BEFORE THE MISSOURI REAL ESTATE COMMISSION

MISSOURI REAL ESTATE COMMISSION	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 10-2219 RE
	)	
MIKEL SHAD FRIEND	)	
and	)	
SOUTWEST HOUSING LOCATORS, LLC	)	
	)	
Respondents.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DISCIPLINARY ORDER

On or about February 19, 2013, the Administrative Hearing Commission entered its Amended Decision in the case of *Missouri Real Estate Commission v. Mikel Shad Friend and Southwest Housing Locators, LLC.*, No. 10-2219 RE. In that Amended Decision, the Administrative Hearing Commission found that Respondents' Mikel Shad Friend's real estate salesperson license (license no. 2002008659) and Southwest Housing Locators, LLC's real estate association license (license no. 2003009880) are subject to disciplinary action by the Commission pursuant to § 339.100.2 (15) and (16) RSMo.[1]

The Missouri Real Estate Commission ("MREC") has received and reviewed the record of the proceedings before the Administrative Hearing Commission and the Amended Decision of the Administrative Hearing Commission. The record of the Administrative Hearing Commission is incorporated herein by reference in its entirety.

[1] All Statutory References are to the Revised Statutes of Missouri, 2000, as amended, unless otherwise indicated.

Pursuant to notice and §§ 621.110 and 339.100.3, RSMo, the MREC held a hearing on June 5, 2013, at the Division of Professional Registration, 3605 Missouri Boulevard, Jefferson City, Missouri, for the purpose of determining the appropriate disciplinary action against Respondents' licenses. All of the members of the MREC, with the exception of Rosemary Vitale, were present throughout the meeting. Twila Hillme participated through conference call. Further, each member of the MREC that was present for the hearing has read the Amended Decision of the Administrative Hearing Commission. The MREC was represented by Assistant Attorney General Matthew Laudano. Following proper and timely notice, Respondent Friend appeared in person without legal counsel.[2] Following proper and timely notice, Respondent Southwest Housing Locators, LLC was not present through legal counsel. After being present and considering all of the evidence presented during the hearing, the MREC issues these Findings of Facts, Conclusions of Law and Order.

Based upon the foregoing the MREC hereby states:

I.

FINDINGS OF FACT

1. The MREC is an agency of the state of Missouri created and established pursuant to § 339.120, RSMo, for the purpose of licensing all persons engaged in the practice as a real estate broker or salesperson in this state. The MREC has control and supervision of the licensed occupations and enforcement of the terms and provisions of §§ 339.010-339.205 and 339.710-339.855, RSMo.

[2] Respondent Friend indicated at the beginning of the MREC disciplinary hearing that he was represented by legal counsel, Miriam Decker, in this matter but that Ms. Decker was not present at the hearing. Friend acknowledged that he had the right to have counsel present at the hearing and elected to proceed with the hearing without the assistance of his legal counsel

2. The MREC hereby adopts and incorporates by reference the findings of fact of the Amended Decision and record of the Administrative Hearing Commission in *Mikel Shad Friend and Southwest Housing Locators, LLC.*, No. 10-2219 RE, in its entirety and takes official notice thereof and hereby enters its findings of fact consistent therewith.

3. The MREC set this matter for disciplinary hearing and served notice of the disciplinary hearing upon Respondents in a proper and timely fashion.

4. The MREC issued Respondents' Mikel Shad Friend's real estate salesperson license 2002008659 and Southwest Housing Locators LLC's real estate association license 2003009880. Respondents' licenses were current at all times relevant to this proceeding.

5. Respondent Friend testified regarding challenges he has faced in his personal life. Friend testified as to the scope of his business. Friend testified that the allegations were false and that his name is not on anything. Friend testified that he didn't think he should be punished for what other parties have done.

II.

CONCLUSIONS OF LAW

6. This MREC has jurisdiction over this proceeding pursuant to §§ 621.110 and 339.100, RSMo.

7. The MREC expressly adopts and incorporates by reference the conclusions of law and Amended Decision issued by the Administrative Hearing Commission dated February 19, 2013, in *Missouri Real Estate Commission v. Mikel Shad Friend and Southwest Housing Locators, LLC.*, No. 10-2219 RE, takes official notice thereof, and hereby enters its conclusions of law consistent therewith.

8. As a result of the foregoing, and in accordance with the Administrative Hearing Commission's Amended Decision dated February 19, 2013, Respondents' real estate licenses are subject to disciplinary action by the MREC pursuant to § 339.100.2 (15) and (16).

9. The MREC has determined that this Order is necessary to ensure the protection of the public.

III.

ORDER

Having fully considered all the evidence before the MREC, and giving full weight to the Amended Decision of the Administrative Hearing Commission, it is the **ORDER** of the MREC that Respondents' Mikel Shad Friend's real estate salesperson license (license no. 2002008659) and Southwest Housing Locators, LLC's real estate association license (license no. 2003009880) are hereby **REVOKED**. All evidence of Respondents' licensure shall be returned to the MREC within 30 days of this Order along with a Closing of a Real Estate Brokerage/Sole Proprietorship form.

The MREC will maintain this Order as an open, public record of the MREC as provided in Chapters 339, 610, and 324, RSMo.

SO ORDERED, EFFECTIVE THIS 18th DAY OF June, 2013

MISSOURI REAL ESTATE COMMISSION

Janet Carder, Executive Director

Before the
Administrative Hearing Commission
State of Missouri

MISSOURI REAL ESTATE COMMISSION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10-2219 RE
	)	
MIKEL SHAD FRIEND and SOUTHWEST HOUSTING LOCATORS, LLC,	)	
	)	
Respondents.	)	

AMENDED DECISION

Mikel Shad Friend and Southwest Housing Locators, LLC ("SHL") are subject to discipline under § 339.100.2(15) and (16)[1] because they performed the functions of a real estate broker when they lacked the licenses to do so, lacked good moral character, and were incompetent.

Procedure

On December 2, 2010, the Missouri Real Estate Commission ("MREC") filed a complaint seeking disciplinary action against Friend's real estate salesperson license and SHL's real estate brokerage corporation license. We served Friend with our notice of complaint/notice of hearing and a copy of the complaint by certified mail on December 23, 2010. Although service was never effected on SHL, an answer was filed by attorney Mariam Decker on behalf of both Friend and SHL on January 6, 2011. On February 27, 2012, Decker filed a motion to withdraw as attorney for SHL. On March 1, 2012, we granted the motion.

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[1]RSMo Supp. 2007. Statutory references are to RSMo Supp. 2012 unless otherwise noted.

We convened a hearing on April 17, 2012. Missouri Assistant Attorney General Matthew Laudano represented the MREC. Mariam Decker represented Friend. SHL was not represented by counsel. This case became ready for our decision on August 16, 2012, the date the last written argument was filed.

Findings of Fact

1. The MREC granted Friend a salesperson license on April 12, 2002. This license was current and active at all times relevant to these findings.

2. The MREC granted SHL a real estate brokerage license on May 1, 2003.[2] SHL lost that license on May 10, 2007.

3. Friend was a partner in SHL.

4. The MREC granted SHL a real estate brokerage corporation license on May 1, 2003. SHL lost that license on May 10, 2007.[3]

5. Friend's salesperson's license became associated with SHL on May 1, 2003. That association ended with SHL's loss of its brokerage corporation license on May 10, 2007.

6. At all relevant times, SHL operated by and through Friend, although Friend did not have an overt ownership interest in SHL, such as being a member or manager. Instead, he characterized his role as "partner."

7. At all relevant times, SHL's office was located at 1901 S. Glenstone, Springfield, Missouri.

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[2] Janet Carder, the MREC's executive director, testified (and the MREC's Exhibit 2 appears to verify) that SHL was initially licensed on August 14, 2006. However, Carder also testified (and the MREC's Exhibit 1 also appears to verify) that Friend first associated his salesperson license with SHL on May 1, 2003. In our prior case styled ***Missouri Real Estate Commission vs. Mikel Shad Friend***, case number 04-1066 RE, we found as fact that SHL was licensed as a real estate association on May 1, 2003, and we adopt our prior finding here. We discuss the prior case in our conclusions of law below.

[3] See "SHL Acted as a Real Estate Broker without a License" below for a discussion of the various terms the MREC used to describe how SHL came to lose its license.

8. At all relevant times, SHL was in the business of assisting in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate, and assisting in the negotiation of transactions calculated or intended to result in the leasing or rental of real estate.

9. SHL continued to do business from the 1901 S. Glenstone address after May 10, 2007.

10. At all relevant times, SHL maintained a web site listing real estate for rent. Prospective tenants looking to rent the properties listed on the web site would contact SHL.

11. At all relevant times, Friend worked in SHL's office.

12. From October 2007 until February 2008, Heather Brownlee was SHL's employee. She worked as a receptionist and facilitated the connection of potential tenants to homeowners. Brownlee showed properties to potential tenants. Brownlee gave lists of properties to potential tenants, arranged with owners to unlock properties so they could be shown to potential tenants, had potential tenants complete rental applications, obtained credit reports on potential tenants, negotiated rents with the potential tenants, and maintained contact with the owners on the potential tenants' behalf.

13. In October 2007, Kristin Lopez contacted SHL in search of rental property. Brownlee showed property descriptions to Lopez and her husband Guillermo Lopez, in the office and then them some of those properties in person.

14. On October 26, 2007, in SHL's office, the Lopezes signed a lease for the rental of real estate located at 1130 S. Elwood, Springfield, Missouri.

15. In January 2008, Daniel and Amanda Head contacted SHL regarding the rental of real estate located at 3864 S. Cottage Ave., Springfield, Missouri. Brownlee met with Daniel Head at the office, and then Brownlee showed the property to him.

16. After the property was shown to Mr. Head, he spoke to Friend and requested, as a condition of renting the S. Cottage Ave. property, that SHL have the property cleaned and repaired. On a subsequent inspection of that property, Mr. Head saw that some of those conditions had been met, and paid a cash deposit to secure a lease.

17. On January 15, 2008, the Heads executed a one-year lease for the S. Cottage Ave. property.

18. After signing the lease, the Heads continued to contact Friend regarding issues arising from the S. Cottage Ave. property, such as continuing repairs to the property and notices of foreclosure of the property.

Friend's License History after SHL

19. When SHL lost its broker license on May 10, 2007, Friend's salesperson's license became ineffective due to his failure to associate it with another broker.

20. On November 9, 2007, Friend associated his salesperson's license with Elite Realty Services ("Elite"), an agency owned by broker Kim House and her husband, David House.

21. Shortly before January 25, 2008, the Houses learned that Friend was continuing to operate SHL and demanded that Friend cease his association with SHL.

22. Friend refused to cease that association.

23. On January 25, 2008, Elite returned Friend's license to the MREC.

24. From January 25, 2008 until March 18, 2008, Friend's salesperson's license became ineffective due to his failure to associate it with another broker.

25. On March 18, 2008, Friend associated his salesperson's license with Kansas Square Apartments.

Cirtin's Investigation on the MREC's Behalf

26. In December 2007, the MREC asked Bob Cirtin, a private investigator, to investigate the activities of SHL and Friend.

27. On February 7, 2008, Cirtin phoned SHL and talked to Brownlee. Brownlee told Cirtin that SHL operated a web site showing houses available for rent and helped people rent those houses.

28. That day, Cirtin went to SHL's office. He met with Brownlee and asked her if he could meet SHL's manager. In response, Brownlee summoned Friend.

29. Friend informed Cirtin of SHL's web site and told Cirtin that he was a partner at SHL.

30. Friend also told Cirtin that SHL made money when one of the listed houses was rented. In that event, SHL received half of the first month's rent from the owner.

31. Photographs of the front of SHL's office, taken by Cirtin a few days after he met with Friend and Brownlee, showed signage identifying the business as Southwest Home Locators. The words "Housing Locators" were printed inside a graphical representation of a house. In addition to the business name, the words "RENT, LEASE, BUY, or SELL" were printed on the signage.

The MREC's Prior Case against Friend

32. On August 6, 2004, the MREC filed a complaint with this Commission styled ***Missouri Real Estate Commission v. Mikel Shad Friend***, to which we assigned the case number 04-1066 RE.

33. On March 10, 2005, the parties to that case filed a "Joint Motion for Consent Order, Joint Stipulation of Facts, Waiver of Hearings Before the Administrative Hearing Commission and Missouri Real Estate Commission and Disciplinary Order With Joint Proposed Findings of

Fact and Conclusions of Law" ("Joint Stipulation"). The facts stipulated to by the MREC and Friend included the following:

- Friend held a real estate salesperson's license from April 12, 2002 until about February 6, 2003;
- Friend's salesperson's license was associated with Murney Associates ("Murney") during that time;
- At all relevant times, Friend operated SHL;
- SHL did not obtain a real estate license until May 1, 2003, when it obtained a real estate association license;
- At all relevant times, SHL was primarily engaged in the business of locating appropriate tenants for landlords and providing information about available properties on its website, www.swhousing.net.
- At all relevant times, SHL operated by and through Friend;
- Friend's supervisor at Murney had forbidden Friend from operating SHL while Friend was associated with Murney;
- Before SHL received a license, it entered into "rental referral agreements" with landlords to market, advertise, and refer prospective tenants to the landlords' property;
- If, through a posting on SHL's website, a landlord successfully obtained a tenant, Friend would collect 40% of the first month's rent as commission;
- On or about December 12, 2002, three properties were shown on SHL's website as available for rent;
- On at least one occasion before SHL obtained a license, Friend, acting on SHL's behalf, personally showed one or more properties offered for rent on SHL's website to a potential tenant or tenants;
- On at least one occasion before SHL obtained a license, Friend, acting on SHL's behalf, delivered the keys for one of the properties offered for rent on SHL's website to a tenant.

34. In the Joint Stipulation, Friend also admitted that his salesperson license should be subject to discipline under § 339.100.2(11), (14), (15), (18), and (22) for the acts set out therein.

35. On March 11, 2005, this Commission adopted the facts stipulated to by the parties and concluded that Friend was subject to discipline under § 339.100.2(11), (14), (15), (18), and (22).

Conclusions of Law

We have jurisdiction.[4] The MREC has the burden of proving by a preponderance of the credible evidence that Friend or SHL committed an act for which the law allows discipline.[5] "'Preponderance of the evidence' is defined as that degree of evidence that 'is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.'"[6] The MREC meets this burden by substantial evidence of probative value or by inferences reasonably drawn from the evidence.[7]

Pleading Issue

At the hearing, Friend alleged the existence of an inconsistency in the MREC's complaint, starting with paragraph 2, which reads in part:

> Friend's license was affiliated with SHL until SHL was closed on May 10, 2007, at which time he transferred his license to Elite Realty Services LLC. Elite Services LLC returned Friend's license to the MREC office on January 17, 2008.

Friend alleged a similar discrepancy in paragraph 9 of the complaint, which read in part:

> After leaving Elite Realty Services, LLC, Friend engaged in the practice of real estate from May 2007 until at least February 2008.

Friend moved to have us bind the MREC to the allegation in paragraph 2, but we denied the motion. We mention it here because Friend raises the issue again in his brief, saying that the pleading, specifically paragraph 9 of the complaint, is misleading and erroneous, while the MREC responds that its pleading was neither misleading nor erroneous.

While Friend alleges an inconsistency between the two allegations (which we see as well), we also see that neither allegation reflects the facts as we find them based on the evidence.

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[4]Section 621.045.
[5]***Missouri Real Estate Comm'n v. Berger***, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).
[6]***State Bd. of Nursing v. Berry***, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).
[7]***Farnham v. Boone***, 431 S.W.2d 154 (Mo. 1968).

Paragraph 2 suggests that as soon as SHL lost its license, Friend associated his license with Elite. Paragraph 9 alleges that Friend left Elite in May 2007 and engaged in the practice of real estate until at least February 2008. Both statements are wrong; SHL lost its license in May 2007 and Friend did not associate his license with Elite until six months later.

Further, by failing to object to evidence that, allegedly, went outside the scope of the complaint as we set out here, Friend waived any error arising from the pleadings not conforming to the proof. His general objection to the inconsistencies in paragraphs 2 and 9 of the complaint did not serve, by itself, to bar any inconsistent evidence because it was up to Friend to object to such inconsistent evidence when it was presented, which he did not do.

Grounds for Discipline

The MREC argues there is cause for discipline under § 339.100:

> 2. The [MREC] may cause a complaint to be filed with the administrative hearing commission as provided by the provisions of chapter 621 against any person or entity licensed under this chapter or any licensee who has failed to renew or has surrendered his or her individual or entity license for any one or any combination of the following acts:
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> * * *
>
> (15) Violation of, or attempting to violate, directly or indirectly, or assisting or enabling any person to violate, any provision of sections 339.010 to 339.180 and sections 339.710 to 339.860, or of any lawful rule adopted pursuant to sections 339.010 to 339.180 and sections 339.710 to 339.860;
>
> (16) Committing any act which would otherwise be grounds for the [MREC] to refuse to issue a license under section 339.040;
>
> * * *
>
> (19) Any other conduct which constitutes untrustworthy, improper or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct, or gross negligence[.]

I. Violation of Statutes and Regulations – § 339.100.2(15)

SHL's and Friend's conduct violated several statutes and regulations that they were obligated to follow. Those violations constitute grounds for discipline under § 339.100.2(15). We detail the violations below.

A. SHL Acted as a Real Estate Broker without a License – § 339.020

At the time of the events discussed here, § 339.010.1 defined "real estate broker" in relevant part as follows:

> A "real estate broker" is any person, partnership, association, or corporation, foreign or domestic who, for another, and for a compensation or valuable consideration, does, or attempts to do, any or all of the following:
>
> (1) Sells, exchanges, purchases, rents, or leases real estate;
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> (2) Offers to sell, exchange, purchase, rent or lease real estate;
>
> (3) Negotiates or offers or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate;
>
> (4) Lists or offers or agrees to list real estate for sale, lease, rental or exchange;
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> * * *
>
> (7) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate;
>
> (8) Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate;
>
> * * *
>
> (10) Performs any of the foregoing acts as an employee of, or on behalf of, the owner of real estate, or interest therein, or improvements affixed thereon, for compensation.

At the time of the events discussed here, § 339.020 stated:

> It shall be unlawful for any person,[[8]] partnership, association, or corporation, foreign or domestic, to act as a real estate broker or real estate salesperson, or to advertise or assume to act as such without a license first procured from the commission.

The MREC alleged that SHL performed the functions of a real estate broker between May 2007 and February 2008 without a license. SHL operated its business out of its office that had a graphical representation of a house and the words "RENT, LEASE, BUY, or SELL." Brownlee told Cirtin in February 2008 that SHL was in the business of operating a web site showing houses for rent and helping people rent those houses. Part of that help involved providing information regarding the houses and taking them to see the houses. Brownlee showed rental properties to Kristin Lopez in October 2007, both in SHL's office and by taking Lopez to two of the properties. Also, Brownlee met Daniel Head at the office in January 2008, where she showed him rental properties, then took him to see the S. Cottage Ave. property. After that showing, the Heads gave Friend a list of items that required cleaning or repairing, as a condition of their renting the property. Because Brownlee was an employee of SHL, she was SHL's agent, and her actions were SHL's actions.[9]

Friend denied that SHL was in the real estate brokerage business or that his actions on SHL's behalf constituted such business. Instead, he explained to Cirtin that SHL received a "finder's fee" of half of the first month's rent for any lease procured through SHL's web site.[10]

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[8] Section 339.020 was amended in 2010 to add "limited liability company" to the list of entities that violate the law by acting as a real estate broker without a license. 2010 H.B. 1692, 1209, 1405, 1499, 1535, & 1811. However, the pre-2010 version of § 339.020 still applied to limited liability companies because § 1.020(11) RSMo Supp. 2007 provided: "The word "person" may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations[.]"

[9] ***McCoy v. Spelman Memorial Hosp.***, 845 S.W.2d 727, 730 (Mo. App., W.D. 1993) (employment relationship is agency relationship).

[10] Tr. 27.

However, as the Court of Appeals stated in ***King v. Clifton***,[11] "[e]ven a casual reading of § 339.010.1(7) demonstrates legislative intent to eliminate 'finder's' or 'business chance broker's' activity from the list of functions excepted from the operation of the licensure statute." Therefore, SHL was acting for compensation or valuable consideration, and its actions were not exempted from the activities of real estate brokers under § 339.010.1.

Because SHL's actions constituted the listing of real estate for lease or rent, the procurement of prospects calculated to result in the lease or rental of real estate, and assisted in the negotiation of transactions calculated or intended to result in the leasing or rental of real estate, and it did those things for compensation or a valuable consideration, SHL violated § 339.020 and by doing so, is subject to discipline under § 339.100.2(15).

B. Friend Acted as a Real Estate Broker without a License – § 339.020

At the time of the events discussed here, § 339.010.2 defined a "real estate salesperson" in relevant part as:

> any person who for a compensation or valuable consideration becomes associated, either as an independent contractor or employee, either directly or indirectly, with a real estate broker to do any of the things above mentioned.

However, the MREC alleged that Friend acted as a real estate *broker* without a license. Because Friend never had a broker license but did have a salesperson license that was sometimes held by a sponsoring broker, this accusation requires further explanation. A real estate salesperson's license is held by his or her broker pursuant to 20 CSR 2250–4.050(2), which provides:

> A broker-salesperson or salesperson license shall be issued only to a person who is associated with a licensed broker. The license of each broker-salesperson or salesperson shall be mailed to the

[11] 648 S.W.2d 193, 197 (Mo. App., S.D. 1983); *see also* ***Knight v. Johnson***, 741 S.W.2d 842, 846 (Mo. App., E.D,. 1987).

> broker. A...salesperson cannot be licensed with more than one (1) broker during the same period of time.

This regulation requires the salesperson's license to be associated with a broker and requires that association to be exclusive.[12] Also, 20 CSR 2250-8.010(1) provides: "No salesperson may be associated with a broker...not actively engaged in the real estate business." Reading these laws together, we conclude that when SHL lost its broker license on May 10, 2007, Friend's salesperson license became ineffective until he associated that license with Elite on November 9, 2007. Therefore, if he performed any of the actions set out under § 339.010.1 between those dates, he was acting as a real estate broker without a license.

First, as we note above, SHL continued to perform the functions of a real estate broker after May 10, 2007, when it no longer had a broker license. During that time, Friend played an active role in SHL's brokerage business. For example, Friend acted as a real estate broker by helping the Heads lease the S. Cottage Ave. property. After Brownlee showed the property to the Heads, Friend dealt with Mr. Head regarding repairs the Heads said needed to be done to the property, and Friend also collected a cash deposit from Mr. Head for the property rental. These actions are consistent with assisting in the negotiation of a transaction calculated or intended to result in the rental of the S. Cottage Ave. property.

Then, after SHL lost its license, Friend associated his salesperson's license with Elite Realty Services, a brokerage firm owned by Kim House and her husband, David House. However, after Mrs. House learned that Friend was still operating SHL, Mr. House contacted Friend, demanding that Friend stop the SHL operation. When Friend refused, Elite returned Friend's license to the MREC.

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[12] *See also* ***City of Washington v. Barnhart***, 93 S.W. 3d 743, 745 (Mo. App., E.D. 2002) (citing requirement in 20 CSR 2250-4.050(2) that a salesperson may only be licensed with one person during the same period of time).

More generally, Friend's actions associated with SHL show he was either participating in or running SHL's real estate brokerage operations after May 10, 2007. When Cirtin went to the SHL office on February 7, 2008 and asked Brownlee if he could talk to the manager or owner of the business, Brownlee summoned Friend. At that meeting, Friend characterized his role as a "partner."[13]

Friend's version of his relationship with SHL differed substantially from the evidence presented by the MREC. He testified he never had any ownership interest in SHL, but instead ran a company called ozarkrentals.net, which did business as Southwest Housing.[14] He testified he did not administer SHL's web site, never was its registered agent, never did any business for SHL after SHL lost its license (including the time when his license was associated with Elite Realty Services), and had never spoken to Lopez or the Heads about the properties they leased from SHL.

After Friend denied his association with SHL, the MREC's attorney asked him to explain why a document titled in part "Joint Stipulation of Facts," filed by the parties in this Commission's case styled ***Missouri Real Estate Commission v. Mikel Shad Friend***[15] included the following statements: "During all times relevant herein, Friend operated Southwest Housing Locators, L L C ("Southwest"); and "At all times relevant herein, Southwest acted by and through Friend." Friend responded, "I wouldn't say I was the operator," and "as far as being an owner or someone that's on the LLC, I was not that person." We do not find Friend's statements credible.

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[13] Tr. 26.
[14] Tr. 70.
[15] No. 04-1066 RE (Mo. Admin. Hearing Comm'n 2005).

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness.[16] When there is a direct conflict in the testimony, we must make a choice between the conflicting testimony.[17] Friend's explanation of his relationship with SHL is contradicted by the testimony of Cirtin, Mr. and Mrs. Head, Lopez, David House, and his own stipulation in the prior case. We believe the other witnesses, not Friend. We conclude that Friend, through his work for SHL, listed or agreed to list real estate for sale and assisted in the procuring of prospects calculated to result in the leasing or rental of real estate.

Therefore, Friend's conduct violated § 339.020, and that violation is cause for discipline under § 339.100.2(15).

II. Grounds for Refusing to Issue a License – § 339.100.2(16)

The MREC asserts that there is cause to discipline Friend under § 339.100.2(16), which allows discipline of any licensee for "[c]ommitting any act which would otherwise be grounds for the [MREC] . . . to refuse to issue a license under section 339.040[.]" Section 339.040.1 states in relevant part:

> Licenses shall be granted only to persons who present . . . satisfactory proof to the [MREC] . . . that they:
>
> (1) Are persons of good moral character; and
>
> (2) Bear a good reputation for honesty, integrity, and fair dealing; and
>
> (3) Are competent to transact the business of a broker or salesperson in such a manner as to safeguard the interest of the public.

[16] ***Harrington v. Smarr***, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992).
[17] *Id.*

The MREC alleges that because Friend and SHL performed the functions of a real estate broker between May 2007 and February 2008 without a license to do so, cause exists to discipline their licenses.

A. Good Moral Character

Good moral character is honesty, fairness, and respect for the law and the rights of others.[18] We agree that Friend's participation in a scheme whereby he operated SHL but disclaimed responsibility for it, his continuing to operate SHL even though his license was associated with a different broker, as well as his incredible explanations regarding his relationship with SHL, show a lack of respect for the law and of good moral character.

Worse, Friend is a repeat offender. His scheme of operating SHL while his license was associated with another broker simply repeated his conduct that he admitted to in the 2004 case against him. His actions were grounds for discipline when he committed them in 2002-03, and they are grounds for discipline now as well.

SHL's actions also show a lack of good moral character. It continued operating as a real estate brokerage firm well after losing its broker license.

B. Reputation

Reputation means "the estimation in which one is generally held : the character commonly imputed to one as distinct from real or inherent character [.]"[19] Reputation is "a consensus view of many people[.]"[20] The MREC presented no evidence of Friend's reputation.

C. Competency

Competency, when referring to occupation, is the "the actual ability of a person to

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[18] ***Hernandez v. State Bd. of Regis'n for the Healing Arts***, 936 S.W.2d 894, 899 n.1 (Mo. App., W.D. 1997).

[19] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1929 (1986).

[20] ***Haynam v. Laclede Elec. Coop, Inc.***, 827 S.W.2d 200, 206 (Mo. Banc 1992).

perform in that occupation."[21] Incompetency is a "state of being" amounting to an inability or unwillingness to function properly in an occupation.[22] The disciplinary statute does not state that licensees may be subject to discipline for "incompetent" acts; it states that a license shall be granted only if the prospective licensee is "competent." This evaluation necessitates a broader-scale analysis, taking into account the licensee's capacities and successes.

We find no evidence supporting a claim that Friend or SHL were unable to function properly in their occupation, but we do find substantial evidence of their unwillingness to function in accord with the standards and practices required of real estate brokers and salespeople. As such, Friend and SHL have demonstrated that they are incompetent to transact the business of a real estate broker in a manner that would safeguard the interests of the public.

Friend's and SHL's conduct constitute sufficient grounds for refusing to issue them a license under § 339.040.1(1) and (3). Therefore, there is cause to discipline Friend and SHL under § 339.100.2(16).

III. Other Conduct – § 339.100.2(19)

Section 339.100.2(19) allows discipline against a licensee for:

> [a]ny other conduct which constitutes untrustworthy, improper or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct, or gross negligence[.]

The adjective "other" means "not the same : DIFFERENT <any [other] man would have done better>."[23] Therefore, subdivision (19) refers to conduct different than referred to in the remaining subdivisions of the statute. We have found that the conduct at issue is cause for discipline under § 339.100.2(15) and (16). There is no "other" conduct. Therefore, we do not find cause to discipline Friend under § 339.100.2(19).

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[21] *See* Section 1.020(8), RSMo 2000 (defining "incompetent" in relation to occupation ability).
[22] ***Albanna v. State Bd. of Regis'n for the Healing Arts***, 293 S.W.3d 423, 435 (Mo. banc 2009).
[23] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1598 (1986).

IV. Imposition of Civil Penalty – § 339.205

The MREC alleges that Friend's conduct constitutes cause to impose a civil penalty on Friend and SHL under § 339.205 because of the above-referenced grounds for disciplining their licenses. Section 339.205 provides:

> 1. In actions against unlicensed persons or disciplinary actions against licensed persons, the commission may issue an order imposing a civil penalty. Such penalty shall not be imposed until the findings of facts and conclusions of law by the administrative hearing commission have been delivered to the commission in accordance with section 621.110, RSMo. Further, no civil penalty shall be assessed until a formal meeting and vote by the board has been taken to impose such a penalty.
>
> 2. Any civil penalty imposed by the commission shall not exceed two thousand five hundred dollars for each offense. Each day of a continued violation constitutes a separate offense, with a maximum penalty of twenty-five thousand dollars. In determining the amount of penalty to be imposed, the commission may consider any of the following:
>
> (1) Whether the amount imposed will be a substantial deterrent to the violation;
>
> (2) The circumstances leading to the violation;
>
> (3) The severity of the violation and the risk of harm to the public;
>
> (4) The economic benefits gained by the violator as a result of noncompliance; and
>
> (5) The interest of the public.
>
> 3. If the commission files a complaint with the administrative hearing commission, the proceedings shall be conducted in accordance with the provisions of chapter 621, RSMo. Upon a finding by the administrative hearing commission that the grounds provided in subsection 1 of this section for action are met, the commission may, either singularly or in combination with other provisions of this chapter, impose a civil penalty against the person named in the complaint in an amount not to exceed the limit authorized by section 339.205.

However, references to "the commission" in this statute refer to the MREC, not this Commission.[24] Further, the statute refers both to "the commission" and "the administrative hearing commission," sometimes in the same sentence, thus making it quite clear that the legislature intended to differentiate between the two commissions. Finally, subsection 1 provides that the penalty shall not be imposed *until* our findings of fact and conclusions of law have been delivered to the MREC in accordance with § 621.110, and that no such penalty shall be imposed until a formal meeting and vote by the board[25] has been taken to impose such a penalty. Therefore, it is not for this Commission to decide whether a civil penalty should be imposed under § 339.205.

Summary

We find cause to discipline Friend and SHL under § 339.100.2(15) and (16).

SO ORDERED on February 19, 2013.

SREENIVASA RAO DANDAMUDI
Commissioner

[24] *See* § 339.010.4. Strictly speaking, the definition reads, "[t]he term 'commission' as used in sections 339.010 to 339.180 and sections 339.710 to 339.860 means the Missouri real estate commission." By those terms, § 339.205 is excluded. However, the explicit differentiation between our responsibilities and those of the MREC set out in § 339.205 make it clear that the legislature's intent was to give the MREC the power to impose the civil penalty.

[25] Chapter 339 does not define the term "board." It appears to refer to the members of the commission when they convene as a body. See § 339.120.1, which interchangeably refers to members of the commission and of the board.