

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
SBC 2004, c 42 as amended

AND

IN THE MATTER OF

[Applicant 4]
([Redacted])

**REASONS FOR DECISION REGARDING
ADMINISTRATIVE PENALTY RECONSIDERATION REQUEST**

[These Reasons have been redacted before publication.]

DATE AND PLACE OF HEARING: Via Written Submissions

HEARING OFFICER: Gareth Reeves

Introduction

1. On June 12, 2024, the BC Financial Services Authority ("**BCFSA**") issued a Notice of Administrative Penalty (the "**NOAP**") in the amount of \$1,000 to [Applicant 4] pursuant to section 57(1) and 57(3) of the *Real Estate Services Act*, RSBC 2004, c 42 ("**RESA**").
2. In the NOAP, BCFSA determined that [Applicant 4] had contravened sections 41 of the *Real Estate Services Rules*, BC Reg 209/2021 (the "**Rules**") by publishing Instagram posts containing inaccurate price differences between listing and sold prices for three properties and implying he was a designated agent in two transactions when he was not involved.
3. [Applicant 4] applied for a reconsideration of the NOAP under section 57(4) of RESA. The application proceeded by written submissions.

Issues

4. The issue is whether the June 12, 2024 NOAP should be cancelled or confirmed.

Jurisdiction and Standard of Proof

5. This application for reconsideration is brought pursuant to section 57(4) of RESA, which requires the Superintendent of Real Estate (the "**superintendent**") to provide a person who receives an administrative penalty with an opportunity to be heard upon request.
6. Section 57(4) of RESA permits the superintendent to cancel the administrative penalty, confirm the administrative penalty, or, if the superintendent is satisfied that a discipline hearing under section 40 of RESA would be more appropriate, cancel the administrative penalty and issue a notice of discipline hearing.

7. The superintendent has delegated the statutory powers and duties set out in section 57 to Hearing Officers.
8. The standard of proof is the balance of probabilities.

Background

9. The evidence and information before me consists of an investigation report completed by BCFSA, the tabs to that report, and the information provided by [Applicant 4] in the application for reconsideration. The investigation report in this matter involved two real estate licensees and I was provided only the tabs relevant to [Applicant 4]'s conduct. The following is intended to provide some background to the circumstances and to provide context for my reasons. It is not intended to be a recitation of all of the information before me.
10. This matter concerns three properties: [Property 1], West Vancouver ("**Property 1**"); [Property 2], Coquitlam ("**Property 2**"); and [Property 3], Coquitlam ("**Property 3**"). The NOAP was issued on the basis that [Applicant 4] published false information concerning the difference between the listing and sale price of the three properties and that he published information that falsely implied he was a designated agent in the transactions regarding Property 1 and Property 2.
11. [Applicant 4] is a representative licensee in the trading services category. He was first licensed on October 7, 2021. At the relevant times he was licensed with [Brokerage 1].
12. At the relevant times, [Applicant 4] had an Instagram page on which he posted information about real estate and real estate services. He identified himself on the page and named his brokerage. The username of his account was "[Applicant 4].prec" and he identified himself as a "Realtor®" and "Real Estate Advisor" in the bio of his account.

Property 1

13. On April 5, 2023, another licensee made an Instagram post about Property 1 stating "There's still a lot of negotiation left on the upper end of the market. Listed for 5.3 mil. We got this at 4.5 mil for our client. Who you work with matters!". The stated price difference is \$800,000. [Applicant 4] and a third licensee were tagged in that post and remained so tagged until at least January 12, 2024 when BCFSA Investigations took a screenshot of it.
14. The actual listing price of Property 1 was \$5,280,000. The actual sale price of Property 1 was \$4,575,000. The difference between those is \$705,000. [Applicant 4] was not listed as a designated agent for the transaction on Property 1 in the MLS information BCFSA Investigations obtained.

Property 2

15. On July 9, 2023, [Applicant 4] made an Instagram post about Property 2 stating as follows:

"Sold! Congratulations to our lovely buyers for securing this beautiful house! We knew and were confident with the market, that's why we could negotiate and bought this house for more than \$600k below the listing price!

Quick reminder! That the listing price means nothing! And your realtor should research and find the market value of the property for you to offer!

Listing Price \$2,388,000

Sold Price: \$1,750,008
16. The original listing price for Property 2 was as indicated, but when it was sold it was listed for \$1,790,800. There was an intervening reduction to \$1,880,000. [Applicant 4] was not listed as a

designated agent for the transaction on Property 2 in the MLS information BCFSA Investigations obtained.

17. Two other licensees were tagged in the Property 2 post, one of whom was the licensee who made the Property 1 post and the other was the third licensee tagged in that Property 1 post. They were so tagged until at least January 12, 2024.

Property 3

18. On August 17, 2023, [Applicant 4] made an Instagram post about Property 3 stating as follows:

“The best part of my job is befriending clients. After touring over 50 homes, we successfully acquired this stunning property, negotiating \$50k below the asking price. Congrats to SH&SH on their new home.”

19. The listing price for Property 3 was \$860,000 and the sale price was \$812,000, a difference of \$48,000.

Submissions

20. [Applicant 4] submits in regard to Property 1 that he did not create or publish the advertisement and was tagged without his consent. In his response to BCFSA's investigation, he also states that on learning his name was tagged in a reel related to the property he “took immediate action to have it removed” and requested that his name be removed from the advertisement.
21. Regarding Property 2, he admits he was not an agent for the buyers but referred them to the agent who represented them. He says he was “actively involved in the transaction”. He says that the actual difference between the list price and the sale price was \$629,999, which was in fact more than \$600,000 as stated in the Instagram post. I note that his calculation is incorrect and the actual difference between \$2,388,000, being the original list price for Property 2, and \$1,750,008, being the actual sale price, is \$637,992; however, this calculation error does not impact the point of [Applicant 4]’s submission, which is that the difference was in fact more than \$600,000.
22. Regarding Property 3, he says that the \$50,000 difference noted in his advertisement “was a rounded representation of the actual amount, \$48K, intended for clarity and ease of understanding.” He says he did not intend to mislead the public. In his response to BCFSA Investigations, he acknowledged that even minor rounding could “lead to misconceptions”.

Reasons and Findings

Applicable Legislation

23. Section 56 of RESA provides that BCFSA may designate specific provisions of RESA, the *Real Estate Regulation*, BC Reg 506, 2004 (the “**Regulations**”), or the Rules as being subject to administrative penalties, and may establish the amounts or range of amounts of administrative penalty that may be imposed in respect of each contravention of a specified provision. Pursuant to section 56(2), the maximum amount of an administrative penalty is \$100,000.
24. Section 26(1) of the Rules indicates that for the purposes of section 56(1) of RESA, contraventions of the Rules listed in section 26(2) are designated contraventions to which Division 5 (Administrative Penalties), Part 4 of RESA, applies.
25. At the relevant time section 26(2) of the Rules, identified four categories, Category A, B, C, and D, for designated contraventions for the purpose of determining the amount of an administrative penalty. Section 41 of the Rules was placed in Category D. Section 27(4) of the Rules provided

that Category D contraventions would attract a \$1,000 base penalty for a first contravention, plus an additional \$250 per day, or part of a day, that the contravention continues.

26. Section 57(1) of RESA sets out that if the superintendent is satisfied that a person has contravened a provision of RESA, the Regulations, or the Rules designated under section 56(1)(a) of RESA, the superintendent may issue a notice imposing an administrative penalty on the person. Section 57(2) requires that a notice of administrative penalty indicate the rule that has been contravened, indicate the administrative penalty that is imposed, and advise the person of the person's right to be heard respecting the matter.

27. The Rules provide as follows:

- 1** In these rules:
- ...
- "publish"**, in relation to real estate advertising, includes
- (a) causing or permitting real estate advertising to be published, and
 - (b) displaying real estate advertising, or causing or permitting real estate advertising to be displayed;
- ...
- 41** A licensee must not publish real estate advertising that the licensee knows, or reasonably ought to know, contains a false or misleading statement or misrepresentation concerning real estate, a trade in real estate or the provision of real estate services.

Analysis

28. The imposition of an administrative penalty under section 57 of RESA is a discretionary decision. A request to reconsider the imposition of an administrative penalty requires a Hearing Officer to consider not only whether a contravention of RESA, the Regulations, or the Rules has occurred, but also whether a licensee exercised due diligence, that is: took reasonable steps or precautions, to prevent the contravention of the designated sections identified in the notice of administrative penalty. A Hearing Officer may also consider information on any extenuating circumstances that prevented compliance, or any other information the licensee believes a Hearing Officer should consider.
29. To establish that a licensee contravened section 41 of the Rules, the following must be shown:
- a. The licensee published the material by causing or permitting it to be published, displaying it, or causing or permitting it to be displayed;
 - b. The material was real estate advertising;
 - c. The content made a false or misleading statement or misrepresentation concerning real estate, a trade in real estate, or the provision of real estate services; and
 - d. The licensee knew or ought to have known the material contained the above noted false or misleading statement(s) or misrepresentation(s).
30. The question of due diligence arises in two contexts within that analysis. First, it arises in the knowledge section in regard to the licensee exercising due care regarding the content published. Once it is proven that the material contained false or misleading statements or misrepresentations, the question is whether the licensee exercised due diligence with regard to those statements or representations. Second, it arises in the publication analysis when addressing whether the licensee

exercised due care when causing or permitting publication. Here, the question is whether the licensee exercised due care when causing, permitting, or continuing publication.

31. In many cases, the content question is of primary concern because the licensee is actively involved in the production and dissemination of the material and the question of care in publishing does not arise; however, in some cases the question of care in publication arises as well because the licensee shares, disseminates, or otherwise becomes connected to the publication after it is published. As is apparent from the below, this case involves both questions.

Property 1

32. In regard to the April 5, 2023 Instagram post, the first question that arises is whether [Applicant 4] published it.
33. The evidence before me establishes that the post was made on another licensee's Instagram page. There is no evidence that [Applicant 4] has access to or control over that page. I find that the other licensee made the post and tagged [Applicant 4] in that post.
34. There is no evidence that [Applicant 4] knew that the other licensee intended to tag [Applicant 4] or that [Applicant 4] consented to it in advance. He cannot be said to have caused the other licensee to post the Instagram post.
35. The question then becomes whether [Applicant 4] permitted the post. In my view, the word "permitting" includes a meaning that encompasses both directly consenting to something and to allowing something to happen with knowledge, actual or implied, that it will occur or is occurring. The phrasing of the definition in the Rules, in particular the use of both "causing" and "permitting" together, suggests that the drafter intended that definition to apply beyond cases where the licensee consented in advance or actively pursued the publication. The word "permit" also indicates that the licensee alleged to have permitted the publication must have a degree of knowledge of the publication to be considered to have permitted it. In my view, that degree of knowledge includes actual knowledge and implied knowledge, that which the licensee reasonably ought to have known: see *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299 at pp 1326-1329.
36. [Applicant 4] may not have made the April 5, 2023 post about Property 1, but Instagram notifies users when they are tagged in posts and allows them to untag themselves. The evidence establishes that [Applicant 4] was tagged in the post and remained tagged in it until at least January 12, 2024. The evidence establishes that he was using Instagram over the course of 2023. I find that it is more likely than not that [Applicant 4] was notified when he was tagged in that post and that he remained tagged for several months.
37. In my view, that tagging is sufficient to conclude that [Applicant 4] permitted the post and therefore published it within the meaning of the Rules. He was notified of the post on a social media platform that he used to promote his real estate services and to represent himself as a real estate licensee and therefore ought to have known he had been tagged and ought to have turned his mind to the question of whether he wanted to remain tagged. In that context, he permitted his own profile to remain tagged in that post for a significant amount of time.
38. I find that the post was real estate advertising. It promoted real estate services and made representations regarding Property 1.
39. The Instagram post regarding Property 1 exaggerated the price difference between the listing and sale price by \$95,000. I find this is false and misleading regarding the noted pricing information. It suggests that the real estate licensees involved in the transaction were able to obtain a purchase price for their buyer client(s) \$800,000 below listing price when the difference was actually \$705,000. I find that the listing and sale price numbers were rounded in a misleading fashion to

exaggerate the difference between those numbers. I find that the post made a false and misleading statement which misrepresented the trade in real estate and the real estate services provided in relation to that trade.

40. Regarding the content, I find that [Applicant 4] ought to have known it was false or misleading or he should have untagged his account from the post. As indicated above, Instagram allows users to untag themselves. It should be recalled that it was [Applicant 4]'s real estate related Instagram account that was tagged in this post and therefore he was linked to this post in regard to his real estate activities. As discussed below, by being tagged in the post [Applicant 4] and his business became connected to it and he should have turned his mind to whether he wanted to remain connected to it. Once [Applicant 4] was tagged and notified that he was tagged, he should have either verified the information in the post and if he could not, untagged himself. It should also be noted that the material before me shows that he was actively using that account during the time when it was tagged.
41. Although [Applicant 4] stated that he "took immediate action to have" the tag removed and asked the poster to have his name removed, he provided no information regarding when this was done or what actions he took. I am not persuaded that [Applicant 4] took sufficient steps to either untag himself or to remove the tag.
42. Regarding whether the post implied that [Applicant 4] was a designated agent, I do not find that [Applicant 4] being tagged in the post implied that he was a designated agent in the Property 1 transaction. Being tagged in a social media post generally implies that one is involved with or connected to the content of the post. This is particularly so where the account tagged is a business account and the post is associated with that business, such as a real estate licensee tagged in a post about specific real estate like in this case. That said, the implied connection might not necessarily be that the tagged person is a designated agent for a party. It could imply that they are a party themselves or that they referred a party.
43. Therefore, I do not find that tagging a licensee in a social media post concerning the property indicates the tagged licensee is a designated agent in the transaction, on its own.
44. I also do not find that this was implied by the post in question, in its context. Although the posting licensee references "We" and "our client", there is nothing in the text that indicates [Applicant 4] specifically represented the referenced client in this transaction. Notably, the post tagged another licensee, not just [Applicant 4]. So, the "We" and "our" could include that other licensee and not [Applicant 4]. I therefore find that the post did not imply that [Applicant 4] was a designated agent in the transaction; it was not false or misleading in that regard.
45. Further, looking at the context of the social media posts provided to me suggests that [Applicant 4] and the other licensee were consistently tagging each other in posts and the other licensee repeatedly made references that might suggest they were a real estate team. Although this might suggest that [Applicant 4] was an agent for the licensee's clients as a result of them being on a team, I do not find that this context was sufficient to support such an inference on a balance of probabilities. I do not find that the one post, on its own or in the context, was sufficient to make this representation.
46. Therefore, I find that [Applicant 4] contravened section 41 of the Rules by permitting real estate advertising that he ought to have known contained a false and misleading statement and misrepresentation concerning a trade in real estate and the provision of real estate services by permitting the April 5, 2023 Instagram post about Property 1 that contained false and misleading information about the difference between the listing and sale prices. I find there was no misrepresentation with regard to [Applicant 4] being a designated agent on the transaction.

Property 2

47. With regard to the July 9, 2023 Instagram post concerning Property 2, [Applicant 4] published the post himself and it was clearly real estate advertising.
48. In my view, his phrasing and his use of “our” and “we” in that post implied that he was actively involved as a designated agent in the transaction and was more than just a referrer for the client. [Applicant 4] admits that he referred the client and provides no clear information about anything else that he did on the transaction. Although [Applicant 4] submits that he was actively involved, he does not indicate to what extent or in what way. In my view, the evidence indicates he made a referral to a more experienced agent who handled the transaction, and [Applicant 4] did not act as an agent for the buyers.
49. I therefore find that the above representation was false and misleading and misrepresented the real estate services he provided on the Property 2 transaction.
50. The phrasing of the post also implies that it was his negotiations that brought the purchase price down at least \$600,000 from the listing price. However, the facts indicate that when the buyers purchased the property it was listed for significantly less. The amount that the purchasers bought the property for was only \$40,792 less than the listing price at the time. The post therefore significantly overstated the reduction acquired with regard to this transaction at the time. It was therefore a false and misleading statement and misrepresentation concerning the provision of real estate services on that transaction. [Applicant 4] ought to have known that the price difference was not as he had indicated: he should have confirmed what the actual difference was between the listing price at the time and the sale price.
51. Therefore, I find that [Applicant 4] contravened section 41 of the Rules by publishing real estate advertising that he ought to have known contained a false and misleading statement and misrepresentation concerning a trade in real estate and the provision of real estate services by publishing the July 9, 2023 Instagram post about Property 2 that misrepresented the difference between the listing and sale prices and implied that he was a designated agent for the buyers.

Property 3

52. [Applicant 4] published the August 17, 2023 Instagram post concerning Property 3 and it was clearly real estate advertising.
53. I find that the Instagram post made by [Applicant 4] regarding Property 3 was misleading and contained false information about the real estate services he provided in relation to that property. The post exaggerated the difference between the sale price and the listing price by \$2,000. In my view, the rounding in this case was misleading and exaggerated the amount of the difference in price [Applicant 4] was able to obtain for his clients. [Applicant 4] has admitted that the difference could have been misleading.
54. While [Applicant 4] submits that he rounded the number for clarity and ease of understanding and that he did not intend to mislead, in my view it would be no less clear to have stated “\$48k” rather than “\$50k”. [Applicant 4] has not established that he took any care in making this misrepresentation, merely that the discrepancy was small. Regardless of its size, it is sufficient to be misleading unless it clearly indicated it was approximate.
55. Therefore, I find that [Applicant 4] contravened the section 41 of the Rules when he made the August 17, 2023 Instagram post regarding Property 3 by incorrectly stating the difference between the listing and sale prices.

Penalty Amount

56. I have concluded that [Applicant 4] contravened section 41 of the Rules on three occasions. The minimum administrative penalty for a single contravention of that section is \$1,000, plus \$250 per day, or part of a day, that the contravention continues. Although I have found that one of the allegations made in the NOAP was not made out, each of the posts was false and misleading, [Applicant 4] knew or ought to have known they were false and misleading, and [Applicant 4] published them within the meaning of the Rules. [Applicant 4] could have faced a base penalty of \$3,000 for these contraventions. In my view, the penalty amount issued is at the low end of the appropriate penalties for [Applicant 4]'s conduct.

57. I therefore find that the \$1,000 penalty was appropriate.

Conclusion

58. I find that [Applicant 4] contravened section 41 of the Rules in regard to the April 5, July 9, and August 17, 2024 Instagram posts as set out above. I confirm that I do not find that the April 5, 2024 Instagram post implied that [Applicant 4] was a designated agent in relation to the transaction noted in that post. I confirm the \$1,000 administrative penalty issued on June 12, 2024.

59. The administrative penalty is now due and payable to BCFSA.

DATED at North Vancouver, BRITISH COLUMBIA, this 1st day of November, 2024.

“Original signed by Gareth Reeves”

Gareth Reeves
Hearing Officer