

Real Estate Commission Bulletin



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Off-Island "Agent" – Licensee or Non-licensee?

When Act 326, Session Laws of Hawaii 2012, was passed, the Real Estate Branch received many calls from licensees who did not understand Act 326, especially the "Local Contact" identified within this Act, and whether or not this "Local Contact" fulfills the off-island agent requirement as stated in Hawaii Revised Statutes ("HRS") Chapter 521, the Residential Landlord-Tenant Code. If you are offering to rent property owned by an off-island owner, an on-island agent is required by HRS §521-43(f), the Residential Landlord-Tenant Code. "Agent" is not defined in Chapter 521, HRS.

The "Local Contact" defined in Act 326 pertains to HRS Chapter 237D, Transient Accommodations Tax. The "Local Contact" individual is an on-island individual who must register with the Department of Taxation to assist in the collection of taxes regarding the rental property. Act 326, and its "Local Contact" is not necessarily the individual who may act as an on-island agent for off-island rental property owners.

"Agent" is also not defined in HRS Chapter 467, the real estate brokers and salespersons licensing law. As used in HRS 521, "off-island agent" is not defined in Chapter 467. For an off-island property owner, landlord, trustee, or a person with the power of attorney from the owner, who is offering to rent Hawaii property, if the on-island agent is also involved in real estate activities, this on-island agent needs a real estate license.

An "on-island" agent may be one of the following:

- a) Hawaii-licensed real estate broker or salesperson; or
- b) "Custodian or caretaker" – "custodian or caretaker" is one of the exceptions to requiring a real estate license, and is defined in Chapter 467, HRS, and reads, "Custodian or caretaker" means any individual, who for compensation or valuable consideration, is **employed as an employee by a single owner** and has

the responsibility to manage or care for that real property, left in the individual's trust; provided that the term, "custodian" or "caretaker" shall not include any individual who leases or offers to lease, rents or offers to rent, any real estate for more than a single owner; provided further that a single owner shall not include an association of owners of a condominium, cooperative, or planned unit development." (emphasis added)

The "custodian or caretaker" exemption is an unlicensed individual, who for a single owner, manages or cares for the single owner's property. The single owner may be an individual or an entity. The single owner must employ the custodian or caretaker. Information on employing another individual may be obtained from the State Department of Taxation and the State Department of Labor and Industrial Relations. There will likely be other considerations when employing the custodian or caretaker such as requirements for unemployment insurance, workmen's compensation insurance, temporary disability insurance, vacation and sick pay, etc. Single owners may own more than one real property. If the single owner is an entity, however, the entity employing a custodian or caretaker must be licensed as a real estate broker or hire a licensed real estate broker to manage the single owner's property. The exceptions to having a real estate license as listed in HRS §467-2 are for individuals, NOT entities.

Real estate licensees listing and selling investment or rental properties should disclose to potential buyers and the licensees representing them, the requirement for an on-island agent if the buyer of a rental property does not or will not reside on the island where the property is located.

The on-island agent may be a non-licensee or a real estate licensee. Again, depending what the non-licensee on-island agent DOES will determine if the on-island agent requires a real estate license.

The Chair's Message



Aloha!

2013 is fast drawing to a close. Best wishes for a safe and happy holiday season!

I know that most real estate licensees do not deal in time share sales or resales, but time shares are considered real estate and understanding what time shares are may only enhance your real estate practice. Under

Hawaii's Time Share Act, Hawaii Revised Statutes ("HRS"), Chapter 514E, a time share interest is deemed to be real estate for purposes of HRS, Chapter 467.¹ Accordingly, those who offer and/or sell time share interests are subject to the same licensing requirements as those who sell other forms of real property.

Time share, also sometimes referred to as "vacation ownership," "fractional ownership," "travel club membership," "destination club," or "interval exchange," continues to be a leading force in the hospitality sector. In 2011, there were 1,548 time share resorts in the United States, representing approximately 194,200 units for an average resort size of 125 units. As of December 2011, the total number of time share intervals and weekly equivalent intervals owned was roughly 8.4 million. In Hawaii alone, there are over 90 time share resorts, generating about \$600 million in annual total sales volume.² Almost every major hospitality company in Hawaii has developed or is developing time share properties, both new construction and through the conversion of existing hotels.

Time share plans in Hawaii are governed by Hawaii's Time Share Act, HRS, Chapter 514E, and by the Rules Relating to Time Sharing, Hawaii Administrative Rules, Chapter 106 (collectively, "Time Share Law"), both of which are administered by the State of Hawaii Department of Commerce and Consumer Affairs ("DCCA"). In Hawaii, time sharing is defined as a plan or program in which the use, occupancy or possession of one or more time share units circulates among various persons for less than a 60-day period.³ Although time sharing has many forms, today, most time share plans are classified as either an "ownership" plan or a "right-to-use" plan. With ownership plans, the buyer is deeded and holds title to real estate, in conjunction with the right to use the property for a specific or discernible period. With right-to-use plans, the buyer does not hold title to the property, but, instead, receives a contract right to use the property for a specific or discernible period of time.

Similar to the condominium registration requirements under Hawaii's Condominium Act, HRS, Chapter 514B, any offering of a

time share plan to the public by a developer must be made through the delivery of a disclosure statement, reviewed and approved by the director of the DCCA. Either upon entering into a binding sales contract for an interest or upon receipt of a disclosure statement, whichever occurs later, the buyer has a 7-day rescission period to cancel the sales contract without penalty.⁴

Because time share interests are considered real estate for purposes of HRS, Chapter 467, a person who offers or sells time share interests or time share plans must hold a valid real estate salesperson's or broker's license. In time share sales, the primary parties involved in selling and promoting time share interests are defined as "sales agents," "acquisition agents," and "outside public contacts."

A "sales agent" is a person who sells or offers to sell for compensation a time share interest in a time share plan.⁵ This definition excludes those who purchase or acquire a time share interest for his or her own occupancy and later offers that interest for resale. Each sales agent must be licensed as a real estate salesperson or broker pursuant to HRS, Chapter 467. While some states allow for employees of developers to sell time share interests without having to hold a real estate license, this is not the case in Hawaii; there are no exceptions for developer employees.⁶ Although time share developers if licensed, may act as a sales agent, many times, the developer will retain a licensed broker to represent the project as the sales agent.

An "acquisition agent" is any person, other than a developer or sales agent, who solicits people to attend a time share presentation or to contact a time share sales agent.⁷ An acquisition agent must either hold a valid real estate license or must register with the DCCA for each time share plan with which he or she is affiliated. Acquisition agents who do not hold a real estate salesperson or broker license may only invite or encourage prospective buyer to attend a sales presentation or to contact a sales agent or developer. Such unlicensed agents are prohibited from engaging in sales activity with prospective time share interest buyers.⁸

An outside public contact ("OPC") is an individual who contacts people who may be interested in purchasing interests in a time share plan.⁹ OPCs act as acquisition agents by encouraging prospective buyers to attend time share sales presentations, but do not engage in the offering or sale of time share interests. Thus, an OPC cannot engage in any activity that falls within HRS, Chapter 467's definition of a "real estate broker" or "real estate salesperson." When inviting a prospective buyer to attend a sales presentation, the OPC must verbally disclose the name of the time share plan, the name of the company that employs the OPC, and that any promised entertainment, gifts, prizes, food, drinks, or other inducements are being offered for the purpose of soliciting sales of time share interests.¹⁰

¹ H.R.S. § 514E-2(b).

² American Resort Development Association (ARDA), State of the Vacation Ownership Industry, 2012 Edition
http://www.arda.org/uploadedFiles/ARDA/News_and_Information/Industry_Information/2012%20state%20of%20industry%20fact%20sheet.pdf

³ H.R.S. § 514E-1.

⁴ H.R.S. § 514E-8.

⁵ H.R.S. § 514E-1.

⁶ H.A.R. §§ 16-106-4(c)(3), 8(a).

⁷ H.R.S. § 514E-2.5.

⁸ Most agents licensed pursuant to HRS, Chapter 467 are sales agents and are not acquisition agents since sales agents are not required to register with DCCA.

⁹ H.A.R. § 16-106-2.

¹⁰ H.A.R. § 16-106-52.

¹¹ H.A.R. § 16-106-12.

The Chair's Message (cont. from page 2)

The time share plan is managed by a "plan manager." A plan manager generally is responsible for management and maintenance of the time share units, assessments and collection of maintenance fees, supervision of occupancy schedules, supervision of enforcement of the house rules, providing time share owners with statements of receipts and expenditures and providing association meeting minutes and financial statements to owners.¹¹ Plan managers must be licensed as a real estate salesperson or broker pursuant to HRS, Chapter 467 and must register with the director of the DCCA in accordance with the Time Share Law.

Considering the growing popularity of time share resorts in Hawaii and across the country, real estate salespersons and brokers should

be familiar with what a time share interest is and the varying roles of the sales support involved in selling time share, including, the sales agent, acquisition agent and OPC. Such an understanding will provide insight into the roles of licensees in Hawaii's time share industry and how to protect consumers in the sale or purchase of time share.



Nikki T. Senter, Chair

Act 326 Website By Department of Taxation



As you may be aware, Act 326, Session Laws of Hawaii 2012 (Act 326), went into effect on July 1, 2012, requiring operators of transient accommodations to provide local contact information to the Department of Taxation (DOTAX). Understanding the logistical difficulties these requirements posed for transient accommodation operators, and homeowners and condominium unit owners' associations (Associations), DOTAX partnered with Hawaii Information Consortium to develop a website which can electronically record, track and manage the required information.

During the website development period, DOTAX issued Tax Announcements – most recently, Tax Announcement 2013-02 (dated March 4, 2013) - stating that penalties for failure to comply with the requirements of Act 326 would be waived until January 1, 2014, to allow for the completion of the website. As of the date of this publication, the Department expects to have the new website operational by the end of this year.

Once the website is completed, DOTAX will issue further guidance and provide transient operators and Associations with at least two months to comply with the requirements prior to the enforcement of penalties. Thereafter, the deadline for submitting the relevant information will be January 1, or sixty days from any change, whichever is later. For example, the reporting of relevant information for operators leasing transient accommodations during 2014

will be due before January 1, 2015, or within sixty days of a change in the local contact information for any changes made on or after November 2, 2014.

The new website will allow Associations to input data for all units on the property governed by that Association that are being leased as transient accommodations. It will also allow Associations to grant permission to one or more agents (i.e., an accountant or employee) to update the required relevant information for the Association.

Generally, the requirements under Act 326 include the submission of information related to the local contact residing on the same island as the transient accommodation; inclusion of the local contact's name and telephone number in any contract or rental agreement; displaying the transient accommodation tax license number in any website advertisement; and providing the local contact's information to the Association that governs the property on which the transient accommodation is located.

To comply with Act 326, Associations need only submit information that had been provided by the transient accommodation operator and which is maintained in the Association's records. Penalties will not be assessed for failing to provide information that was never provided to the Association by the operators leasing the transient accommodations.

Administrative Actions

August 2013

Maria White, Brian Benton, Helen Lindemann and Prudential Locations, LLC
Salesperson-RS 65575
Broker – RB 17903
Broker – RB 9039
Broker – RB 17905
Case No. REC 2009-157-L
Dated 9/27/13

Introduction: On 4/11/11, RICO filed a petition for disciplinary action against the real estate licenses of Maria White, Brian Benton, Helen Lindemann, and Prudential Locations, LLC. Petitioner and Respondents filed motions for summary judgment on 7/22/11 and 9/2/11, respectively. On 9/26/11, the Hearings Officer denied Respondents' motion and granted Petitioner's motion in part "as to the charges based on HRS §§467-14(1), (2), (3), and (18), HRS §467-1.6(b)(3), along with HRS §436B-19(2) and (11)". On 11/1 and 11/30/11, the hearing was convened to address the remaining issues in the case. On 11/10/11, Respondents filed a motion for protective order "limiting the policies and procedures that must be produced by the production deadline of 11/22/11 set at the Hearing." By order dated 11/21/11, the Hearings Officer denied the motion. Both parties filed closing briefs on 1/6/12.

Factual Findings: At all relevant times herein, Respondent Benton was listed as a broker-in-charge of Respondent Prudential. Respondent Prudential has six brokers-in-charge including Benton.

At all relevant times herein, Respondent Lindemann was the principal broker of Respondent Prudential.

In 8/07, Respondents entered into an Exclusive Right-to-Sell Listing Agreement ("Listing Agreement") with the Seller to list and sell a townhouse unit in the Ewa Colony Estates ("Property"). The Listing Agreement was reviewed and signed by Wayne Nishida acting as a Contract Supervisor for

Respondent Prudential. Nishida was not a broker-in-charge for Respondent Prudential. The Listing Agreement was thereafter placed into Transaction Management which was supervised and directed by Steve Tam, one of Respondent Prudential's brokers-in-charge. Although Tam was the broker-in-charge of Transaction Management, he did not sign the Listing Agreement.

Respondent White testified that her principal broker, Respondent Lindemann, and her broker-in-charge, Respondent Benton, were responsible for supervising her work in the subject transaction.

In or about 8/29/07, Respondent White arranged to have the Property listed. The listing indicated that the Property was subject to a monthly maintenance fee of \$260.00 which included sewer and water. The representation in the listing that the Property's monthly maintenance fee included water and sewer fees was based exclusively on information Respondent White received from the Seller.

At no time prior to the sale of the Property did Respondent White verify the information she received from the Seller.

In or about 9/07, the Complainants submitted an offer to purchase the Property. The Complainant's offer to purchase the Property was based, in part, on their belief that the monthly maintenance fee included water and sewer fees as reflected in the listing. The inclusion of water and sewer in the monthly maintenance fee was a material fact for the Complainants in deciding to purchase the Property. On 9/8/07, the Complainants received the Seller's Property Disclosure Statement ("Seller's Disclosure Statement").

Item 76(a) of the Seller's Disclosure Statement addressed the source of the water supply to the Property and contained the

following questions: "Is this Property separately metered?" and "Is this a submeter?" The Seller checked off the "No" box for the first question and did not respond to the second question. (Note: An "X" was subsequently placed in the "No" box corresponding to the question, "Is this a submeter?" However, the record here is insufficient to establish the identity of the person who placed the "X" in the box. The record does establish that when the Complainants received the Seller's Disclosure Statement, that box had not been checked off by the Seller.)

On 9/18/07, after receiving the Seller's Disclosure Statement, one of the Complainants emailed her agent and noted:

In reviewing the Seller's Disclosure the following are areas that were incomplete: #B37 – There is nothing checked by the seller for this line item. #E76a – Question: Is this a submeter? There is nothing checked by the seller for this line item. #E78a – There is nothing checked by the seller for this line item. #F85 – Were additions, modifications and/or alterations made to your property without obtaining required association approval? NTMK

Other Questions: We'd also like to know how we can go about getting more information about the history of the maintenance fee increases to gain a better handle on what to expect over the years of us owning the property. I noticed that in 2005 the fee increased by \$15.00 and 2006 the fee increased again but this time by \$20.00. Also, what in the unit does the association handle repairing such as electrical, plumbing, the overall foundation of the unit etc. and also *what does the monthly maintenance fee cover.* (Emphasis added).

The 9/18/07 email from the Complainant was forwarded by her agent to Colleen Souza, Respondent Prudential's transactions manager, on the same date.

Administrative Actions (cont. from page 4)

On 9/18/07, after receiving the Complainant's email, Souza emailed Respondent White and asked:

Maria,

Can you respond to the Buyer's questions regarding the Seller's Disclosure. I've referred to the property management company, Hawaii First, . . . regarding her questions under "Other Questions" below.

In her affidavit attached to Respondent's motion for summary judgment, Respondent White attested to the following:

Prior to the closing I never knew that the maintenance fee did not include water and sewer. I had no reason to believe that the Seller's statement to me was not accurate. I never once told the Complainants that the maintenance fee included water and sewer, not orally, in e-mail or in any other form. *When the Complainants asked me about the maintenance fee I directed them to the managing agent. (Emphasis added)*

Respondent White testified that she directed Souza to email the Complainant's agent and direct him to the property management company for the information regarding the "blank" items referred to in the Complainant's 9/18/07 email. Respondent White later changed her testimony, stating that she told Souza that she would check with the seller about the "blank" items left in the Seller's Disclosure Statement. Upon further examination, Respondent White testified that she did not remember how she responded to Souza's request that she respond to the Complainant's questions before stating again, that Souza referred the Complainants to the property management company.

There was no credible evidence that Respondent White asked the Seller to complete the blank spaces on the Seller's Disclosure Statement.

Prior to the closing of the transaction, the Complainants received Property

Information Form RR105c that had been completed by the Property's managing agent. On Page 3 of the form, the following appeared:

What do the Apartment maintenance fees include?

Water & Sewer Parking Recreation/
Community Assoc. dues

Hot Water XElectricity Real Prop. Tax
(common area only)

Air Cond. Lease Rent Other:

Cable TV Gas Other:
Signal

The Complainants read the section above as further confirmation that water and sewer were included in the monthly maintenance fee. The maintenance fee for the Property also included some of the other listed items such as an air conditioning unit, parking, a recreation center/dues and cable tv signal. On the other hand, it did not include lease rents or gas.

The Complainants discovered that the water and sewer charges were not included in the monthly maintenance fee when they received a bill for those charges about three and a half months after they purchased and moved into the Property.

When notified about the water and sewer bill that the Complainants received, Respondent White indicated that there must be some mistake because the monthly maintenance fee definitely included sewer and water. Respondent White later acknowledged that the monthly maintenance fee did not include water and sewer.

The Complainants purchased the Property for \$373,500.00.

The Complainants have a paid a total of \$2,686.86 in sewer and water fees between 10/30/07 and 3/8/11, and continue to pay for the sewer and water fees.

Respondent White acknowledged that whether the maintenance fee included

sewer and water is a material fact that related to the sale of the Property to the Complainants.

Respondent White testified that if information is provided by a client and she has no reason to question the client, then she has no further obligation to ascertain material facts. Respondent White further testified that if she was faced with the same situation today, she would not do anything differently.

Respondent White testified that after the Complainants filed a complaint with Petitioner, she was contacted by Petitioner's investigator, who requested a response along with any relevant supporting documents. Respondent White testified that she remembers getting the letter from Petitioner, that her attorney responded on her behalf, and that she received a copy of her attorney's letter. Nevertheless, Respondent White, in an affidavit attached to Respondents' motion for summary judgment, states, "After the RICO Complaint was filed I was not contacted by the RICO investigator, asked about my side of the events or otherwise allowed to provide any information to RICO regarding the background."

Respondent White testified that no one directed her how to proceed with the transaction and that the situation did not require anyone to direct her. Respondent White testified that Respondent Prudential has several sales managers who inspect work, but she doesn't know who, if anybody, inspected her work in this transaction.

Respondent Lindemann testified that she had no involvement in this transaction and that she did not supervise Respondent White. Respondent Lindemann testified that Respondent Prudential has policies and procedures concerning the handling of real estate transactions and the conduct of associated real estate licensees and other staff, including education and enforcement of the policies and procedures.

Administrative Actions (cont. from page 5)

Respondent Prudential's Property Disclosure Policy, B 1.14, states under the heading CAR-DINAL RULES, "Agents will perform diligently in disclosing material facts." Under the heading GUIDELINES, the policy states:

Material facts will be ascertained for Buyers/Sellers we represent by:

1. Inspection of the public records, including Tax office records. If improvements do not conform to Tax Office records, Building Department Records will be checked.
2. Review of other pertinent documents: Title Report, Deeds, Restrictive Covenants, etc.
3. Verification and physical inspection of parking stalls, including checking with resident/property manager.
4. Review of Seller's Disclosure Statement for "red flags".
5. Physical inspection of the property for "red flags" and other discrepancies.
6. Inspection reports of home inspectors and other qualified professionals.

Respondent Prudential's policy acknowledges the statutory duty to ascertain material facts regarding the property. Respondents' Property Disclosure Policy, B 1.13, states:

It is the responsibility of both the Seller and the Agent to disclose "material facts" about the property to the Buyer. However, the disclosure form statement is the Seller's not the agent's. It is further the agent's responsibility to exercise "due diligence" as defined below.

1. The agent should obtain and verify factual information available in certain public records, in Association minutes, from mortgages and from a Preliminary Title Report.
2. Tax office records must always be checked for single-family residences and for any zero-lot line or CRP residences that can be extended or altered. Building department records must be checked when Tax Office records do not conform to the improvements. It is also prudent to check Building Department records when there are questions regarding additions or alterations on the property.
3. For condominiums, townhouses, and any residence where there are assigned

stalls, the agent must confirm the stall number by checking documents and confirming with the Resident Manager or Property Manager. Seller and agent should physically check the stall location and number painted on the stall.

4. An agent should also exercise "due diligence" by doing an inspection of the property for "red flags" (i.e. ceiling stains, cracked walls, sloping floor, etc.). The agent must then bring any observed discrepancies to the attention of the client and recommend that appropriate professional be employed to conduct inspections, make reports, and render opinions. THE AGENT SHOULD NEVER RENDER AN OPINION REGARDING THE CONDITION OF THE PROPERTY, EVEN A GENERAL ONE, AS THIS IS AN AREA BEYOND HIS/HER EXPERTISE.

Respondent Lindemann testified that relying solely on the seller's statement that water and sewer was included in the maintenance fee satisfies Respondent's duty to ascertain material facts. Respondent Lindemann acknowledged that the answers left blank on the Seller's Disclosure Statement would be considered "red flags" under Respondents' property disclosure policy, B 1.14. However, Respondent Lindemann stated that Respondent White satisfied her duty to ascertain and disclose material facts "by asking the seller to complete the form."

Respondent Lindemann testified that licensees affiliated with Respondent Prudential are required to be members of the Hawaii Board of Realtors ("HBR") as a condition of employment and must be trained in the National Association of Realtors ("NAR") code of ethics. Respondent Lindemann testified that the NAR code of ethics contains generally recognized standards of ethics for real estate licensees.

Respondent Lindemann testified that she believes Respondent White did nothing wrong in this transaction because, in her opinion, Respondent White had no reason

to question the seller's statement that the maintenance fee included water and sewer.

Respondent Benton testified that he had no personal involvement in this transaction and did not supervise Respondent White.

Respondent Lindemann agreed that Nishida had no statutory authority to sign the Listing Agreement and that it should have been signed by her or a broker-in-charge.

Respondent Benton submitted a declaration stating that Nishida was the manager supervising Respondent White in this transaction. Respondent Benton has no knowledge of whether anyone actually supervised Respondent White in this transaction.

Respondent Benton testified that Respondent Prudential has policies and procedures that govern how Respondent White should have handled this situation and that according to the policies and procedures Respondent White would not have been expected to do anything different. However, Respondent Benton acknowledged that simply repeating information from the seller is not the right answer, and that "We advise our agents to verify information such as this." Respondent Benton agreed that Respondents had an obligation to ascertain and disclose whether the maintenance fee included water and sewer charges and that in this case the material facts were not ascertained or disclosed.

Respondent Benton was questioned about the apparent inconsistency between his testimony and a prior written declaration. In his declaration, Respondent Benton stated that, "in this case I would not have expected Ms. White to conduct any additional investigation because the seller's statement that water and sewer were included was clear and there was no reason to question it." Then Respondent Benton testified, "My position today is, under the circumstances could Maria White have done more? Perhaps, but there was no indication whatsoever that the information was false or mis-

Administrative Actions (cont. from page 6)

leading.” Respondent Benton was asked what he would do under the same circumstances today, and he said, “I would tell her if you have any doubts, there are ways to ascertain the information and she should do that, and I would show her.” Respondent then agreed that Respondents failed to satisfy their duty to ascertain the material facts in this case and agreed that the transaction was not properly handled. Respondent Benton explained the discrepancy between his testimony and his declaration, stating that the declaration was : “on the advice of counsel.”

Respondent Benton testified that Respondents had reason to question what the maintenance fee included because the Complainants specifically asked about the blank items on the Seller’s Disclosure Statement and Respondent White was specifically asked to address the issue of whether the Property had a submeter for water. Respondent Benton agreed that failing to ascertain material facts in this case constitutes a violation of the generally recognized standards of ethics for the profession.

The Hearings Officer granted Petitioner’s Motion for Summary Judgment as to the charges based upon HRS §467-14(1), (2), (3), and (18), HRS §467-1.6(b)(3), and HRS §436B-19(2) and (11). The undisputed evidence established that Respondent White listed the Property and represented in the listing that the monthly maintenance fee included water and sewer charges. There is also no dispute that the erroneous representation in the listing was based on information Respondent White obtained from the seller and that Respondent White did not attempt to verify the accuracy of the information before including that information in the listing. These uncontroverted facts establish that Respondent White made a misrepresentation and an untruthful statement concerning real estate in her listing of the Property, effectively made a false promise concerning a real estate transaction of a character likely to mislead another, failed to ascertain and disclose a material fact con-

cerning the Property, and engaged in business under her real estate salesperson’s license in a manner causing injury to members of the public, in violation of HRS §§467-14(1), (2), (3), (18), and (20), as well as HRS §§436B-19(2), and (11). These violations also constitute a violation HRS §467-1.6(b)(3) by Respondent Lindemann, as Respondent’s principal broker, and Respondent Prudential.

Throughout this proceeding, Respondent White maintained that under the circumstances of this case she was not obligated to verify the information she received from the seller that the monthly maintenance fee included water and sewer unless she had reason to believe that the information was erroneous. HRS §467-14(20), however, expressly required the licensee to “ascertain and disclose all material facts concerning every real property for which the licensee accepts the agency, so that the licensee may fulfill the licensee’s obligation to avoid error, misrepresentation, or concealment of material facts.” Nowhere in that section or anywhere else in HRS Chapter 467 is that obligation conditioned on the licensee having knowledge that the information was erroneous. At a minimum, that obligation requires the licensee to undertake a reasonable effort to verify material facts in order to avoid errors and misrepresentations of the kind involved here. Simply relying on the seller’s representation of a material fact that can be easily verified does not meet that responsibility.

The evidence adduced at hearing established that neither Respondent Lindemann nor Respondent Benton supervised or attempted to supervise Respondent White vis-a-vis the subject transaction. Although Respondents argue that the transaction was placed in and supervised by Respondent Prudential’s Transaction Manager, Nishida, who was not one of Respondent Prudential’s brokers-in-charge, was nevertheless allowed to sign off on the Listing Agreement and the record did not establish who, if anyone, was actually directly managing and supervising Respondent White. The lack of any meaningful supervision of

Respondent White is not only a violation of HRS §467-1.6 by Respondents Prudential and Lindemann but also, amounts to a failure to maintain a record of competency in violation of HRS §467-14(20) and §436B-19(7) by Respondents Benton, Lindemann, and Prudential.

Lastly, the Hearings Officer concludes that while Respondent White’s conduct in the subject transaction was negligent, and Respondents Lindemann’s and Benton’s failure to properly supervise Respondent White was deficient, none of these actions amounted to fraud or dishonest dealings in violation of HRS §467-14(8); nor did Respondent White’s conduct rise to the level of professional misconduct, incompetence or gross negligence in violation of HRS §436B-19(7).

Order:

White: \$5,000.00 fine.

Lindemann, Benton, Prudential: \$7,500.00 paid jointly.

Also, **White, Benton, and Lindemann:** Take and successfully complete an education course or courses to be determined by the Commission.

Violations:

White: HRS §467-14(1), (2), (3), (18), (20), HRS §436B-19 (2), (11).

Lindemann: HRS §467-1.6(b)(3), §467-14(20), and HRS §436B-19(7).

Benton: HRS §467-1.6, §467-14(20), and HRS §436B-19(7).

Prudential: HRS §467-1.6, §467-14(20), and HRS §436B-19(7).

Administrative Actions (cont. from page 7)

August 2013

Leslie Mackenzie Smith
Salesperson-RS 42147
Case No. REC 2013-146-L
Dated 8/23/13

Allegations: On or about 10/23/12, Respondent pled no contest in the District Court of the Second Circuit, State of Hawaii, for the crime of driving under the influence. The Respondent disclosed the Conviction in writing to the Commission on or about 2/7/13.

Sanction: Pay a \$500.00 administrative fine.

Violations: HRS §§436B-19(12), (14), and (17)

Donald A. Wright
Salesperson – RS 49935
Case No. REC 2013-165-L
Dated 8/23/13

Allegations: On 1/15/13, the Respondent pled no contest in the District Court of the Second Circuit, State of Hawaii, for the crime of driving under the influence. The Respondent disclosed the conviction in writing to the Commission. The Respondent was disciplined in 2013 for a previous DUI conviction and fined \$500.00

Sanction: Pay a \$1,500.00 fine

Violations: HRS 436B-19(12), (14), and (17)

Matthew J. Aki
Broker – RB 13502
Case No. REC 2013-46-L
Dated 8/23/13

Allegations: On or about 7/13/11, Respondent pled no contest in the District Court of the Second Circuit, State of Hawaii, for the crime of driving under the influence. The Respondent disclosed the Conviction in writing to the Commission on or about 12/31/12, by letter and the license renewal process..

Sanction: Pay a \$500.00 fine.

Violation: HRS 436B-19(12), (14), and (17)

Richard Littlefield
Broker-RB21203
Case No. REC 2013-4-L
Dated 8/23/13

Allegations: On or about 8/22/11, Respondent pled no contest in the District Court of the Second Circuit, State of Hawaii, for the crime of driving under the influence. The Respondent was licensed as a reale state salesperson when convicted. The Respondent disclosed the Conviction in writing to the Commission on or about 10/23/12, by letter addressed to RICO.

Sanction: Pay a \$500.00 fine.

Violation: HRS 436B-19(12), (14), and (17)

September 2013

Kelly Ann Wakayama
Broker – RB 18045
Case No. REC 2013-72-L
Dated 9/27/13

Allegations: On or about 10/26/11, Respondent pled no contest in the District Court of the Third Circuit, State of Hawaii, for the crime of driving under the influence. Respondent submitted a license renewal application to the Commission and answered “no” to the question “[i]n the past 3 years have you ever been convicted of a crime which has not been annulled or expunged?”

Sanction: Pay an administrative fine of \$1,000.00

Violations: HRS §§436B-19(5), (12), (14), (17)

Statutory/Rule Violations

Settlement Agreement (Allegations/Sanction): The Respondent does not admit to the allegations set forth by the Regulated Industries Complaints Office (RICO) and denies having violated any licensing law or rule. The respondent enters in a Settlement Agreement as a compromise of the claims and to conserve on the expense of proceeding with a hearing on the matter.

Disciplinary Action (Factual Findings/Order): The respondent is found to have violated the specific laws and rules cited, and the Commission approves the recommended order of the Hearings Officer.

HRS §467-1.6 Principal brokers.

HRS §467-1.6(b)(3) The principal broker shall be responsible for all real estate contracts of the brokerage firm and its handling by the associated real estate salesperson

Statutory/Rule Violations (cont. from page 8)

- HRS §467-14 (1) Making any misrepresentation concerning any real estate transaction.
- HRS §467-14 (2) Making any false promises concerning any real estate transaction of a character likely to mislead another.
- HRS §467-14 (3) Pursuing a continued and flagrant course of misrepresentation.
- HRS §467-14 (18) Failing to ascertain and disclose all material facts concerning every property for which the licensee accepts the agency, so that the licensee may fulfill the licensee's obligation to avoid error, misrepresentation, or concealment of material facts; provided that for the purposes of this paragraph, the fact that an occupant has AIDS or AIDS Related Complex (ARC) or has been tested for HIV (human immunodeficiency virus) infection shall not be considered a material fact.
- HRS §467-14 (20) Failure to maintain a reputation for or record of competency, honesty, truthfulness, financial integrity, and fair dealing.
- HRS §436B-19(2) Engaging in false, fraudulent, or deceptive advertising, or making untruthful or improbable statements.
- HRS §436B-19(5) Procuring a license through fraud, misrepresentation, or deceit.
- HRS §436B-19(7) Professional misconduct, incompetence, gross negligence, or manifest incapacity in the practice of the licensed profession or vocation.
- HRS §436B-19(9) Conduct or practice contrary to recognized standards of ethics for the licensed profession or vocation.
- HRS §436B-19(11) Engaging in business under a past or present license issued pursuant to the licensing laws, in a manner causing injury to one or more members of the public.
- HRS §436B-19(12) Failure to comply, observe, or adhere to any law in a manner such that the licensing authority deems the applicant or holder to be an unfit or improper person to hold a license.
- HRS §436B-19 (14) Criminal conviction.
- HRS §436B-19(17) Violating this chapter, the applicable licensing laws, or any rule or order of the licensing authority.

Core B 2013 - 2014

The main topic for the Commission's mandatory core course, 2013-2014, Part B, will be "agency". Yes, it's another visit to this important topic, and appears to be necessary. The Commission's 2007 Core Course featured "agency". Since then, there have been a couple attempts to change the existing rules on agency in Chapter 99, Hawaii Administrative Rules ("HAR"), with no results as the bottom line arrived at was that the existing rules are sufficient, but more education was needed.

Also included in Core B, 2013-2014, will be a summary of real estate-related legislation from the 2014 legislative session.

Remember that effective January 1, 2014, Core A, 2013-2014, may only be offered in an on-line format. To date, 1,958 licensees have completed Core A. There are approximately 14,624 individual real estate licensees in Hawaii.

Real Estate Branch Welcomes Two New Members

Katherine Kay Linster, New Condominium Specialist



The Real Estate Branch welcomed Katherine Kay Linster as a new Condominium Specialist in August, 2013. Katherine was employed by the Insurance Division at the Department of Commerce and Consumer Affairs, as a health insurance premium analyst.

She is a graduate of Hawaii Pacific University, and the University of Illinois, College of Law, and has knowledge of real estate transactions, real property law, and alternative dispute resolution. She enjoys research and writing.

Marilyn Antolin, New Secretary



The Real Estate Branch also welcomed Marilyn Antolin as Secretary in August, 2013. Marilyn previously worked at the Regulated Industries Complaints Office (RICO) and then moved to the Department of the Attorney General in the Criminal Justice Division, Tobacco Enforcement Unit, where she was a legal clerk for the past six years.

Marilyn enjoys reading, walking/running and agility classes, and traveling.

Interesting Numbers From The Commission

Here are some interesting numbers from the Real Estate Commission's 2013 Annual Report, which covers the fiscal year ("FY") July 1, 2012 through June 30, 2013.

Disciplinary actions and violations

The Commission took disciplinary action against 46 licensees in FY 2013. This was a 58.6% increase over the 29 licensees disciplined in FY 2012. Nine licenses were suspended and no license was revoked. Also interesting is that the top four areas of complaint for the Regulated Industries Complaints Office ("RICO") has historically included motor vehicle repairs, contractors, motor vehicle sales, and real estate, not necessarily in that order. Recently, the number of real estate related complaints has increased dramatically to move the area of real estate into contender for most complaints filed with RICO. Perhaps this is the time for some industry self-reflection?

The number of real estate complaints filed with RICO increased 35.6% over the prior FY, with 191 complaints filed. The most common statutory violations found were:

1. Failure to maintain a reputation for or record of competency, honesty, truthfulness, financial integrity, and fair dealing. (HRS §467-14(2))
2. Principal brokers management, supervision and responsibilities (HRS §467-1.6)
3. Engaging in business under a past or present license issued pursuant to the licensing laws, in a manner causing injury to one or more members of the public (HRS §436B-19(11))
4. Failure to comply, observe, or adhere to any law in a manner such that the licensing authority deems the applicant or holder to be an unfit or improper person to hold a license. (HRS §436B-19(12))
5. Professional misconduct, incompetence, gross negligence, or manifest incapacity in the practice of the licensed profession or vocation. (HRS §436B-19(7))
6. Conduct constituting fraudulent or dishonest dealings. (HRS §467-8)
7. Failing to account for moneys belonging to others. (HRS §467-7)
8. Conduct or practice contrary to recognized standards of ethics for the licensed profession or vocation. (HRS §436-B-19(9))

The most common rule violations found included:

1. Licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. (HAR §16-99-3(b))
2. Licensee shall fully protect the general public in its real estate transactions. (HAR §16-99-3(a))
3. Licensee shall not acquire property without making the true position known in writing to the owner. (HAR §16-99-3(g))
4. The brokerage firm shall not submit or advertise property without written authorization, and in any offering the price quoted shall not be other than that agreed upon with the owner as the offering price. (HAR §16-99-3(i))
5. There shall be a principal broker or one or more brokers in charge, or both, at the principal place of business, and one or more brokers in charge at a branch office who shall be immediately responsible for the real estate operations conducted at that place of business. (HAR §16-99-3(m))
6. The licensee shall not convert other people's moneys to the licensee's own use. (HAR §16-99-3(v))
7. Client's account; trust funds; properties other than funds. (HAR §16-99-4)

License candidates, new and current licensees

In FY 2013, broker candidates decreased by 9.8%, but salesperson candidates increased by 19.3%. Five hundred fifty-four broker candidates tested and 3,720 salesperson candidates tested. New broker licenses were issued to 179 individuals and 103 entities. New salesperson licenses went to 801 individuals.

By island, the real estate licensee was as follows:

O'ahu: 59.72% or 10,262 active and inactive licensees

Maui: 14.95% or 2,568 active and inactive licensees

Big Island: 12.21% or 2,098 active and inactive licensees

Kauai: 7.00% or 1,203 active and inactive licensees

Molokai: 0.24% or 42 active and inactive licensees

Lanai: 0.12% or 20 active and inactive licensees

Other: 5.76% or 990 active and inactive licensees

Increase in Exam Fee

Effective January 1, 2014, the PSI licensing exam fee will increase from \$63.00 to \$68.00 per exam. Licensing candidates may take the exam as many times as necessary to pass the exam within the two-year validity of their applicable licensing equivalency certificates. This is the first increase in the exam fee since the Real Estate Commission first contracted with PSI in 2009.

Prelicense Schools

Abe Lee Seminars	808-942-4472
Akahi Real Estate Network LLC	808-331-2008
Carol Ball School of Real Estate	808-871-8807
Coldwell Banker Pacific Properties Real Estate School	808-597-5550
Continuing Ed Express LLC	866-415-8521
Dower School of Real Estate	808-735-8838
Fahrni School of Real Estate	808-486-4166
Hawaii Institute of Real Estate, LLC	808-589-0550
Inet Realty	808-955-7653
Property Merchants, Inc. dba All Islands Real Estate School	808-564-5170
ProSchools, Inc.	800-452-4879
Ralph Foulger's School of Real Estate	808-239-8881
REMI School of Real Estate	808-230-8200
Seiler School of Real Estate	808-874-3100
University of Hawaii Maui College - OCET Real Estate School	808-984-3231
Vitousek Real Estate Schools, Inc.	808-946-0505



State of Hawaii Real Estate Commission

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This material can be made available to individuals with special needs. Please call the Senior Real Estate Specialist at 586-2643 to submit your request.

Continuing Education Providers

Abe Lee Seminars	808-942-4472	Key Realty School LLC	800-472-3893
Akahi Real Estate Network LLC	808-331-2008	Lorman Business Center, Inc. dba Lorman Education Services	715-833-3940
Carol Ball School of Real Estate	808-871-8807	McKissock, LP	800-328-2008
Carol M. Egan, Attorney at Law	808-222-9725	OnCourse Learning Corporation dba Career WebSchool	800-532-7649
Charfen Institute dba Distressed Properties Institute, LLC	800-482-0335	Pacific Real Estate Institute	808-524-1505
Coldwell Banker Pacific Properties Real Estate School	808-597-5550	Property Merchants, Inc. dba All Islands Real Estate School	808-564-5170
Continuing Ed Express LLC	866-415-8521	ProSchools, Inc.	800-299-2207
Dower School of Real Estate	808-735-8838	Ralph Foulger's School of Real Estate	808-239-8881
Eddie Flores Real Estate Continuing Education	808-951-9888	Real Class, Inc.	808-981-0711
Green Building LLC	808-873-2040	Realtors Association of Maui, Inc.	808-873-8585
Hawaii Association of Realtors	808-733-7060	REMI School of Real Estate	808-230-8200
Hawaii Business Training	808-250-2384	Russ Goode Seminars	808-597-1111
Hawaii CCIM Chapter	808-528-2246	Shari S. Motooka-Higa	808-457-0156
Hawaii Institute of Real Estate, LLC	808-589-0550	The CE Shop, Inc.	888-827-0777
Hawaii Island Realtors	808-935-0827	The Seminar Group	206-463-4400
Honolulu Board of Realtors	808-732-3000	TM Education Services	808-268-7473
Institute of Real Estate Management – Hawaii Chapter No. 34	808-536-4736	University of Hawaii Maui College - OCET Real Estate School	808-984-3231
Institute of Real Estate Management – National	312-329-6058	Vitousek Real Estate Schools, Inc.	808-956-2037
Investment Property Exchange Services, Inc.	808-387-4140		
Kauai Board of Realtors	808-245-4049		

State of Hawaii
Real Estate Commission
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2013 and 2014 Real Estate Commission Meeting Schedule

Laws & Rules Review Committee – 9:00 a.m.

Condominium Review Committee –

Upon adjournment of the Laws & Rules Review Committee Meeting

Education Review Committee – Upon adjournment of the

Condominium Review Committee Meeting

Wednesday, November 13, 2013

Wednesday, December 11, 2013

Wednesday, January 8, 2014

Wednesday, February 12, 2014

Wednesday, March 12, 2014

Wednesday, April 9, 2014

Wednesday, May 14, 2014

Wednesday, June 18, 2014

Wednesday, July 9, 2014

Wednesday, August 13, 2014

Wednesday, September 10, 2014

Wednesday, October 8, 2014

Wednesday, November 12, 2014

Wednesday, December 10, 2014

Real Estate Commission – 9:00 a.m.

Wednesday, November 27, 2013

Friday, December 20, 2013

Friday, January 24, 2014

Friday, February 28, 2014

Friday, March 28, 2014

Friday, April 25, 2014

Friday, May 30, 2014

Friday, June 27, 2014

Friday, July 25, 2014

Friday, August 29, 2014

Friday, September 26, 2014

Friday, October 24, 2014

Wednesday, November 26, 2014

Friday, December 19, 2014

All meetings will be held in the Queen Liliuokalani Conference Room of the King Kalakaua Building, 335 Merchant Street, First Floor.

Meeting dates, locations and times are subject to change without notice. Please visit the Commission's website at www.hawaii.gov/hirec or call the Real Estate Commission Office at (808) 586-2643 to confirm the dates, times and locations of the meetings. This material can be made available to individuals with special needs. Please contact the Executive Officer at (808) 586-2643 to submit your request.