

**BEFORE THE NEW MEXICO
REAL ESTATE COMMISSION**

IN THE MATTER OF:

**DAN J. CASH III
License Nos. 19707 and 14339**

NMREC Case No. 14-12-08-136

Respondent.

DECISION AND ORDER

This matter is before the New Mexico Real Estate Commission ("Commission") for decision and order pursuant to the provisions of the Uniform Licensing Act, NMSA 1978, §§ 61-1-1 to -34.

The proceedings in this matter were presided over by Clifford Stroud, the Hearing Officer duly appointed by the Commission. The allegations in the Notice of Contemplated Action were heard on Wednesday, June 7, 2017, at the Coldwell Banker Legacy Office, 500 Unser Blvd. Suite 101, Rio Rancho, N.M. Rebecca Branch, Assistant Attorney General and Administrative Prosecutor, was present on behalf of the State. Respondent, Dan Cash was present and was represented by his legal counsel, Spring Schofield. Lori Chavez, Assistant Attorney General and commission counsel, was present to advise the hearing officer. The Hearing Officer's Report was filed with the Commission on July 7, 2017.

On July 31, 2017, a quorum of the Commission, having familiarized themselves with the record, including the Hearing Officer's Report, participated in the deliberation and decision in this matter. A copy of the Hearing Officer's Report is attached hereto and incorporated by reference. All references below to the hearing transcript are noted as ("Tr.").

By an affirmative vote of 3-0, the Commission renders the following Decision and Order.

I. FINDINGS OF FACT

1. Respondent, Dan Cash, is a qualifying broker, holding License Numbers 14339 and 19707. Tr. 13: 14-16, Tr. 15: 21-23 and Ex. D;
2. Steven E. Bush filed a complaint against Respondent with the Commission on December 22, 2014 alleging that the Respondent misrepresented the square footage of a property that the Respondent listed and sold to him. Ex. D;
3. Respondent claims to have been in the business of selling real estate for approximately 19 years. Tr. 13: 17-20;
4. Respondent claims to have sold approximately 1,600 homes. Tr. 15: 12-20;

5. The largest square footage home the Respondent claims to have sold was approximately 8,500 square feet. Tr. 16: 2-4;
6. The smallest square footage home the Respondent claims to have sold was approximately 250-300 square feet. Tr. 16: 7-11;
7. Respondent claims to have completed a Broker's Price Opinion ("BPO") for the property that is the subject of this complaint. He claims to have measured the property, completed a drawing and calculated the square footage of the subject property at approximately 1,500 square feet for the BPO. Tr. 19:1-25 and Tr. 20: 1-25 and Tr. 21: 1-22 and Tr. 22: 1-5;
8. In spite of his own measurements and calculations, Respondent entered the property into MLS at 2901 square feet. Tr. 23 1-25 and Tr. 24 1 -25 and T 25: 1- 24;
9. Respondent claims that the 2901 square foot figure was conveyed to him through a Department of Housing and Urban Development (HUD) listing letter. Tr. 25: 13-15;
10. Respondent admitted that he did not make any notes in the MLS comment section indicating a discrepancy in the square footage between his measurements used in preparing the BPO and the HUD appraisal. Tr. 26: 6 – 24 and Tr. 27: 4 – 7;
11. Respondent did not receive an appraisal report from HUD reflecting 2901 square feet and did not make a MLS note indicating that he had not received an appraisal report for the subject property. Tr. 27: 16 – 25 Ex. D.
12. Respondent stated he received no training in measuring property but passed the broker's exam that includes questions concerning calculation of square footage. Tr. 42: 18-25 and Tr. 43: 1-16; Respondent has had on the job training and experience in measuring and appraising property. Tr. 43: 21-25, Tr. 46: 18-25, Tr. 47: 1-8, Tr. 97: 11-23, Tr. 98: 4-25, Tr. 99: 1-3 and Tr. 117: 3-16;
13. Respondent stated most brokers only provide rough estimates of square footage while appraisers provide a more definitive and accurate measurement. Tr. 79: 3-12;
14. Respondent said he assumes that square footage is a material consideration to buyers in deciding whether or not to purchase a property. Tr. 44: 1-12;
13. Respondent said he believes that listing brokers should be as accurate, honest and thorough as possible when passing on information about a property to buyers. Tr. 55: 23-25 and Tr. 56: 1-5;
14. Respondent has sold HUD homes for approximately eight years. Tr. 13: 24-25 and Tr. 14: 1-5;
15. HUD utilizes asset managers when selling property, but HUD remains the owner of the property until the house is sold to a buyer. Tr. 99: 4-13, Tr. 106: 17-20 and Tr. 108: 4-7;
16. Respondent has a master listing agreement with a HUD asset manager. Tr. 57: 1-17;

17. Respondent is paid a three percent commission by HUD for the sale of a HUD home. Tr. 14: 11-21;
18. The HUD master listing agreement requires Respondent to comply with all local standards. Tr. 100: 5-9;
19. Respondent has sold in excess of 400 HUD homes. Tr. 15: 7-11;
20. HUD sends listing assignments to real estate brokers. Tr. 16: 19-20;
21. The HUD listing assignment is an automated system in which the broker receives an email with a time line from an asset manager. Tr. 16: 19-25 and Tr. 17: 1-4;
22. Brokers must accept the listing assignment within four hours after the email is sent. Tr. 17: 14-16;
23. Brokers are required to log in and accept the listing assignment. Tr. 16: 20-21 and 17: 2-4;
24. Brokers have the option to decline the listing assignment. Tr. 17: 5-11.
25. Respondent does not intentionally decline listing assignments from HUD. Tr. 17: 14;
26. Once the listing assignment is accepted by the broker, the broker must submit an initial property inspection report within 24 hours. Tr. 17: 24-25 and Tr. 18: 1;
27. The inspection consists of walking through the home, taking pictures of all rooms, all closets, all fixtures, all amenities and all damage. Tr. 18: 5-9;
28. The written report includes responses to approximately 40 HUD questions. Tr. 19: 7-9;
29. Based on the evaluation, brokers prepare a Broker Price Opinion ("BPO"). Tr. 22: 6-20;
30. The broker submits the BPO to HUD within 48 hours. Tr. 19: 13-15;
31. The BPO is submitted on-line to HUD before the house is listed on the MLS. Tr. 22: 16-25 and Tr. 23: 1-6;
32. The HUD appraisal department inputs information about the house, including the square footage and the year the house was built, into the HUDhomestore.com website. Tr. 85: 7-17, Tr. 87: 5-12, Tr. 91: 13- 21 and Exs. E and F;
33. HUD reviews the appraisal and extracts the information from the appraisal and gives it to the broker to enter into the MLS. Tr. 54: 5-9 and 12-25 and Tr. 55: 1-8;

34. Within a week, the broker receives a listing letter based on the appraisal and enters the information contained in the letter into the MLS and the listing letter is cross-referenced to HUD's website, HUDhomestore.com. Tr. 23: 8-14 and Tr. 24: 2-6;
35. The listing letter includes information extracted from the appraisal including the square footage of the house. Tr. 24: 18-25 and Tr. 25: 1-12;
36. HUD believes the appraiser's square footage calculation is more accurate than county records because the appraiser has actually been to the property. Tr. 93:24-25 and Tr. 94: 1-13;
37. Respondent claims he is 100% confident that the information provided by HUD is extracted from an appraisal of the house, and in the Respondent's opinion, is the most professional source for determining square footage of a house. Tr. 48: 10-21;
38. The broker must create a MLS listing for the house within 24 hours after receiving the listing letter. Tr. 23: 19-22;
39. The MLS listing includes information entered by the listing broker from the listing letter including room dimensions, square footage, age and list price as appraised. The listing references HUDhomestore.com website for further information. Tr. 23: 25, Tr. 24: 1-11 and Tr. 45: 5-25;
40. The MLS calculates price by per square footage. Tr. 25: 24-25 and Tr. 26:1-5;
41. The MLS allows brokers to put notes in the listing. Tr. 26: 6-8;
42. HUD does not provide an actual appraisal report to brokers. Tr. 25: 13-15, Tr. 62: 6-7 and 21-25 and Tr. 93: 14-19;
43. HUD does not provide any drawings of houses to brokers. Tr. 115: 1-17;
44. HUD uses the appraisal to establish the list price for its houses. Tr. 67: 23-25 and Tr. 68: 1-10;
45. In order for a buyer to submit an offer to purchase a HUD owned house, the buyer or buyer's broker must go through the HUDhomestore.com website. Tr. 86: 2-25 and Tr. 108: 22-25 and Ex. F;
46. The HUD website is where the buyer or buyer's broker submits a bid on a house. Offers do not go through the broker's office. Tr. 23: 15-18;
47. HUD believes it is the listing agent's responsibility to verify the facts of the appraisal or have the lender order a new appraisal. Tr. 62: 18-20, Tr. 68: 11-14 and Tr. 69: 1-9;
48. Respondent accepted the assignment listing from HUD's asset manager for a property located at 7504 El Cirquito in Albuquerque, New Mexico. the El Cirquito house. Tr. 16: 16-21, Tr. 83: 20-25 and Tr. 84: 1-10 and Ex. E;

49. Respondent conducted an inspection of the house that noted considerable deferred maintenance issues. Tr. 18: 10-15;
50. The inspection also revealed poor quality additions with no mechanical heat upstairs or downstairs equaling approximately 1,000 additional square feet. The additions were not included in the Respondent's BPO. Tr. 18: 19-25, Tr. 21:16-25, Tr. 22: 1, Tr. 31: 22-25, Tr. 32: 1-9, Tr. 35: 1-25 and Tr. 82: 19-25 and Ex. C1;
51. In order to prepare a BPO, Respondent measured the El Cirquito property, used the photo sets and repair value based upon comparables (three sold and three active properties). Tr. 19: 16-21;
52. Respondent measured the majority of the El Cirquito property from the exterior of the home. Tr. 20: 16-24;
53. Respondent stated that the purpose of measuring property was to determine the value for the Respondent's BPO. Tr. 82: 16-18;
54. Based upon the Respondent's measurements, Respondent determined that the El Cirquito property measured approximately 1,500 square feet. Respondent included only heated space, consisting of the original home without the additions in his measurements. Tr. 21: 16-25, Tr. 22: 1-5, Tr. 45: 24-25 and Tr. 46: 1-3;
55. The value for the 1,500 square feet was estimated by Respondent to be somewhere between \$142,000 and \$143,000. Tr. 22: 8-16;
56. The Respondent believes that HUD has brokers submit a BPO so they can cross reference with the actual appraisal, but generally rely upon the appraisal. Tr. 32: 14-20;
57. After receiving the listing letter, the Respondent created a MLS listing for the house. Tr. 23: 19-21;
58. The listing letter from HUD stated the house measured 2,901 square feet, which Respondent entered into the MLS. Tr. 67: 4-7 and Ex. E;
59. There was a discrepancy between the HUD square footage calculation and the Respondent's calculation because the Respondent did not calculate value for any of the additions to the property while the HUD appraiser included the additions. Tr. 25: 18-23;
60. Respondent stated there was additional square footage that could reasonably amount to 2,901 square feet and could account for the HUD appraiser's higher calculation of square footage. Tr. 26: 19-25, Tr. 27: 1-3, Tr. 82: 24-25 and Tr. 83: 1-5;
61. Respondent did not question the difference in square footage between the Respondent's calculation and HUD's appraiser's calculation. Tr. 47: 17-25;

62. Had the Respondent been unable to attribute the difference in the square footage calculation to heated and unheated space and a converted garage, he said he would have contacted HUD and informed the asset manager of the error in square footage. Tr. 82: 18-25 and Tr. 83: 1-13;
63. Respondent never received an appraisal for the house from HUD. Tr. 27: 16-23, Tr. 53: 1-5 and 14-18;
64. Respondent has seen a HUD appraisal form in the past and it includes original list price, square footage and the year the home was built. Tr. 84: 11-25 and Tr. 85: 1-4;
65. Respondent did not place any notes in the MLS indicating that there was a discrepancy in the square footage calculation between the Respondent's calculation and HUD's appraiser's calculation. Tr. 26: 9-13, and 19-25 and Tr. 27: 1-7;
66. Respondent did not indicate in the notes in the MLS that Respondent did not have the HUD appraisal. Tr. 27: 16-25, Tr. 28: 1, Tr. 101: 3-18 and Ex. I;
67. Respondent did mark "appraisal" in the MLS drop down box to indicate that the square footage calculation was based upon an appraiser's calculation, not the Respondent's calculations. Tr. 27: 4-15;
68. The Respondent believes "appraisal" in the square footage drop down box is the most commonly chosen by brokers because buyers give more credence to an appraiser's measurements of square footage than to a broker's rough estimates. Tr. 95: 13-22;
69. Respondent did include information in the MLS notes about the sunroom including that the sunroom was heated and measured 140 square feet. Respondent also stated that the house had a second master bedroom added to the ground floor. Tr. 66: 6-23 and Ex. D;
70. The HUD contract states "HUD's original list price was based upon an appraisal." Tr. 37: 4-20 and Ex. A;
71. The HUD appraiser estimated the square footage of the house to be 2,901 which Respondent reported on the MLS listing. Tr. 41: 24-25 and Tr. 42: 1-5;
72. The seller establishes the list price of the house regardless of what the broker believes is the value of the property. Tr. 41: 3-9 and Tr. 50: 12-25;
73. The list price for the El Cirquito property was not the list price from HUD's original appraised value, but in Respondent's opinion, had been lowered by HUD because the subject property was on the market in excess of 45 days. Tr. 38: 18-25 and Tr. 39: 1-5;
74. The asset manager for HUD contacted Respondent in June 2014 and provided the Respondent with the drawing of the subject property. Tr. 104: 15-22, Tr. 105: 3-9 and Ex. G;

75. The drawing of the subject property was provided to the Respondent by HUD after the Respondent had listed the house on the MLS. Tr. 105: 10-12;
76. The HUD asset manager contacted Respondent because the offers for the subject property were coming in considerably below the original list price and he wanted to review Respondent's BPO. Tr. 105: 3-18;
77. The HUD asset manager questioned why Respondent's BPO was 1,500 square feet versus the appraiser's 2,901 square feet. Tr. 105: 20-22, Tr. 111: 22-25, Tr. 112: 1-25, Tr. 113: 1-25 and Tr. 114: 1-14;
78. The Respondent maintains that he explained to the asset manager that his lower square footage calculation was due to him excluding the additional square footage of the subject property because of its poor quality construction. Tr. 112: 19-25 and Tr. 113: 1-6;
79. The HUD appraiser's drawings confirmed HUD's square footage calculation of 2,901 square feet. Tr. 89: 13-25 and Tr. 90: 1-16 and Ex. G;
80. The HUD contract was signed by the buyer's broker. Tr. 38: 1-10 and Ex. A;
81. The HUD contract was signed by the buyer. Tr. 38: 11-13 and Ex. A;
82. The HUD contract states that "Seller makes no representations or warranties concerning the condition of the property." Tr. 39: 17-25 and 40: 1-9 and Ex. A;
83. The HUD contract states "Purchaser understands that seller's listing price is seller's estimate of current fair market value." Tr. 40: 10-13 and Ex. A;
84. The HUD contract states that the buyer is responsible "to be an informed buyer". Tr. 100: 2-4 and Ex. B;
85. The HUD appraiser's square footage estimate was 2,901 square feet. Tr. 47: 10-16;
86. Respondent stated he relied upon HUD's appraiser's calculation of square footage and value because they are the people who "know how to value property." Tr. 47: 21-25;
87. The Commission investigator's opinion, based upon 30 years' experience, that it is the broker's obligation to verify all facts related to the house including the square footage especially when the broker does not have a copy of the appraisal in hand and when there is a significant discrepancy in measurements. Tr. 70: 23-25, Tr. 71: 1-15, Tr. 72: 4-25, Tr. 73: 1-19, Tr. 77: 18-25 and Tr. 78: 1-10;
88. Had the Commission investigator taken a rough estimate of 1,500 square feet and HUD came up with 2,901 square feet, the investigator would said it was her opinion that the Respondent should have contacted HUD to inquire about the discrepancy and make a notation in the MLS Comments section. Tr. 80: 9-17;

89. A&B Floor Plans, a company specializing in square footage measurements, measured the subject property at 2,346 square feet of heated space. Tr. 41; 10-17 and Ex. C1;
90. Respondent is familiar with broker duties. Tr. 49: 4-11.
91. Respondent claims he does not have a signed broker duties disclosure with HUD and is unsure whether he ever had one. Tr. 56: 8-21 and Tr. 58: 12-20;
92. Respondent claims that HUD does not sign an acknowledgement of receipt of Broker Duties Disclosures. Tr. 64: 1-7 and Tr. 69: 8-10;

II. CONCLUSIONS OF LAW

- A. Respondent is a real estate broker licensed by the Real Estate Commission, and therefore is subject to the Real Estate Brokers and Salesmen Act, NMSA 1978, Section 61-29-1 through -29 and the jurisdiction of the New Mexico Real Estate Commission. NMSA 1978, Section 61-29-4;
- B. The Commission may refuse to issue a license or may suspend, revoke, limit or condition a license if the applicant or licensee has by false or fraudulent representations obtained a license or, in performing or attempting to perform any of the actions specified in Chapter 61, Article 29, Part 12(A) NMSA 1978, has:
- (1) made a substantial misrepresentation;
 - (2) pursued a continued and flagrant course of misrepresentation; made false promises through agents, salesperson, advertising or otherwise;
 - (10) violated a provision of Chapter 61, Article 29 NMSA 1978 or a rule promulgated by the commission; or
 - (11) committed an act, whether the same or different character from that specified in this subsection, that is related to dealings as a qualifying broker or an associate broker and that constitutes or demonstrates bad faith, incompetency, untrustworthiness, impropriety, fraud, dishonesty, negligence or any unlawful act;
- C. Title 16, Chapter 61, Part 12, of the New Mexico Administrative Code delineates the procedures for disciplinary actions by the Commission in regard to persons acting in the capacity of a real estate broker in New Mexico. The regulation provides that "violation of any provision of the real estate license law or commission rules may be cause for disciplinary action against any person who engages in the business or acts in the capacity of a real estate broker in New Mexico without a New Mexico real estate license, up to and including license suspension or revocation if the person is licensed in New Mexico. 16.61.12.8 NMAC.
- Part 19 K. Broker duties: the duties that brokers owe to their clients and customers in the course of a real estate transaction; and

Part 19. Before the time a broker generates or presents any written document that has the potential to become an express written agreement, the broker shall disclose in writing to their prospective customer or client, and obtain a written acknowledgement from their prospective client, showing the delivery of the disclosure of the following broker duties:
A. honesty and reasonable care as set forth in the provision so this section.

- D. The Commission may impose fines, costs, education requirements or any other penalty authorized by NMSA 1978, Section 61-1-3;
- E. Respondents shall bear costs of disciplinary proceedings unless excused by the board from paying all or part of the fees pursuant to NMSA 1978, Section 61-1-4(G);
- F. Substantial evidence shows that Respondent failed to verify the accuracy of material information concerning the square footage of the subject property in violation of NMSA 1978, Section 61-29-12(A) (1), (2) and (10) - (11);
- G. Substantial evidence shows that Respondent did not disclose the discrepancy in square footage on the MLS listing or during the sales transaction in violation of NMSA 1978, Section 61-29-12(A) (1), (2) and (10) - (11);
- H. Substantial evidence shows Respondent failed to obtain written acknowledgement from the seller of the subject property that Respondent delivered or attempted to deliver a disclosure of broker duties in violation of Part 16.61.19.8 NMAC and NMSA 1978, Section 61-29-12(A) (10) - (11).

III. ORDER

Upon consideration of all the facts and circumstances the Commission **ORDERS**:

- A. Respondent shall pay a fine in the amount of \$2,000.00 within sixty (60) days after receipt of this Decision and Order. Payment shall be made in the form of a cashier's check payable to the New Mexico Real Estate Commission and mailed to the Commission office at 5500 San Antonio Drive NE, Albuquerque, New Mexico 87109, Attn: Lyn Carter, Chief Investigator.
- B. Respondent shall receive a Letter of Reprimand from the Commission that shall be a matter of public record.
- C. Respondent shall successfully complete for no continuing education credit the Commission-approved three-hour course entitled "How to Measure Real Property" within ninety (90) days of the receipt of this Order. Respondent shall provide to the Commission Chief Investigator a certificate of course completion to document compliance with this term of the Order.
- D. Respondent shall pay the cost of the disciplinary proceedings in the amount of \$1,320.95 within sixty days (60) after receipt of this Decision and Order. Payment shall be made in the form of a cashier's check payable to the New Mexico Real Estate Commission and may be combined with payment of the fine ordered in paragraph A of this Order.
- E. Respondent's failure to comply with the provisions of this Order shall result in the summary suspension of all real estate brokers' licenses held by Respondent until after a hearing on the

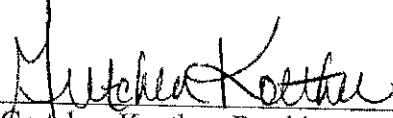
matter. The hearing shall be set as soon as is practicable. The hearing may result in the Commission taking additional disciplinary action against the Respondent up to and including revocation of all broker's licenses held by the Respondent.

Gretchen Koether, the Commission's President, is designated to sign this Decision and Order. A copy of the Decision and Order shall be filed and served upon the Respondents in accordance with the law.

NOTICE: Pursuant to Section 61-1-17 of the Uniform Licensing Act and NMSA 1978, Section 39-3-1.1, a person aggrieved by an adverse decision of the Commission issued after a hearing may obtain a review of the decision in the district court of Santa Fe County or in the district court of any county in which a hearing on the matter was conducted. To obtain such review, a notice of appeal must be filed in the proper district court within thirty (30) days after the date of the Commission's decision. Failure to file a notice of appeal within the time stated herein shall operate as a waiver of the right to judicial review and shall result in the decision of the Commission becoming final. The procedures for filing an appeal from the Commission to the district court are governed by Rule 1-074 of the Rules of Civil Procedure for the District Courts.

Date: 8-16-17

FOR THE NEW MEXICO
REAL ESTATE COMMISSION


Gretchen Koether, President