoked or suspended when the licensee is guilty of any of the following acts or offenses:

...

- c. Professional incompetency.
- d. ...engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.

Iowa Code section 543B.34 authorizes the commission to suspend or revoke a license issued under Iowa Code chapter 543B for the following reasons:

h. Being unworthy or incompetent to act as a real estate broker or salesperson in such manner as to safeguard the interests of the public.

...

k. Any other conduct, whether of the same or different character from that specified in this section, which demonstrates bad faith, or improper, fraudulent, or dishonest dealings which would have disqualified the licensee from securing a license under this chapter.

Iowa Code section 543B.56(1) provides, in relevant part:

1. *Duties to all parties in a transaction.* In providing brokerage services to all parties to a transaction, a licensee shall do all of the following:

a. Provide brokerage services to all parties to the transaction honestly and in good faith.

b. Diligently exercise reasonable skill and care in providing brokerage services to all parties.

c. Disclose to each party all material adverse facts that the licensee knows except for the following:

(1) Material adverse facts known by the party.

(2) Material adverse facts that the party could discover through a reasonably diligent inspection, and which would be discovered by a reasonably prudent person under like or similar circumstances.

(3) Material adverse facts the disclosure of which is prohibited by law.

(4) Material adverse facts that are known to a person who conducts an inspection on behalf of the party.

193E IAC 12.4(2). *Duty to seller or landlord.* A licensee acting as an exclusive buyer's or an exclusive tenant's agent shall disclose to any customer all material adverse facts actually known by the licensee, pursuant to Iowa Code section 543B.56.

193E IAC 18.14(5)(s) provides, in relevant part:

18.14(5) *Violations for which civil penalties may be imposed.* The following is a nonexclusive list of violations for which a civil penalty may be imposed:

...

s. Violating any of the remaining provisions in 193E-Chapters 1-20 inclusive, which have not heretofore been specified in this rule.

It is undisputed that Respondent knew, prior to the closing on May 29, 2013, that Megan Hart-Fernandez and Manuel Montelongo were a married couple. Respondent also knew that Megan was financially involved in the purchase of the property as the co-signer of the loan for her husband. There is also persuasive circumstantial evidence that Respondent was aware, as early as March 2013, that Megan and Manuel had a personal relationship and that Megan's involvement in the real estate transaction was not limited to her role as a seller. On March 6, 2013, three days before Manuel Montelongo signed the Purchase/Sales Contract and 3-4 days before Manuel and Megan each signed the Consensual Dual Agency Agreement, Respondent sent an email to the mortgage loan officer asking for a "letter of pre-approval for Mr. Mobtelongo (sic) and Megan to purchase the subject property." Respondent was unable to provide any credible explanation for the wording of his email, which conveys the clear impression that Megan was involved financially in the *purchase* of the property. The clear implication of Respondent's email appears to be confirmed when the mortgage loan officer responds "Yes *they* are fine. So I will get everything submitted and start working on getting to closing."

Upon seeing these emails, Mr. O'Toole's attorney pointedly asked Respondent to "fully disclose the identity of the proposed purchaser of the house including whether such purchaser has any relationship to Megan, including through marriage." Respondent replied that "Megan Hart-Fernandez is NOT one of the buyers. I misstated that earlier...the only legitimate Buyer is Mr. Mobtelongo." In a second email, Respondent stated that he was representing "Mrs. Fernandez as part of the seller as you are representing Mr. O'Toole as the other seller." He further stated that he was representing Mr. Montelongo as the Buyer who replaced Mr. Barrios" and claimed that this was why he mentioned both in reference to the lender. Finally, Respondent stated "Let me reassure you that only Mr. Montelongo is the only qualified Buyer in this matter."

Respondent did not respond to the question put to him about the relationship between Megan and Manuel. Respondent claimed that he was justified in not answering the question or making any inquiry of his clients because their relationship, if any, was not material to the transaction and because it was illegal to ask about the buyer's marital status. Given the specific circumstances of this particular transaction, the Commission disagrees.

Mr. O'Toole and his attorney obviously believed that information about the relationship between Ms. Hart-Fernandez and Mr. Montelongo was material to his decision whether

to proceed with the transaction, and this belief was clearly expressed in his attorney's email to Respondent. This is not a case where a seller is making generic and unjustified inquiries about the marital status of buyers for purposes of discrimination. As pointed out by the peer reviewer, when an individual is both the co-seller of property and the spouse of the person purchasing the property, the person has the potential to benefit financially regardless of the price or terms of the sale. In this case, the marriage relationship was clearly a material adverse fact, Respondent was specifically asked for this information, and Respondent owed Mr. O'Toole a duty to provide the answer.

If Respondent truly did not know the answer to the question, he could have easily obtained the answer by asking his clients. Based on Ms. Hart-Fernandez' undisputed testimony, it appears that Respondent did speak to Ms. Hart-Fernandez and her response to him should have prompted him to ask further questions about their relationship. Moreover, there is no question that Respondent knew weeks prior to closing that Ms. Hart-Fernandez and Mr. Montelongo were married and that Ms. Hart-Fernandez was co-signing the loan for Mr. Montelongo. Respondent admits that he knew this in early May, prior to the closing, but did not tell Mr. O'Toole or his attorney because Ms. Hart-Fernandez asked him not to because she was afraid that the information would sabotage the sale. Respondent specifically chose not to disclose the information because he wanted the sale to go through. He asserts that this was reasonable because the purchase price was fair, the sellers were dividing the proceeds equally, and Mr. O'Toole had signed the purchase agreement on May 1st without insisting on receiving an answer to the question about their relationship. While these may be mitigating factors, they do not negate the fact that Respondent had an ethical and statutory duty to disclose the material adverse fact that was known to him (the marriage of the buyer and seller that he represented) and was specifically requested from him.

Respondent had specific duties to all parties to the transaction, regardless of whether they were his clients. These included the duty to provide his brokerage services to all parties honestly and in good faith, the duty to diligently exercise reasonable skill and care, and the duty to disclose all material adverse facts known to him unless those facts are already known by the other party. Iowa Code section 543B.56(1)(a)-(c). Respondent's handling of this transaction violated all of these duties.


DECISION AND ORDER

IT IS THEREFORE ORDERED that within thirty (30) days of the issuance of this Decision and Order, Respondent Robert Bembenek shall pay a civil penalty of two thousand dollars (\$2000).

IT IS FURTHER ORDERED that within one (1) year of the issuance of this Decision and Order, Respondent must provide written verification of his completion of the following hours of continuing education: 12 hours of Developing Professionalism and 8 hours of Real Estate Law and Agency Law. These hours of continuing education shall be in addition to the continuing education hours required for license renewal.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6 and 193 IAC 7.41, that Respondent shall pay \$75.00 within thirty (30) days of receipt of this decision for fees associated with conducting the disciplinary hearing. If the Commission issues a separate order assessing additional costs or expenses, the Respondent shall promptly comply with the terms of that order.

Dated this 28th day of October, 2014.


Terry Duggan, Chairperson
Iowa Real Estate Commission

cc: James Affeldt
316 Second Street SE, Suite 124
P.O. Box 1968
Cedar Rapids, IA 52406-1968 (CERTIFIED)

John Lundquist
Assistant Attorney General
Hoover State Office Building (LOCAL)

Judicial review of the commission's action may be sought in accordance with the Iowa administrative procedure act, from and after the date of the commission's order. Any judicial review petition must be filed with the district court within 30 days after the issuance of the commission's final decision. 193 IAC 7.37.