Citation: Shums (Re), 2025 BCSRE 11
Date: 2025-01-23
File No. 24-5300

BC FINANCIAL SERVICES AUTHORITY

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

AND IN THE MATTER OF

AYYAZ SHUMS
(162398)

AND

AYYAZ SHUMS PERSONAL REAL ESTATE CORPORATION
(162398PC)

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 September 6, 2024, the BC Financial Services Authority ("**BCFSA**") issued a Notice of Administrative Penalty (the "**NOAP**") in the amount of $11,500 to Ayyaz Shums and Ayyaz Shums Personal Real Estate Corporation (collectively, "**Mr. Shums**") pursuant to section 57(1) and 57(3) of the *Real Estate Services Act*, RSBC 2004, c 42 ("**RESA**"). The $11,500 was made up of a $1,000 base penalty plus 42 days of daily penalties in the amount of $250 per day for the period from July 27 to September 6, 2024, inclusive.

2. In the NOAP, BCFSA determined that Mr. Shums had contravened section 29(1)(b) of the *Real Estate Services Rules*, BC Reg 209/2021 (the "**Rules**") by failing to respond promptly to investigation demands.

3. On October 4, 2024, Mr. Shums made submissions on an application for a reconsideration of the NOAP under section 57(4) of RESA. The application proceeded by written submissions.

4. On November 7, 2024, BCFSA Hearings Division wrote to Mr. Shums and BCFSA to advise that it appeared to me that the NOAP had been issued under the wrong section of the Rules because it appeared that the appropriate section was section 21 and not section 29(1)(b). I set a submission schedule for the parties, which they followed. On January 9, 2025, I decided that BCFSA could correct the NOAP to reference section 21. Those reasons are indexed as follows: *Shums (Re),* 2025 BCSRE 4.

5. On January 17, 2025, BCFSA issued a Corrected Notice of Administrative Penalty replacing section 29(1)(b) of the Rules with section 21 of the Rules (the "**Corrected NOAP**") and otherwise being the same as the NOAP.

6. On January 22, 2025, Mr. Shums's legal counsel, David Taylor, resubmitted Mr. Shums's October 4, 2024 submissions and asked if anything further was required from Mr. Shums. BCFSA Hearings Division confirmed that nothing further was required and that the Corrected NOAP would be addressed in this reconsideration.

Issues

7. The issue is whether the Corrected NOAP should be cancelled or confirmed. If the Corrected NOAP is cancelled, I must decide whether it should be referred to a discipline hearing.

Jurisdiction and Standard of Proof

8. 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.

9. 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.

10. The superintendent has delegated the statutory powers and duties set out in section 57 to Hearing Officers.

11. The standard of proof is the balance of probabilities.

Background

12. The evidence and information before me consists of an investigation report completed by BCFSA, the tabs to that report, the letter enclosing the NOAP for delivery to Mr. Shums, and the information provided by Mr. Shums in the application for reconsideration. 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.

General Background

13. Ayyaz Shums was first licensed as a representative in the trading services category on July 28, 2011 and has been so licensed since that date. Ayyaz Shums Personal Real Estate Corporation was first licensed on March 16, 2015 and has been licensed in the same fashion as Ayyaz Shums since that date.

14. On April 3, 2024, BCFSA Investigations sent Mr. Shums an investigation letter (the "**Investigation Letter**") advising Mr. Shums that it had become aware of a civil proceeding against him that had resulted in a judgment dated January 29, 2024 (the "**Judgment**"). The Investigation Letter stated that the matter was related to his alleged involvement in acting as a mortgage broker to arrange a $100,000 loan between two families for the purpose of purchasing a property in Surrey, BC and his allegedly misrepresenting the "financial credibility of the borrower to the lender".

15. The Investigation Letter stated that it was investigating the following conduct:

> “1. As a real estate professional, your conduct, as described in the [Judgment], resulted in negative media coverage, thereby possibly bringing the industry into disrepute.
>
> 2. You failed to promptly notify the Superintendent, in writing, of the [Judgment] against you dated January 29, 2024, regarding the above-mentioned matter.
>
> 3. You failed to accurately complete your July 2023 license renewal application by not disclosing your involved [Judgment] in the application.”
>
> [*sic*]

16. The Investigation Letter requested a detailed statement of Mr. Shums’s involvement in the matter including his knowledge of events that gave rise to the matter and copies of “contracts, service agreements, disclosure forms, correspondence and any other relevant documents related to the subject matter.”

17. The deadline for Mr. Shums to respond to the Investigation Letter was April 17, 2024.

18. On April 8, 2024, Mr. Taylor, wrote to BCFSA Investigations to advise that he was retained and to request a short extension to obtain instructions from his client. BCFSA Investigations responded that same day to extend the deadline to May 1, 2024.

19. On April 30, 2024, Mr. Taylor and BCFSA Investigations had a telephone conversation and Mr. Taylor followed up with an email. In short, Mr. Taylor advised that he had been engaged by Mr. Shums to file a cross appeal of the Judgment in the appeal proceedings that had already been commenced and Mr. Taylor was in the process of ordering trial transcripts. Mr. Taylor advised that he did not know when those transcripts would be made available or what their volume would be. He stated he would keep BCFSA Investigations updated with proof of the order and information about delivery dates. Mr. Taylor advised that he would need to see the transcripts in order to advise what additional time he would need to respond to the Investigation Letter but that he expected he would need two weeks from the date he received the transcripts. He noted the importance of reviewing the transcripts to his client’s response.

20. On May 1, 2024, BCFSA Investigations agreed to waive the May 1, 2024 deadline and to reset a reasonable deadline once Mr. Taylor had received the transcripts.

21. On May 8, 2024, Mr. Taylor’s paralegal advised BCFSA Investigations that his firm had ordered the trial transcripts.

22. On June 12, 2024, Mr. Taylor wrote to BCFSA Investigations to advise that he had received the trial transcripts and that he expected to be able to provide a response to the Investigation Letter by July 31, 2024. Mr. Taylor’s proposed deadline was seven weeks from the date he received the trial transcripts.

23. On June 14, 2024, BCFSA Investigations emailed Mr. Taylor, copying Mr. Shums, to reject Mr. Taylor’s proposed deadline. BCFSA Investigations stated that items 2 and 3 in the Investigation Letter did not depend on the trial transcript and could be answered separately. Those items related to Mr. Shums reporting the Judgment to the superintendent and his disclosure of the civil proceedings in his July 2023 renewal application. BCFSA Investigations requested a response to those items independently from the review of the transcripts, but did not set a specific deadline for that response. Instead, BCFSA Investigations set a July 2, 2024 deadline for a response to all three items and Mr. Shums statement regarding the matter under investigation, stating that BCFSA Investigations had already been accommodating. This deadline was a day short of three weeks from the date Mr. Taylor received the trial transcripts.

24. Mr. Shums did not provide the required response by July 2, 2024, either himself or through Mr. Taylor.

25. On July 5, 2024, BCFSA Investigations emailed Mr. Taylor, copying Mr. Shums, to follow up and request an update on the status of the matter. That email reminded Mr. Shums and Mr. Taylor that licensees are required to respond to BCFSA Investigations' requests under section 37 of RESA. The email also highlighted section 35(1)(e) of RESA and section 21 of the Rules.

26. On July 11, 2024, BCFSA Investigations sent Mr. Shums a letter, copying Mr. Taylor, (the "**Reminder Letter**") reminding Mr. Shums of his obligations to respond. The Reminder Letter pointed out Mr. Shums's obligation to cooperate with the investigation under section 35(1)(e) of RESA and his obligation to respond promptly and by the deadlines set by the superintendent under section 21 of the Rules. The Reminder Letter also noted that a failure to comply with section 21 could attract an administrative penalty with a base penalty of $1,000 plus $250 per day that the contravention persists and provided a link to BCFSA's guidance published online entitled "Administrative Penalties under the Real Estate Services Act".

27. The Reminder Letter set a July 18, 2024 deadline for Mr. Shums to respond.

28. Neither Mr. Shums nor Mr. Taylor responded by July 18, 2024.

29. On July 19, 2024, BCFSA Investigations issued a Non-Compliance Warning Letter ("**NCWL**") to Mr. Shums, copying Mr. Taylor. The NCWL noted that the Investigation letter asked for a detailed statement, copies of documents, and any further information Mr. Shums would like considered. The NCWL noted that no response was provided by the July 2 or July 18, 2024 deadlines. The NCWL required compliance by Mr. Shums by July 26, 2024.

30. The NCWL further confirmed that an administrative penalty might be issued for Mr. Shums' non-compliance even if he provided the response before July 26, 2024, and that daily penalties could be issued for the number of days or part days that the non-compliance continued after July 26, 2024.

31. On July 26, 2024, Mr. Taylor wrote to advise that he was in a 10-week trial continuation and to respond to items 2 and 3 from the Investigation Letter.

32. Mr. Taylor's response detailed the civil proceedings that had resulted in the Judgment, certain dealings and correspondence between Ayyaz Shums's wife and BCFSA between late 2019 and early 2023 regarding the civil proceeding and Mr. Shums's July 2023 renewal application, and Mr. Shums's failure to advise the superintendent of the Judgment. The details of those responses are not particularly relevant to the issues in this proceeding and therefore will not be reproduced. It is sufficient to note that Mr. Shums responded to items 2 and 3 from the Investigation letter.

33. Mr. Taylor also confirmed he had obtained the trial transcripts and expected to receive copies of documents the following week. Mr. Taylor noted that he was in a lengthy trial continuation while attempting to finalize Mr. Shums's response. He noted that the matter at issue would likely be influenced by the results of the appeal. He stated that Mr. Shums would provide his response with respect to his conduct "as soon as possible".

34. Mr. Taylor advised that the delay in response was due to his involvement in a lengthy trial and delays in his obtaining transcripts and documents related to the trial. He advised that he was in court "every day until the end of August, 2024." He offered to make himself available outside of court hours for a telephone call.

35. Mr. Taylor's letter enclosed various documents, including pleadings in the proceeding that resulted in the Judgment, the appeal and cross appeal notices from the Judgment, emails between Mrs. Shums and BCFSA, Mr. Shums's July 2023 renewal applications, and certain pleadings and correspondence related to claims underlying the civil proceeding.

36. Mr. Taylor's letter did not address the allegation that media coverage of Mr. Shums's conduct may have brought the real estate industry into disrepute and did not provide a detailed statement regarding the matter.

37. On August 1, 2024, BCFSA Investigations wrote to Mr. Taylor, copying Mr. Shums, to confirm receipt of the July 26, 2024 letter and confirming that the responses to items 2 and 3 in the Investigation Letter were sufficient. BCFSA Investigations noted that the letter did not provide a detailed statement regarding Mr. Shums's involvement in the matter under investigation nor did it provide a response to item 1 in the Investigation Letter. BCFSA Investigations also took the position that Mr. Shums was required to respond to the investigatory request himself, as opposed to having his counsel provide factual responses, and that he could do so by providing a signed copy of Mr. Taylor's letter confirming the contents of that letter. It is not clear to me if that occurred, but in any event, that point is not at issue here.

38. BCFSA's August 1, 2024 letter noted that daily penalties had begun to accrue on July 27, 2024 and would continue to accrue until compliance was achieved.

39. BCFSA received no further reply from Mr. Taylor or Mr. Shums prior to September 6, 2024, the date BCFSA issued the NOAP.

Submissions

40. Mr. Shums provided a reconsideration request on October 4, 2024 along with written submissions. On October 7, 2024, BCFSA Hearings Division wrote to Mr. Shums to confirm receipt of that material and to advise him that he should forward any other material he felt supported his request by October 28, 2024. Mr. Shums did not provide anything further by that date. The only further submissions he made were those provided in the course of addressing the preliminary matter in this reconsideration proceeding, which are summarized in *Shums (Re)*, 2025 BCSRE 4.

41. In his submissions, Mr. Shums submits that Mr. Taylor, his counsel of choice, was in trial on another matter from June 24, 2024 until September 12, 2024 and it was difficult for Mr. Taylor to respond. Mr. Shums notes that Mr. Taylor advised BCFSA Investigations that he would need to review the trial transcripts and meet with Mr. Shums prior to providing a response to BCFSA.

42. Mr. Shums submits that Mr. Taylor received the trial transcripts in mid-June and hoped to discuss the matter with Mr. Shums prior to the start of Mr. Taylor's trial on June 24, 2024; however, Mr. Shums says Mr. Taylor advised him that "he did not have the time or the ability to properly and responsibly deal with the review of facts, evidence and documents regarding [Mr. Shums's] involvement in the transaction while immersed in preparations for a long, complex and contentious Trial [*sic*]."

43. Mr. Shums submits that Mr. Taylor advised him that he had told BCFSA Investigations about his trial and the inability to address one component of the issues raised in the Investigation Letter as a result of that trial.

44. Mr. Shums submits that no other lawyer at Mr. Taylor's firm was able to help respond to the final portion of BCFSA's request.

45. Mr. Shums submits that when Mr. Taylor returned to the office after his trial, he stated that Mr. Taylor's lengthy trial commitment meant he was facing significant backlog of urgent matters that required his attention and he was trying to clear time to assist Mr. Shums with the final portion of his response.

46. Mr. Shums submits that he was available at all times to meet with Mr. Taylor and that he did not instruct Mr. Taylor to delay any responses or refuse to provide them. He submits that Mr. Taylor is

Mr. Shums's lawyer of choice and is handling his appeal of the Judgment, which overlaps with the response owed to BCFSA.

47. Mr. Shums submits that the lengthy, uninterrupted trial and its impact on Mr. Taylor's practice was outside Mr. Shums's control and is therefore extenuating. He submits that neither he nor Mr. Taylor intended to "thwart the BCFSA investigation or process" but Mr. Taylor's trial commitments coincided with BCFSA's requests.

48. Mr. Shums submits that BCFSA's deadlines were set without Mr. Taylor's agreement or consulting with him and that there is no "significant prejudice" to the delay in Mr. Shums providing his final response. Mr. Shums submits that Mr. Taylor has informed him that he was working on a final response and expects it to be finalized within 10 days of his submissions, which would be October 17, 2024.

49. Mr. Shums submits that he seeks an "opportunity to be fully heard" and that he considers the administrative penalty to be unfair in the circumstances. He submits that he expected Mr. Taylor may have some additional comments or evidence about the matter and the delay on Mr. Taylor's part.

50. As noted above, Mr. Shums provided no further submissions on the merits of this proceeding and did not provide any comments or evidence from Mr. Taylor.

Reasons and Findings

Applicable Legislation

51. Section 56 of RESA provides that BCFSA may designate specific provisions of RESA, the Real Estate Regulation (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.

52. 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) of the Rules are designated contraventions to which Division 5 (Administrative Penalties) of Part 4 of RESA applies.

53. Section 26(2) of the Rules identifies six categories, Category A, B, C, D, E, and F, of designated contraventions for the purpose of determining the amount of an administrative penalty. Section 21 of the Rules is placed in Category D. Section 27(4) of the Rules sets out that a Category D contravention can attract a $1,000 base penalty for a first contravention or a $2,000 base penalty for a subsequent contravention plus $2,500 per day, or partial day, that the contravention continues.

54. 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.

55. Section 21 of the Rules states as follows:

> **21** (1) A licensee must respond promptly to any inquiry addressed to the licensee by the superintendent.
>
> (2) The licensee's response

(a) must be in writing, unless the superintendent allows it to be provided otherwise, and

(b) if applicable, must be provided to the superintendent no later than the date set by the superintendent.

Analysis

56. 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.

57. To establish a contravention of section 21 of the Rules, BCFSA Investigations must show that a licensee failed to respond to a request either promptly or by the deadline set for response by the superintendent. BCFSA's investigators are delegated the authority to set deadlines pursuant to section 21 of the Rules. In my view, those deadlines must be reasonably set; therefore, BCFSA must also show that the deadline set was reasonable in the circumstances.

58. In my view, the reasonableness of the deadlines should be assessed in light of the information known to the superintendent, or the superintendent's delegate, in setting that deadline. I conclude this for two reasons.

59. First, it would set an impossible standard for the superintendent to be required to exercise the discretion to set a deadline in light of information that was outside of the superintendent's knowledge.

60. Second, that standard speaks to the fundamental policy motivation behind section 21 of the Rules, which is to encourage and require effective and prompt communication between licensees and the superintendent. In short, it requires the licensee to advise the superintendent of any information relevant to the exercise of the discretion to set a deadline for compliance.

61. In showing that a licensee failed to respond promptly, BCFSA is not required to show that the licensee entirely failed to respond. It is sufficient that the licensee failed to respond in a way that addresses the substance of the request. In that context, if BCFSA shows that the licensee replied merely to confirm receipt, to discuss deadlines, or to respond to parts but not all of the requests made, that is sufficient to establish a contravention.

62. Once a contravention is established, the licensee may avoid liability for failing to meet a reasonably set deadline if they can show the alleged contravention occurred despite their exercise of due diligence or as a result of extenuating circumstances.

63. I note that the issue of setting reasonable deadlines arises also in relation to the deadline set in a non-compliance warning letter. This is acknowledged to some extent in BCFSA's guidance published online entitled "The Administrative Penalty Process" (the "**AP Process**") which provides as follows:

> BCFSA may grant an extension of the Compliance Warning Period or cancel the Non-Compliance Warning Letter if the individual or entity provides BCFSA with sufficient information to satisfy BCFSA that there are extenuating circumstances.
>
> If compliance cannot be achieved within the Compliance Warning Period due to extenuating circumstances, a request for an extension of the Compliance Warning

> Period should be made to BCFSA before the period ends. If an extension is granted, administrative penalties will not be imposed during the extension period. The length of the extension will be determined on a case-by-case basis and will consider the nature of the circumstances.
>
> Granting an extension of the Compliance Warning Period or cancelling the Non-Compliance Warning Letter does not prevent BCFSA from taking action in the future in respect of the matter. If the contravention continued beyond a reasonable timeframe after granting an extension of the Non-Compliance Warning Letter, and the contravention continues to be eligible for an administrative penalty, BCFSA can choose to issue an administrative penalty for the base amount.

64. The AP Process provides examples of circumstances that BCFSA generally considers extenuating and those it generally does not by stating as follows:

> Some examples of extenuating circumstances include, but are not limited to:
>
> - Significant disruption to a brokerage's computer system due to a cyber attack, a fire, or a flood;
> - Extraordinary work being undertaken by an external auditor;
> - Business disruption caused by industrial action, natural disaster, or state of emergency;
> - Significant illness, accident, or injury requiring hospitalization; and
> - Absence caused by jury duty.
>
> Examples of situations that are unlikely to be considered as extenuating circumstances include:
>
> - Staff changes or absences;
> - Minor computer problems, partial system disruptions, or lack of contingency plans;
> - Office closures or statutory holidays;
> - Personal or domestic events such as moving or attending a wedding;
> - Holidays or travel arrangements;
> - Postal delivery delays or strikes; and
> - Minor illnesses.

65. In short, extenuating circumstances are generally those events that are unavoidable, unforeseeable, and beyond a licensee's control. They are not those events that a licensee could have reasonably avoided or planned for or that the licensee causes.

66. I note that I am not bound by the AP Process and that I must consider this matter in the whole of its context and in accordance with the relevant provisions of RESA and the Rules, but I may refer to the AP Process for guidance.

67. In my view, the AP Process indicates two things, with which I agree.

68. First, that the choice to issue a daily administrative penalty is, in part, discretionary and separate from the question of whether a contravention of the underlying rule has occurred. If this were not the case, then the superintendent would not have the ability to set a non-compliance warning period or extend it. Instead, the superintendent would be required to issue a daily penalty for each day that the contravention persisted after the deadline had passed.

69. Second, that the exercise of the discretion to set a non-compliance warning period is constrained to limited circumstances akin to those listed in BCFSA's list of extenuating circumstances. I say this because setting a non-compliance warning period assumes that the licensee is offside an ongoing regulatory obligation and the licensee has therefore, in the superintendent's view at the time, failed to exercise sufficient due diligence in meeting their statutory obligations. Once they have failed to exercise due diligence in meeting the initial statutory obligation, only discharging the obligation will prove the licensee has exercised due diligence after the fact, absent extenuating circumstances that prevented compliance.

Contravention

70. BCFSA Investigations set two material deadlines for Mr. Shums to respond to the Investigation Letter: July 2, 2024 and July 18, 2024. At the time those deadlines were set, BCFSA Investigations did not know that Mr. Taylor was in trial. That information was not provided to BCFSA Investigations until July 26, 2024: a date after both those deadlines had expired and the date set for Mr. Shums to cure his alleged non-compliance according to the NCWL.

71. Mr. Shums says that these dates were set without consulting Mr. Taylor and without his agreement. This is only partially true. The July 2, 2024 date was set on June 14, 2024, in response to Mr. Taylor's proposal to set the deadline for response at July 31, 2024. Although Mr. Taylor did not agree to BCFSA Investigations' July 2, 2024 deadline, he did not reply to object to that deadline or to note that his trial commitments might interfere with his ability to deliver a response by that date. He did not respond to BCFSA Investigations' argument that portions of the response did not require a review of the trial transcripts at all and could therefore be provided independently of the other responses.

72. In fact, Mr. Taylor did not respond to BCFSA Investigations after the June 14, 2024 email in any fashion until July 26, 2024. He failed to do so despite BCFSA Investigations explicitly noting to Mr. Taylor, via correspondence copying Mr. Shums, that a failure to respond may contravene section 21 of the Rules on July 5, 2024 and noting that the failure to respond by the deadline set could attract an administrative penalty on July 11, 2024.

73. I acknowledge in this regard that Mr. Taylor was in trial starting June 24, 2024, as indicated by Mr. Shums in his submissions. I also acknowledge that trial appearances are highly demanding on counsel's time. That said, those facts do not explain why Mr. Taylor did not respond between June 14, 2024 and June 24, 2024 to note his pending trial obligations. It also does not explain why Mr. Taylor's paralegal, who was copied on BCFSA Investigations' June 14 and July 5, 2024 emails, could not have responded on Mr. Taylor's behalf. It further does not explain why Mr. Shums, being in receipt of BCFSA Investigations' correspondence, did not respond to advise that Mr. Taylor was in trial either.

74. Mr. Taylor and Mr. Shums provided no reason for BCFSA Investigations to believe that the July 2, 2024 deadline was unreasonable, objectionable, or unworkable. I find that the July 2 and July 18, 2024 deadlines were both reasonably set by BCFSA Investigations. The first was approximately one week longer than the initial estimate from Mr. Taylor regarding how long it would take to deliver the response once he had the trial transcripts and the second was approximately three weeks longer. Had Mr. Taylor or Mr. Shums advised BCFSA Investigations that Mr. Taylor was in trial, such that BCFSA Investigations was aware of that commitment, that could have impacted the exercise of the discretion to set a deadline. Given that information was not provided and that Mr. Taylor and Mr. Shums did not raise any issue with either date, BCFSA Investigations could have no reason to believe those deadlines should not stand.

Due Diligence, Extenuating Circumstances, and the NCWL Deadline

75. Regarding Mr. Shums' exercise of due diligence, I find that he failed to exercise due diligence in responding to the substance of BCFSA Investigations' inquiries by the deadlines set by BCFSA Investigations. Mr. Shums did not respond to any portion of the Investigation Letter until both of those deadlines had passed. In my view, he was obliged to either substantively respond by those deadlines or to respond in a manner that demonstrated the deadlines were unreasonably set in the circumstances, he failed to do either and therefore failed to demonstrate he had exercised due diligence in meeting those deadlines.

76. That said, the matter does not end with the question of whether Mr. Shums failed to meet the deadlines set because the Corrected NOAP seeks to impose daily penalties for the period from July 27, 2024 to September 6, 2024, inclusive. That requires an assessment whether Mr. Shums met the deadline in the NCWL, whether compliance was achieved within that period, and whether the deadline was set in a way that did not properly consider extenuating circumstances.

77. As indicated above, Mr. Shums did not substantively respond to item 1 or provide a detailed statement regarding his involvement in the matters underlying the civil claim by July 26, 2024 and had not provided such a response by September 6, 2024. There is no dispute regarding those facts; therefore, absent proof of extenuating circumstances, the administrative penalty should be confirmed.

78. In this case, Mr. Shums essentially argues that Mr. Taylor's trial constitutes an extenuating circumstance. I agree for the reasons that follow.

79. Mr. Shums had engaged Mr. Taylor to represent him in this matter in April 2024. It appears that he engaged Mr. Taylor to act for him regarding BCFSA's investigation and regarding an appeal and cross appeal of the Judgment. Mr. Shums likely would not have known at that time that Mr. Taylor had a substantial trial commitment in the summer of 2024 and, even if he did, he likely would not have known the extent to which that commitment might limit Mr. Taylor's ability to respond to BCFSA's requests, particularly because trial transcripts had not been ordered or delivered to Mr. Taylor.

80. It was not until mid-June 2024 that Mr. Shums could have known that the transcripts were delivered and, in light of that delivery date, known the risk that Mr. Taylor's trial commitment would interfere with his ability to respond to BCFSA by the deadlines set. Although I have found that Mr. Shums failed to advise BCFSA Investigations of this issue prior to July 26, 2024, Mr. Taylor did eventually advise BCFSA Investigations of that fact on that date. Mr. Taylor also advised BCFSA Investigations that he was going to continue to be in trial until at least the end of August, 2024, that he was waiting on the delivery of certain documents the following week, and that he had filed a cross appeal that took issue with certain findings of fact by the trial judge.

81. In those circumstances, which were largely beyond Mr. Shums's control, it was unreasonable for BCFSA Investigations to expect a substantive response from Mr. Shums or Mr. Taylor while Mr. Taylor was in the midst of a trial, which undoubtedly would have occupied a significant amount of Mr. Taylor's time.

82. I note in this regard that an individual's choice of counsel is well recognized as an important right. It is not absolute, but it should not be interfered with lightly: see *MacDonald Estate v Martin*, [1990] 3 SCR 1235, at 1243 in the context of disqualification of counsel for conflicts of interest.

83. In my view, Mr. Shums's choice of Mr. Taylor was not unreasonable when he made it and it was reasonable of him to seek to have the same counsel represent him for his appeal and his dealings with BCFSA Investigations. There are clear efficiencies in having both matters addressed by a single lawyer who is familiar with the background facts.

84. I also think it was reasonable for Mr. Taylor to need to review the trial transcripts before preparing Mr. Shums's response to item 1 in the Investigation Letter and a detailed summary of Mr. Shums's involvement in the matter. Those transcripts would have contained evidence from Mr. Shums and the other witnesses in the proceeding regarding the matters under investigation by BCFSA. It would have been important for Mr. Taylor to have reviewed those materials in preparing any such response and would have been reckless to issue a substantive response without doing so.

85. In the particular circumstances of this case, where the trial transcripts were delivered so close to Mr. Taylor's trial continuation commencing, I find the trial to be extenuating. I find this having considered that Mr. Taylor should have communicated the fact of his trial commitment more clearly to BCFSA Investigations before July 26, 2024 and that he was perhaps overly ambitious with the estimation of his ability to respond on Mr. Shums's behalf by July 31, 2024 given his immediately pending trial proceedings. I have also considered that Mr. Taylor's July 26, 2024 letter did not clearly advise when he expected the trial continuation to conclude.

86. I note that there is no evidence before me that would indicate Mr. Shums was attempting to delay his response to BCFSA Investigations or that his choice of counsel was aimed at achieving such a delay.

87. I am conscious of the fact that Mr. Shums had not provided a substantive response to the remaining issues in the Investigation Letter by October 7, 2024, when he made his first submissions in this matter, and that it is unclear whether he has complied after that date. Although I am troubled by this further delay and the lack of information regarding the status of Mr. Shums's compliance, the fact that the daily penalties were assessed for the period from July 27, 2024 to September 6, 2024 inclusive renders these facts irrelevant.

88. Although the availability of counsel is not listed as an extenuating circumstance in the AP Process, the list provided there is neither exhaustive nor binding on me. In my view, the unavailability of a licensee's choice of counsel, where there is no evidence that the licensee is attempting to obstruct or delay the proceeding, is sufficiently akin to those matters listed in the AP Process that it should be considered an extenuating circumstance, particularly given the importance of that right.

89. I therefore find that the July 26, 2024 deadline in the NCWL should have been extended to a date that would have given Mr. Taylor a reasonable opportunity to respond after his trial had concluded. I do not opine on what that date ought to have been, but it suffices to note that the NOAP was issued before Mr. Taylor would have had that reasonable opportunity. The daily amounts issued in this case should not have been issued because of the circumstances surrounding Mr. Taylor's availability, which had become known to BCFSA Investigations on July 26, 2024.

Penalty Amount

90. The administrative penalty in this case includes a base penalty of $1,000 plus daily penalties totaling $10,500. I do not have the power to vary or amend the penalty amount in this proceeding. I only have the power to confirm or cancel the administrative penalty. If I cancel the administrative penalty, I can refer the matter to a discipline hearing.

91. The penalty issued in this case, although composed of a base and daily amounts, is a single penalty. This is indicated by the wording of section 27(4) of the Rules which indicates that the penalty issued is a singular penalty composed of a base amount and daily amounts and not separate penalties. As a result, my finding that the daily penalties were improperly issued, combined with the limited scope of orders available to me to order under section 57(4) of RESA, means I must cancel the administrative penalty.

92. The question therefore remains whether I should issue a notice of hearing under section 40(1) of RESA in addition to cancelling the penalty.

93. In my view, this matter is not one in which issuing a notice of discipline hearing would be "more appropriate than imposing the administrative penalty". This is not a matter in which there is an issue as to whether the administrative penalty was the appropriate form of regulatory intervention, as opposed to another type of order under section 43(2) of RESA. The matter does not need to be sent to a hearing because there are unresolvable factual disputes that require the matter to be sent to hearing: the facts are sufficiently clear in this case. Further the matter does not need to be sent to a discipline hearing to determine what proportion of the daily penalty amounts are warranted and which are not: I have found that the whole of the period for which daily penalties were issued fell within a period during which it was not reasonable to expect a substantive response from Mr. Taylor on behalf of Mr. Shums.[1] As a result, none of the daily penalty amounts issued here could stand at a hearing. The only issue at a discipline hearing would be the appropriate penalty for Mr. Shums's contravention of section 21 of the Rules by failing to respond substantively by July 2 and 18, 2024. In my view, that does not warrant the time and expense required to have this matter heard by way of a discipline hearing.

94. I therefore, cancel the Corrected NOAP.

Conclusion

95. I find that Mr. Shums contravened section 21 of the Rules by failing to respond to the requests made in the Investigation Letter by July 2 and July 18, 2024. I find that, notwithstanding those contraventions, Mr. Taylor's lack of availability while in trial was sufficiently extenuating such that daily penalties should not be issued from July 27 to September 6, 2024 inclusive.

96. I find that issuing a notice of discipline hearing is not more appropriate than imposing an administrative penalty in this matter.

97. I cancel the Corrected NOAP.

DATED at the City of North Vancouver, BRITISH COLUMBIA, this 23rd day of January, 2025.

"Original signed by Gareth Reeves"

Gareth Reeves
Hearing Officer

[1] In my view, it may be appropriate in some cases to have a matter referred to a discipline hearing where there may be some unresolvable evidentiary dispute or credibility issues regarding the duration for which a contravention continued.