

NEW JERSEY REAL ESTATE COMMISSION

NEW JERSEY REAL ESTATE	)	Docket No.: REC-E-22-004
COMMISSION,	)	(REC Ref No.: 10013827)
	)	
Complainant,	)	
v.	)	FINAL DECISION AND ORDER
	)	
JOHN PAGANO, licensed New Jersey	)	
real estate salesperson (Ref. No. 1536486),	)	
	)	
Respondent.	)	
	)	

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**THIS MATTER** was heard at a plenary hearing by the New Jersey Real Estate Commission (“Commission”) by video conference in accordance with P.L. 2020, c. 11 on November 15, 2022.<sup>1</sup>

**BEFORE:** Commissioners Eugenia K. Bonilla, William Hanley, Erin Brown, Denise M. Illes, Carlos Lejnieks, Gabrielle Liguori, and Robert Oppenheimer.

**APPEARANCES:** Jacqueline Dilks-Brotman, Regulatory Officer (“RO Dilks-Brotman”), appeared on behalf of the New Jersey Real Estate Commission staff (“REC”). John Pagano (“Respondent”) did not appear.

**STATEMENT OF THE CASE**

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated May 2, 2022, pursuant to N.J.S.A. 45:15-17, N.J.S.A. 45:15-18, and N.J.A.C. 11:5-1.1 to -12.18.

The OTSC seeks to revoke the Respondent’s real estate salesperson license and impose a civil monetary penalty for violations of the Real Estate Brokers and Salespersons Act, N.J.S.A.

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<sup>1</sup> The meeting was conducted via Zoom. All those participating participated via Zoom.

45:15-1 to -42 (“Act”). The OTSC alleges that the Respondent engaged in the following activities in violation of the laws of this State:

Count One: The Respondent plead guilty to one count of Theft by Deception, in violation of N.J.S.A. 2C:20-4, after the Respondent, who was acting in his capacity as a volunteer firefighter and treasurer, used checks issued to Green Brook Fire Department (“GBFD”) to make ATM withdrawals amounting to approximately \$244,169.65 to pay personal expenses. The conduct underlying the Respondent’s guilty plea demonstrates unworthiness, bad faith, or dishonesty, in violation of N.J.S.A. 45:15-17(e).

Count Two: The Respondent failed to notify the Commission within 30 days that charges had been filed against him, in violation of N.J.S.A. 45:15-17(s).

On or about May 27, 2022, the Respondent filed an Answer to the OTSC wherein he denied certain allegations set forth in the OTSC and requested a hearing. On June 28, 2022, the matter was deemed contested and scheduled for a hearing before the Commission on September 13, 2022. The matter was rescheduled, by letter dated July 29, 2022, to be heard on November 15, 2022. The July 29, 2022 scheduling letter was properly served by regular and certified mail, return receipt requested, and sent to the Respondent at his home address at 218 Mountain Parkway, Green Brook, New Jersey 08812 and his business addresses at WGLG LLC, Route 22 West, P.O. Box 8127, Bridgewater, New Jersey 08807. The certified mail receipt was signed and returned from both addresses. On November 15, 2022, the Respondent failed to appear at the hearing. RO Dilks-Brotman represented that she had spoken with the Respondent by phone several days before the hearing, at which time the Respondent confirmed that he was aware of the upcoming hearing date and in receipt of the evidence packed prepared by RO Dilks-Brotman. Pursuant to N.J.A.C. 1:1-14.4(d), RO Dilks-Brotman requested permission to submit ex parte proofs, as the Respondent had been properly served and failed to appear. The Commission granted this request.

At the hearing, the following documents were submitted by the REC, and entered into evidence:

- S – 1: New Jersey Department of Banking and Insurance, Real Estate Commission, License Certification with History for John Pagano, dated October 26, 2022;
- S – 2: Complaint-Warrant W 2021 05 1809 in State of New Jersey v. John V. Pagano; New Jersey Courts – Public Safety Inspection, dated March 31, 2021; New Jersey Courts – Criminal and Court History, dated March 31, 2021;
- S – 3: New Jersey State Police Arrest Notification for John V. Pagano, requested March 31, 2021;
- S – 4: Answers to Renewal Qualifying Questionnaire, submitted by John Pagano on June 28, 2021;
- S – 5: Letter from Clark K. Masi to John V. Pagano, dated July 28, 2021;
- S – 6: Correspondence from John Pagano to Clark Masi, dated August 13, 2021;
- S – 7: Memo: Recommendation for PTI Admission in State v. John Pagano, dated December 16, 2021; and,
- S – 8: New Jersey Judiciary Plea Form for John Pagano, dated March 3, 2022.

### **TESTIMONY OF THE WITNESSES**

#### **Mark Wilkening**

Mark Wilkening (“Wilkening”) testified on behalf of the REC. Wilkening stated that he has been employed as a REC investigator for nine months. Prior to joining the REC, Wilkening stated that he served in the United States Air Force for 24 years.

Wilkening testified that the Respondent came to the REC’s attention after his submission of the 2021 Renewal Qualifying Questionnaire (“Renewal Questionnaire”) and receipt of the New Jersey State Police (“NJSP”) Arrest Notification.<sup>2</sup> Wilkening identified Exhibit S-4 as the Respondent’s answers to the Renewal Questionnaire, submitted on June 28, 2021. Wilkening noted that the exhibit indicates the Respondent answered “Yes” to Question One, which asks if

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<sup>2</sup> Wilkening noted that while he was not the original investigator assigned to this case, he reviewed and is familiar with the investigative file.

the licensee has been charged or convicted of a crime during the previous licensing term. Wilkening noted that licensees are required to submit the renewal questionnaire every odd year.

In addition, Wilkening identified Exhibit S-3 as the NJSP Arrest Notification and Exhibit S-5 as a letter dated July 28, 2021, sent to the Respondent following the receipt of the NJSP Arrest Notification by the REC. Wilkening testified that the letter requested the Respondent provide a copy of the criminal charges or police report, a written explanation of the arrest in the licensee's own words and a final court disposition or status of these charges. Wilkening testified that the Respondent submitted a written explanation, dated August 13, 2021, and appearing at Exhibit S-6. Further, Wilkening noted that in the letter, the Respondent admits to using the Green Brook Fire Department ("GBFD") funds to pay his mortgage, car payments and credit card bills between 2015 and 2020. Wilkening noted that this is Respondent's first disciplinary action before the Commission.

### **FINDINGS OF FACT**

Based on the pleadings, the testimony of the witnesses, and the documentary evidence duly admitted into the record, the Commission makes the following findings of fact:

1. The Respondent is an actively licensed real estate salesperson, first licensed in New Jersey on January 5, 2015.
2. The Respondent is licensed with WGLG, LLC located at 1701 Route 22 West, Bridgewater, New Jersey, 08625.
3. The Respondent volunteered as a firefighter in 2014 and served as the treasurer of the GBFD in 2015.
4. Between 2015 and 2020, the Respondent used GBFD funds to write checks and make ATM withdrawals amounting to approximately \$244,169.65 to pay his personal expenses.
5. On or about March 29, 2021, the Respondent was charged with one count Theft by Unlawful Taking, in violation of N.J.S.A. 2C:20-3A and one count of Official Misconduct, in violation of N.J.S.A. 2C:30-2A.

6. The Respondent had 30 days from the date the charges, or until April 28, 2021, to notify the Commission.
7. The Respondent did not timely notify the Commission of the charges filed against him.
8. On or about June 28, 2021, the Respondent submitted his Renewal Questionnaire, disclosing that charges had recently been filed against him.
9. On December 16, 2021, the Respondent was recommended for Pre Trial Intervention by the Somerset County Prosecutor's Office.
10. On or about March 3, 2022, the Respondent completed and submitted a New Jersey Plea Form, which reflected his intent to enter a guilty plea for one count of Theft by Deception, in violation of N.J.S.A. 2C:20-4, in the Superior Court of New Jersey, Somerset County.

### **CONCLUSIONS OF LAW**

In light of the above findings of fact, the Commission makes the following conclusions of law with regard to the charges contained in the OTSC as summarized above:

1. The Respondent violated N.J.S.A. 45:15-17(e), in that the conduct underlying the Respondent's criminal charges demonstrates unworthiness, bad faith, and dishonesty.
2. The Respondent violated N.J.S.A. 45:15-17(s), in that he did not notify the Commission within 30 days of the charges filed against him.

### **DETERMINATION**

At the conclusion of the hearing in this matter, the Commission voted in favor of finding the aforementioned violations and imposing the sanctions described in this Final Decision and Order. In arriving at the determination in this matter, the Commission took into consideration the documentary evidence submitted and the nature of and circumstances surrounding the Respondent's conduct.

The REC bears the burden of proving the allegations in the OTSC by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962);

In re Polk, 90 N.J. 550, 560 (1982). The evidence must be such as would “lead a reasonably cautious mind to a given conclusion.” Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may be described as “the greater weight of credible evidence in the case. It does not necessarily mean evidence of the greater number of witnesses but means that evidence which carries the greater convincing power.” State v. Lewis, 67 N.J. 47, 49 (1975).

### **Allegations Against the Respondent**

The allegations in the OTSC are undisputed. The Respondent admitted to using GBFD funds to pay his mortgage, car payments and credit card bills from 2015 to 2020 while serving as Treasurer of the GPFD. The Respondent admits to this conduct in written submissions to the REC, contesting only the total amount of GBFD funds involved.<sup>3</sup> Exhibit S-6 at 36; Answer at 7. This conduct involves the theft of a significant sum of money for personal financial gain, the abuse of a position of trust in a fire company and breach of fiduciary duty. This is a serious offense and clearly demonstrates unworthiness, bad faith, and dishonesty in violation of N.J.S.A. 45:15-17(e).

Further, the OTSC alleges the Respondent is in violation of N.J.S.A. 45:15-17(s), which requires licensees to notify the Commission within 30 days of charges being filed against them. In the instant matter, the evidence is irrefutable that charges were filed against the Respondent on March 29, 2021. Exhibit S-2 at 15. The statute provides that licensees must notify the Commission of criminal charges within 30 days; thus, the Respondent was required to notify the Commission by April 28, 2021. Pursuant to the Respondent’s written submission, after consultation with his attorney, he chose to inform the Commission by way of his Renewal Questionnaire which he asserts was submitted “in late April or early May”. Answer at 7. The

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<sup>3</sup> The OTSC and charging documents indicate the Respondent misappropriated \$244,169.65. In his written letter of explanation, the Respondent asserts the total amount misappropriated was \$125,000. Exhibit S-6 at 36.

Respondent provides no documentation to substantiate his claim and he did not provide testimony. However, the REC Licensing System indicates that the Respondent did not file his Renewal Questionnaire until June 28, 2021, well beyond the 30 day timeframe. Exhibit S-4 at 32. The Respondent failed to notify the Commission within the mandated timeframe in violation of N.J.S.A. 45:15-17(s). This fact is uncontroverted.

### **Penalty Against the Respondent**

The Act charges the Commission with the “high responsibility of maintaining ethical standards among real estate brokers and sales[persons]” in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real Estate Commission, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The Commission is empowered to suspend and revoke the licenses of, and impose fines against, brokers and salespersons that violate any of the offenses enumerated in N.J.S.A. 45:15-17 or the real estate regulations. Maple Hill Farms, Inc. v. New Jersey Real Estate Commission, 67 N.J. Super. 223, 232 (App. Div. 1961); Division of New Jersey Real Estate Commission v. Ponsi, 39 N.J. Super. 526, 527 (App. Div. 1956). Courts have long recognized that the real estate sales industry should exclude individuals who are incompetent, unworthy, and unscrupulous, in order to protect the public interest. See Div. of New Jersey Real Estate Commission v. Ponsi, supra at 532-533.

In the instant matter, the Commission has found the Respondent was in violation of N.J.S.A. 45:15-17(e). As stated above, the Respondent affirms the central facts related to the conduct underlying the criminal charges against him: as a volunteer firefighter and Treasurer of the GBFP, he accessed GBFD funds via checks and ATM withdrawals to pay his personal bills from 2015 to 2020. Pursuant to N.J.S.A. 45:15-17, the Commission has the power to suspend, revoke, or place on probation the license of the Respondent for a violation of N.J.S.A. 45:15-17(e).

After considering the evidence presented, and in light of the serious violations committed by the Respondent under N.J.S.A. 45:15-17(e), as set forth herein, the Respondent's real estate salesperson license shall be revoked for a period of five years.

In addition, pursuant to N.J.S.A. 45:15-17, the Commission may impose "a penalty of not more than \$5,000 for the first violation" of the Act, and a "penalty of not more than \$10,000 for any subsequent violation." In Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), the Supreme Court established the following seven factors that must be considered in evaluating the imposition of fines in administrative proceedings and these factors are applicable to this matter which seeks the imposition of penalties under the Act: (1) the good or bad faith of the respondent; (2) the respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) the injury to the public; (5) the duration of the illegal activity or conspiracy; (6) the existence of criminal or treble actions; and (7) any past violations. Id. at 137-139.

The first Kimmelman factor is whether the Respondent acted in good or bad faith. The Respondent certainly demonstrated bad faith by misappropriating money from the GBFD. Moreover, the Respondent demonstrated bad faith when he failed to notify the REC of his conviction in a timely manner in violation of N.J.S.A. 45:15-17(s). Indeed, Respondent admits that he was aware of his obligation to timely notify the Commission of the charges filed against him, but chose not to do so. This factor weighs in favor of a monetary penalty.

The second factor of the Kimmelman analysis is the Respondent's ability to pay the fines imposed. Here, no evidence was presented as to the Respondent's ability to pay fines assessed. A Respondent who claims an inability to pay a monetary penalty bears the burden of proving his financial limits and incapacity. NJREC v. Cortese, Final Order of Determination, (08/09/17) (citing Goldman v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision



and Order (09/02/08)). The Respondent has not met that burden. This factor weighs in favor of a monetary penalty.

The third factor of the Kimmelman analysis addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. Here, it is uncontested that the Respondent obtained profits from his underlying conduct, which totaled approximately \$244,000, and resulted in criminal charges. Moreover, the Respondent's failure to notify the Commission of those criminal charges in a timely manner enabled the Respondent to maintain his license for a longer period of time, postponed the evitable enforcement action by the Commission, and may have resulted in additional profits on the part of the Respondent. This factor weighs in favor of a monetary penalty.

The fourth factor of the Kimmelman analysis is to determine whether the licensee's conduct caused injury to the public. In order to protect consumers, the Commission is charged with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]." Goodley, 29 N.J. Super. at 182. Therefore, the public is harmed when licensed professionals fail to maintain the level of trustworthiness demanded under the laws of this State. It is the responsibility of the Commission to ensure that individuals who hold licenses demonstrate behavior which instills the utmost public trust. In this matter, the Respondent failed to conduct himself in accordance with the high standards expected of every licensee and failed to abide by the real estate statutes and rules governing every licensee. The fact that Respondent's criminal conduct did not involve a real estate transaction is irrelevant. The public's trust in the real estate profession is seriously damaged whenever a licensee fails to maintain high ethical standards and fails to demonstrate trustworthiness and integrity while engaging in other professions, employment

and endeavors. The public's trust was further eroded when the Respondent intentionally failed to notify the Commission of the charges filed against him in a timely manner. The factor weighs in favor of a monetary penalty.

The fifth factor in a Kimmelman analysis is the duration of the illegal conspiracy or scheme. The evidence presented indicates that the Respondent's illegal conduct occurred over a period of several years while working at the GBFD. Thus, while the failure to notify the Commission is an isolated occurrence and was not part of an ongoing scheme, this factor does weigh in favor of a monetary penalty.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. Here, the Respondent has not faced any criminal punishment for his failure to notify the Commission. As such, this factor weighs in favor of a monetary penalty.

The seventh and final factor takes into consideration the Respondent's past violations, of which there are none. No evidence of past violations was presented at the hearing. This factor does not weigh in favor of a monetary penalty.

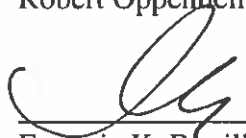
In light of these factors, the Commission determined that the Respondent shall pay a fine in the total amount of \$1,000 for the violation of N.J.S.A. 45:15-17(s) only. In addition, the restitution ordered in the criminal matter must be paid in full prior to the restoration of the Respondent's eligibility for licensure.

Accordingly, and pursuant to N.J.S.A. 45:15-17, the Commission imposes the following sanctions:

- I. Any and all real estate licenses presently or formerly held by the Respondent are revoked for a period of five years.
- II. Restitution in the criminal matter must be paid in full prior to the restoration of the Respondent's eligibility for licensure.
- III. The Respondent shall pay a fine in the amount of \$1,000 with respect to the Respondent's violation of N.J.S.A. 45:15-17(s).

SO ORDERED this 31<sup>st</sup> day of January, 2023.

By: Eugenia K. Bonilla, President  
William Hanley, Vice President  
Erin Brown, Commissioner  
Denise M. Illes, Commissioner  
Carlos Lejnieks, Commissioner  
Gabrielle Liguori, Commissioner  
Robert Oppenheimer, Commissioner

  
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Eugenia K. Bonilla, President  
New Jersey Real Estate Commission

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