BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE REAL ESTATE COMMISSION

In the Matter of	)	
	)	
LINDA S. GARRISON	)	OAH No. 09-0289-REC
	)	Agency Case No. 3000-03-013
	)	

DECISION

I. Introduction

A. Nature of the Case

The Department of Commerce, Community and Economic Development's Division of Corporations, Business and Professional Licensing ("the Division") filed this case in 2009, seeking to persuade the Real Estate Commission to revoke or suspend the license of real estate broker Linda Garrison. The case grows out of a 2002 residential transaction in which Ms. Garrison represented the buyers.

The case is framed by an accusation that alleges two specific acts of deliberate fraud. First, the Division contends that Ms. Garrison intentionally withheld the AS 34.70 disclosure statement from the buyers, and with it the knowledge that they could terminate their purchase offer within a specified time after receiving the statement. Second, the Division contends that Ms. Garrison deliberately misled the buyers about the nature of the water system serving the home they were buying.

Ms. Garrison has contested the substance of the allegations, and in addition has contended vigorously that the allegations are too stale to be pursued at this time. This decision concludes that the allegations may be considered in spite of their age, but that the Division has failed to prove either count of the accusation. In some respects, the failure of proof is a close question; in other respects, the Division has fallen far short of making a persuasive case.

B. Evidence Received

The record encompasses three days of testimony. At the hearing, Division Exhibits 1 through 12 and Respondent's Exhibits 1 through 5 were admitted without objection.

Respondent's Exhibit 6, relating to the nature of the water system serving the property at issue, was admitted over a relevancy objection.[1]

The main component of the exhibits was a sequential administrative record bearing page numbers prefixed by "REC." In the interest of brevity, most citations to documents in the footnotes below refer only to the REC number, without separately identifying the exhibit in which that page number falls.

In this case, the limitation regarding use of certain hearsay that is codified in AS 44.62.460(d) applies only to the extent preserved by timely objection.[2] Because no objections were made, it is not applicable to any of the evidence relied on below, and hearsay may be considered in the same manner as other evidence.

II. Facts

A. AAR #1 Buyer's Agency

Linda S. Garrison has been a licensed real estate broker in Alaska since 1992. Beginning in that year, she operated her brokerage exclusively as a buyers' agency. She and her husband, associate broker David Garrison, did business as AAR #1 Buyer's Agency, employing Jim Pritchett as a licensed assistant. By the time the events at issue in this case occurred ten years later, AAR #1 had written about 5000 contracts, and closed about 1000, in this capacity.[3]

The Garrisons conducted a high-volume business, and they followed a business routine aimed at efficiently handling this volume. In general, after an interview about what kind of house they wanted, clients were given maps of the city correlated to a set of relevant listings to drive by.[4] They were instructed to call in if they wanted to be shown a house. Mr. Garrison, whose role was almost exclusively to show houses, would circulate during the day meeting clients for these showings as he received instructions from the main office. He would therefore typically have no paperwork on the house in question when he arrived at the showing. Clients interested in making an offer went to the office, where Linda Garrison walked them though the offer form.[5]

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[1] The objection was overruled because the Division had opened the door by eliciting testimony from its expert that the water system was not a public water system.

[2] Scheduling Order (June 10, 2009), at 3.

[3] Direct and cross-exam of David Garrison; direct exam of Linda Garrison.

[4] This procedure was not used with Clinton Brown, the complainant who initiated the investigation in this case, because he did not want to use it.

[5] Testimony of Mr. and Mrs. Garrison.

Both Mr. and Mrs. Garrison testify that they had essentially rote explanations that they gave to buyers. At a showing, Mr. Garrison would look for a property disclosure statement. If one was in the house, he would give it to his clients with an explanation. If none was present, he would tell them that if they pursued an offer they would at some point receive a disclosure statement, at which point they would have three days to back out of the transaction. Linda Garrison described a similar litany that she would go through as she worked through an offer with a client; if the disclosure was not in hand, part of her routine was to check the appropriate boxes on the form to indicate it had not been received and explain that when it was, the client would have three days to back out.

The Garrisons' testimony with respect to these rote explanations is entirely credible. Linda Garrison, in particular, has a notably systematic mind. Her direct testimony in this case was among the most crisply organized the undersigned has ever witnessed, and she retained her perfect orientation through the jumbled questioning of cross-examination. Her command of the details of the transaction and of the legal rights and duties that apply at each stage eclipsed that of all of the professionals at the hearing, including the purported real estate experts hired by the two sides. She is the kind of person who could be expected to give a very organized presentation as she filled out a purchase contract with a buyer, covering each essential point as it came up. She is also, however, very brisk in the way she explains things, and one can surmise that some buyers would not be able to follow her rapid-fire delivery. David Garrison is an engineer by training and is likewise quite organized in his manner, but is less brisk than his wife.

That the Garrisons had, and generally followed, an organized set of routines in their oral dealings with clients does not mean that their paperwork system was foolproof. In particular, they had no written checklist for ensuring that all items and signatures were in a given file. Files were maintained in a special order that was meant to facilitate checking them for completeness, but there seems to have been no specific procedure for tracking a particular missing signature or set of initials.[6]

B. The Transaction at Issue

1. House Search

Seven and a half years ago, Clinton and Deanna Brown engaged AAR #1 Buyer's Agency to assist them in finding and purchasing a home. The Browns were inexperienced in real

[6] Cross-exam of Linda Garrison.

estate. Clinton Brown was extremely anxious to make a purchase. In the words of Deanna Brown, he wanted to find a house "yesterday."

Jim Pritchett of AAR #1 showed the Browns a house on F Street in Anchorage. It was the first house they had viewed with a realtor in their 2002 house search.[7] The Browns made an offer on it. The offer was not accepted.

Mr. Brown asked Linda Garrison to arrange a showing of a second house, 1452 Hillcrest Drive, which was listed by Why USA Soquet Realty (hereafter "Soquet"). Linda Garrison arranged a showing by either David Garrison or Jim Pritchett on August 20, 2002.[8]

Mrs. Brown knew the house was the right one as soon as she stepped into the entry.[9] After about 20 minutes of looking around the house, she and Mr. Brown conferred in the car outside and decided to make an offer.[10]

At the time of this decision, the Browns apparently had in hand marketing information from Soquet indicating that 1452 Hillcrest Drive was on a public water system.[11] In any event, Clinton Brown assumed the house was on public water because of its location.[12]

The marketing material and the assumption were correct. 1452 Hillcrest Drive is on a Class A public water system operated by the Romig Park Improvement Company, a public utility under the jurisdiction of the Regulatory Commission of Alaska. The system is interconnected with the Anchorage Water and Wastewater Utility. It serves several hundred residences and businesses south of the Chester Creek Greenbelt in Anchorage. Except in emergencies, the source of water used by the utility is a community well located at the intersection of Hillcrest Drive and Spenard Road.[13]

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7 Direct exam of Deanna Brown (inferred from her testimony that 1452 Hillcrest was the second house they had been through with a realtor). The Browns may have previously walked through some open houses and may have viewed houses with a realtor in 1995.

8 The Browns believe they were first shown the house by Pritchett, while David Garrison believes he conducted the first showing. The Browns certainly had some dealings with both Pritchett and David Garrison on the Hillcrest transaction, and David Garrison certainly went through the house with them at least once, but that visit to the house may have come after the house was under contract. After so many years it is not clear whose recollection of the first showing is more accurate.

9 Direct exam of Deanna Brown.

10 *Id.*; direct exam of Clinton Brown.

11 Direct and cross exam of Clinton Brown; cross-exam of Deanna Brown; *see* REC 040.

12 Cross exam of Clinton Brown.

13 *See* Resp. Ex. 5.

For reasons that were not explored in testimony, Clinton Brown seems to have assumed that public water systems do not draw from wells.[14] There is no evidence in the record of Deanna Brown's beliefs or assumptions in this regard.

Unbeknownst to any of the realtors involved, Mrs. Brown had a strong aversion to well water. This aversion grew out of having lived in a part of Kansas where well water had an unpleasant smell and had excessive iron content.[15] The Browns had never mentioned this aversion to anyone at AAR #1.[16] Many Anchorage wells, including the Romig Park well,[17] do not have these problems, but the Browns did not know that at the time.

It is undisputed that neither AAR #1 nor the Browns had, at this point, a copy of the seller's AS 34.70 Residential Real Property Transfer Disclosure Statement. Soquet had not left any in the home. On the disclosure statement, under "Water Supply," the box for "public" was erroneously left unchecked.[18] The box for "community" was correctly marked. Most information relating to wells was not marked, and the lack of responses to these questions suggested that no well was involved.[19] However, there was a box checked next to one question on the subject of wells, namely, a negative answer to the question whether there had ever been a well failure while the seller owned the property. Someone paying close attention to detail might have surmised from the disclosure statement that the property might rely on well water of some kind, although the document is neither accurately filled out nor unequivocal in handling this issue. In any event, as mentioned above, the document was not yet available.

2. Offer and Counteroffer

On August 21, 2002 (the day after the showing), Clinton Brown and Linda Garrison sat down together in Ms. Garrison's office and prepared an offer on the Hillcrest property, with Clinton Brown as the sole buyer. The offer used an MLS form. Mr. Brown initialed and signed in all the appropriate places. On one of the pages he initialed, a custom term was typed at the bottom providing: "The following to be to buyer's approval: seller property disclosure . . . ."[20]

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[14] Inference from direct and cross-exam of Clinton Brown. Mr. Brown's assumption is misguided with respect to Anchorage. Even the largest of the city's public water systems, the Anchorage Water and Wastewater Utility, makes use of a number of wells.

[15] Direct exam of Clinton Brown; direct exam of Deanna Brown.

[16] Cross-exam of Clinton Brown.

[17] The Browns acknowledge that the water in Romig Park is good.

[18] *See* REC 011. The accurate way to mark this form would have been to check both "public" and "community," since both descriptions applied.

[19] *See id*.

[20] REC 148.

On another page, a blank was marked to show that the buyer "has not" received the disclosure statement, and Mr. Brown initialed that statement as well as the page as a whole.[21] A similar blank was marked in the negative on an addendum that Mr. Brown signed.[22] Ms. Garrison has testified credibly that she gave her essentially rote explanation of these special terms with Mr. Brown as they worked their way through the offer, a rote explanation that includes mentioning that the buyer has three days to rescind when the disclosure statement comes through.[23] David Garrison physically delivered the offer to the Soquet office.

Beginning a little before 7 p.m. on the same day, Soquet faxed a counteroffer to AAR #1. The counteroffer had four short amendments, one of which was "Attached is Seller's Property Disclosure Statement for buyer's review and approval."[24] In addition, on the first page of the offer the seller had lined out some of the custom terms, but had left intact the requirement that the disclosure be to buyer's approval.[25] The disclosure statement itself was faxed about five minutes after the other components of the counteroffer finished transmitting.[26]

Mr. Brown was unavailable when the counteroffer came in, but he came to the AAR #1 office the next morning, August 22. Linda Garrison, who did not work in the morning, was not there.[27] Because of the passage of time, Clinton Brown has no recollection of this meeting.[28] At the meeting, Clinton Brown signed the counteroffer sheet to signify his acceptance of the four very short amendments it contained, one of which was the single sentence specifying that the disclosure statement was "[a]ttached . . . for buyer's review and approval."[29] He concedes that he probably read these terms.[30] He also specifically initialed the place on the first page of the offer where parts of the special offer terms had been lined out but approval of the disclosure

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21 REC 150.

22 REC 154 (Right and Duty of Inspection Addendum).

23 See Part II-A above.

24 REC 020.

25 REC 021.

26 *See* REC 032 and 009.

27 Direct exam of Linda Garrison. The testimony is corroborated by the fact that the acceptance of the counteroffer was faxed to Soquet by a different person. *See* REC 179 (not Garrison's handwriting; several other fax cover sheets in this transaction are in her hand).

28 Direct and cross exam of Clinton Brown. Brown stated on two occasions that he did not remember with whom he met, and he was unable to impart any details about the meeting, such as whether he carefully reviewed the documents presented. He did claim, when pressed, to have a memory of the location of the meeting, but his inflection and his prior testimony that he was "guessing" about the location made it impossible to take this testimony at face value.

29 REC 020, 181; cross-exam of Brown (identifying signature).

30 Cross-exam of Brown.

statement had been left in.[31] He signed again to indicate that he received a copy of the accepted offer at 9:50 a.m.[32]

3. Handling of Disclosure on August 22

A key element of the Division's case against Ms. Garrison is the allegation that Clinton Brown was not given a copy of the disclosure statement on the morning of August 22, 2002. The Division alleges that the supposed failure to give Brown the statement was a "willful," "fraudulent," and "dishonest" act on Ms. Garrison's part, because Ms. Garrison "knew" from the disclosure that the property used a community well but did not want Clinton Brown to have that information.[33] It will be important to examine each of these alleged facts separately:

(1) Was the disclosure statement provided?; and

(2) If not, did Linda Garrison withhold it deliberately?

In alleging that the disclosure statement was not provided on August 22, the Division relies on two items of evidence. First, it is undisputed that as of October 18, 2002 (the date of the subsequent closing of the transaction), neither AAR #1 nor Soquet had in their files a copy of the disclosure statement bearing initials and signature from the buyer. Second, Clinton Brown has testified that he is sure he was not shown or given the disclosure statement on August 22.

There is significant contrary evidence. A sticky note in the AAR #1 file, written by Jim Pritchett, said: "Brown 8/22 Picked up copy for he & wife to sign. Will bring in Mon."[34] Mr. Brown signed documents on August 22 acknowledging receipt of the counteroffer (of which the disclosure was a part), and he signed or initialed in two places on these documents where bold-face, easily understandable text ought to have alerted him that there was a disclosure statement he was supposed to review and approve.[35]

Further, Clinton Brown's testimony that he did not receive the disclosure statement on August 22 has weak credibility, for the following reasons:

-- Brown can remember nothing about the August 22 meeting.

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31 REC 166.

32 REC 169.

33 Accusation at 5; direct exam of Kathleen Kowalczuk (Division's expert witness).

34 REC 182. One must always be mindful of the possibility that such a note could be manufactured after the fact to cover up a prior omission. In this case, there is no direct allegation that the note was concocted and no evidence (such as investigative interviews or testimony from Pritchett) has been offered that would help to evaluate such an allegation. AAR #1 apparently produced the sticky note at the very outset of the investigation in 2003. At that time, Pritchett no longer worked for AAR #1, but apparently he worked for another agency in Anchorage. *See* REC 140. The Division does not appear to have interviewed him.

35 REC 020, 021.

-- Brown maintained a set of binders of documents related to the transaction, but he declined to bring them to the hearing for inspection. This unwillingness to open his records to full examination undermines his credibility.

-- Brown claims that if he had seen the disclosure, he would have known the house used well water, and that fact would have had great significance to him—and thus he would remember it. However, Brown apparently did not read the other documentation in the transaction carefully, and so it is reasonable to infer that he would not have read the disclosure statement carefully. Moreover, the disclosure was so ambiguous on the question of water supply that it is unlikely that Brown would have gathered from it that there was a well.

-- In testifying about other matters in this case, Brown showed a willingness to exaggerate. As noted in Part II-C below, he exaggerated the delay in closing attributable to the well, and exaggerated his monetary damages from that delay.

-- Brown admits that he is less "paperwork oriented" than his wife,[36] and his behavior throughout the transaction reflects disinterest in details, including such things as disclosures. For example, he took an Alaska Housing Finance Corporation buyer education class prior to closing, but has no recollection of learning about the disclosure process in the class and took no action after the class consistent with a person who had discovered he should be receiving a disclosure, but had never received one.

-- Brown's demeanor at the hearing showed great anger toward Linda Garrison. Much of the anger came from his sense that, in all aspects of the transaction (not just the ones at issue in this case), Ms. Garrison did not give him a level of assistance and service during the transaction commensurate with her commission.[37] The anger was so strong that it appeared capable of coloring his memory and testimony.

-- During the period when Brown first claimed that he had not received the disclosure statement in a timely way, he had a financial motive to make the claim. He believed the allegation entitled him to $16,762.50 in damages.[38]

Weighing the conflicting evidence and the credibility issues connected with the key testimony from Clinton Brown, the administrative law judge finds it slightly more likely than not that Mr. Brown received a copy of the disclosure statement on August 22, 2002. It is possible that he mislaid it, forgot that he received it, or read it but did not notice or understand the cryptic allusion to a community well; or that some combination of these circumstances occurred.

If, notwithstanding the above finding, one assumes that Clinton Brown did not receive the disclosure statement on August 22, did he fail to receive it because Linda Garrison deliberately withheld it from him? Here, the answer is clearly no. Garrison had no motive to

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[36] Cross-exam of Clinton Brown.

[37] Whether the Browns received good, indifferent, or poor service is irrelevant to the two very narrow and specific allegations in the Accusation that frames this case. No finding will be made about the quality of service. The finding here is that Mr. Brown, independent of any concern about the disclosure statement, has a high level of frustration about the service he received. *See* direct and cross-exam of Clinton Brown.

[38] REC 006.

hold back the disclosure from Brown. She probably did not appreciate the significance of the statement's ambiguous reference to a "community" water source. In any event, she had no way of knowing that Deanna Brown had an aversion to well water, having never been told this by Clinton or Deanna Brown. All of the cognizable[39] evidence indicates that any mishandling of the disclosure statement—whether it was failure to get a buyer signature, as Ms. Garrison admits, or failure to deliver the document to the buyer at all, as the Division alleges—was the result of a negligent oversight, not a deliberate plan.

4. Activities While Under Contract

The parties initially agreed to close the transaction by September 30, 2002. On August 25, Deanna Brown was added to the purchase agreement by addendum. The Browns elected to pursue VA financing through the Alaska Housing Finance Corporation first-time homebuyer program.[40]

An inspection occurred on August 30. The printed inspection report correctly noted that the house was on a public water supply.[41] According to Clinton Brown, he and the inspector discussed the water supply and associated tanks in the basement, but the subject of a well did not come up.[42]

Regardless of any issues with the water supply, the transaction did not move forward fast enough to close by September 30. The appraisal report required for VA financing was not signed until September 26 and appears not to have been delivered until October 2,[43] and a reinspection to assess repair work was not completed until later still.[44] Mr. Brown needed to take an Alaska Housing Finance Corporation class in order to qualify for his financing, and he

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[39] The opinion testimony of the Division's expert (to the effect that Linda Garrison concealed the disclosure statement deliberately) is deemed not cognizable for purposes of this finding because she was opining on an ordinary question of fact, not on a question drawing on her expertise as an associate broker. *See, e.g., Hall v. State*, 2001 WL 1518763, *5-6 (Alaska App. 2001). Accordingly, her testimony was lay testimony by a person without personal knowledge. In any event, her understanding of the transaction and the surrounding water supply issues was so inaccurate as to render her testimony essentially valueless in this case.

[40] Direct exam of Bock. The interplay of VA and AHFC requirements made the financing more complex. *Id.*

[41] REC 206.

[42] Because of the passage of time, the inspector's field notes, which might provide more information about what was discussed, no longer exist. Direct exam of Renk.

[43] REC 231-240; direct exam of Linda Garrison.

[44] *See* REC 247. Notwithstanding testimony from Beth Bock, the written record makes it clear that the appraisal delays alluded to in the text were independent of any water supply issues. There was one additional step that had to be taken with the appraisal as a result of the well issue; this seems to have been done sometime between October 16 and the closing on October 18. REC 258, 260.

did not do this until the first week of October.[45] There were also problems with the Browns' credit report that had to be worked out.[46]

On October 5 or 6,[47] the Browns visited the house in the company of David Garrison to measure for carpets. During that visit, Deanna Brown learned from the seller that the water supply for the house came from a community well.[48] Although it is possible that Clinton Brown already knew this fact,[49] it is clear that Deanna Brown had no inkling that a well was involved. Because of her strong aversion to well water, she was upset. Her husband told her to "settle down."[50] Shortly afterward, she telephoned Linda Garrison. Ms. Garrison said the existence of a well was in the Browns' paperwork but that she would look into it.[51] Deanna Brown also called the loan originator.

The loan originator believed that the existence of a community well meant that the water supply was not "public,"[52] and that the nature and water quality of the system needed to be further documented. Obtaining this information seems to have occupied approximately seven days, from October 10 through October 16,[53] although the well issue was not the sole loose end being tied up during that time. Clinton Brown and the loan originator did most of the legwork in running down the well information.[54] Matters were largely in order for closing on October 16, and final preparations began.[55]

5. Closing

The transaction closed on October 18, 2002.[56] When the Browns were at the title company to sign the closing documents, a title company employee appeared with a fax from AAR #1. The fax was the disclosure statement for the Hillcrest property, which still lacked the buyers' initials and signatures. A cover memo from AAR #1 asked the title company to "Please Send Us Back A Copy After Closing."[57] The document was presented to the Browns for

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45 Cross-exam of Brown; REC 339.
46 REC 243.
47 REC 339.
48 Direct exam of Deanna Brown.
49 He denies that he knew it; David Garrison believes there had been some prior discussion of a well.
50 Direct exam of Deanna Brown.
51 *Id.*
52 Direct and cross-exam of Bock.
53 REC 249-255, 258. There is no credible evidence that well issues were a significant cause of the delays prior to October 10. *See* REC 243.
54 REC 249, 251, 301; direct and cross-exam of Clinton Brown; direct exam of Deanna Brown.
55 REC 260.
56 Direct exam of Clinton Brown; REC 277.
57 REC 270.

signature and they signed it.[58] Clinton Brown remarked that "this is the paperwork that we were supposed to have received that everyone's been talking about."[59]

C. Browns' Damage Claim

Beginning about a year after the closing, Clinton Brown began claiming that he and his wife were financially damaged by the late discovery of the well issue, demanding $16,762.50 in compensation.[60] He continues to contend that the issue caused a delay that forced the Browns to stay in a rental house at $1600 per month for "at least an extra month."[61]

There is no credible evidence that any such damages can be attributed to the well issue. As noted above, other factors completely unrelated to the well pushed the closing back from late September into October. At most, the well issue itself accounts for seven calendar days of delay to a closing that ultimately occurred on October 18, and it is not the only cause of even that delay. Moreover, it is unlikely that AAR #1's handling of the disclosure statement was the cause of the well issue coming to light so late in the process. More probably, it was the ambiguity of the disclosure's contents, coupled with the apparent unfamiliarity of all of the professionals involved with the nature of Anchorage's water distribution system, that led to the late identification of this issue.[62]

The Browns contend that they would not have looked at the Hillcrest property had they had the disclosure statement prior to the showing.[63] Since the disclosure statement is ambiguous about water supply, this claim may be factually mistaken. In any event, it is purely hypothetical, because the document was not available to be given to the Browns until after the showing.

The Browns now acknowledge that learning about the well did not affect their decision to go ahead and buy the house.[64] They acknowledge that they have been "fairly" happy with the well water.[65] They acknowledge that it is used by the Wonder Bread bakery and that the city

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58 *See* REC 271-276.

59 Direct exam of Deanna Brown.

60 REC 006.

61 Direct exam of Clinton Brown.

62 The problem with the community well was that it created a potential complication with the VA financing, albeit a fully resolvable one. It was in the interest of both the buyers and the seller to have this issue identified and taken care of early on. None of the professionals they employed—neither Mr. and Mrs. Garrison, Mr. and Mrs. Soquet, nor the mortgage originator—seems to have been familiar enough with water distribution in Anchorage to flag the issue for the clients.

63 Direct exam of Deanna Brown.

64 *Id.*

65 Cross-exam of Clinton Brown.

tried to purchase the Romig Park well to add it to the Anchorage Water and Wastewater Utility.[66]

D. Division's Investigation

The alleged wrongdoing in this case occurred between August and October of 2002. The alleged victims did not complain of the wrongdoing until more than 12 months later.[67] Upon receiving the complaint, the Division's investigator Margo Mandel promptly asked for, and received, Ms. Garrison's file relating to the matter.[68] Further investigation was delayed until eight months later. There followed approximately six weeks of active investigation, ending in early September of 2004.[69]

The Division then required more than two years, until October of 2006, to develop an opinion as to whether there had been a violation.[70] At that time, the Division apparently made a proposal that Ms. Garrison simply surrender her license.[71] Negotiations ensued, with Ms. Garrison rejecting a subsequent Division offer in December of 2006.[72] Nothing further transpired for more than two additional years, until March 3, 2009, when the Division issued an accusation. Of the nearly six and a half years of delay in initiating enforcement, only about four months can fairly be said to have been devoted to active investigation and negotiation.

III. Discussion

A. Whether the Case Can Be Entertained at All

One of the most arresting features of this case is its age. The Browns waited a considerable time to come forward with their complaint, a delay that in the context of civil enforcement is probably chargeable to the enforcing authority.[73] Thereafter, the processing of the case required many more years.

While these six and a half years elapsed, some records were lost. There is also a natural deterioration of human memory that occurs over such a long period.

A very long delay in pursuing enforcement can force dismissal of a case in two ways. The simplest is where a statute of limitations applies. Before the hearing in this case, the ALJ

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66 Direct exam of Brown.
67 REC 001 (Resp. Ex. 1).
68 *Id.*
69 *Id.*; REC 002.
70 REC 002.
71 *Id.*
72 REC 003.

asked the parties to brief the issue of whether one of Alaska's general statutes of limitation might cover this proceeding. That question was eventually answered in the negative, largely because those statutes apply to "civil actions"[74] and this is an administrative proceeding, not a civil case in court.[75]

The second way that delayed enforcement can be blocked is through the defense of laches. In this case, both parties agree that laches can limit the length of time an enforcement authority can wait before pursuing a remedy. The person asserting laches—here, Ms. Garrison—must prove two principal elements: unreasonable delay and resulting prejudice. These are evaluated on a sliding scale, such that the longer the delay, the "lesser degree of prejudice . . . required."[76] The public interest can also be weighed in evaluating laches. The public interest can sometimes help to tilt the balance for enforcement, such as where it is important to protect the public from especially dangerous misconduct. On the other hand, there is a public interest in accurate results, and since long delays can greatly compromise the accuracy of the factfinding system and cause enforcement to be misdirected, the public interest factor can tip the scales against enforcement.

In this case, Ms. Garrison raised the defense of laches vigorously, both in motion practice ahead of the hearing and at the hearing itself. The ALJ declined to grant summary adjudication on laches ahead of the hearing, but the issue must now be revisited based on the fuller record developed after the hearing.

1. Reasonableness

In responding to the laches claim, the Division has approached the reasonableness issue as if the defense were being asserted against investigator Mandel personally. It has explained that Ms. Mandel had a heavy caseload, with many higher priority matters.[77] This is beside the point, because the question is not whether Ms. Mandel is a conscientious employee, but rather whether the government *as a whole* has succeeded in pursuing this matter in a reasonable time. Even if it is the unavoidable result of budget and staffing limitations imposed by legislative

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73 *See In re Tennenbaum*, 918 A.2d 1109, 1127-28 (Del. 2007) (agreeing that "there is no distinction to be drawn between prejudicial delay attributable to the prosecuting entity and that of the original complainant").

74 *See* AS 09.10.010.

75 *See, e.g., Smith v. State, Bd. of Dental Examiners,* 1984 WL 908389 (Alaska 1984) (just after issuing *Alascom*, court observed that "civil and criminal statutes of limitations are not applicable to license revocation proceedings"); *Nims v. Board of Registration*, 53 P.3d 52, 56 (Wash. App. 2002) (same*); In re C. V.*, OAH No. 04-0322-TAX (Order on Pending Dispositive Motions, 2007); *In re B.A.*, OAH No. 06-0829-PER (2007).

76 *Pavlik v. State, Dep't of Commuity & Reg. Affairs*, 637 P.2d 1045, 1047-8 (Alaska 1981).

77 Opposition to Motion to Dismiss on Grounds of Laches, at 7-9.

funding, a delay can nonetheless be unreasonable for purposes of laches.[78] Moreover, by asserting that Ms. Mandel, year after year, had more important matters to pursue, the Division effectively concedes that any public interest favoring the prosecution of this matter—and any need to protect the public from the alleged danger Ms. Garrison poses—must not be very compelling.

In evaluating whether a delay is reasonable, one may be guided by analogous statutes of limitation.[79] In Alaska, the legislature has placed an absolute limit of six years on most civil lawsuits by the state.[80] The Division's preparation time for this case exceeded that allowance. The Division has not attempted to rely on any special circumstances, such as noncooperation by the respondent, unusual complexity, or agreed-upon delays. On the contrary, this was a simple case, Ms. Garrison responded promptly to requests for information, and Ms. Garrison never agreed to put the matter on hold. The delay must therefore be treated as unreasonable. Because the delay does not greatly exceed the analogous statute of limitations, the degree of unreasonableness is only moderate. Under the sliding scale analysis that applies to laches in Alaska, this means that a moderately strong showing of prejudice is required.

2. Prejudice

Even with an unreasonable delay, it is nonetheless essential that Ms. Garrison show prejudice from the delay before either of the counts of the accusation may be dismissed for laches. Prejudice in this context means that, on account of the delay, the respondent must be unfairly compromised in her ability to assemble or present evidence in her defense.

Ms. Garrison has demonstrated that the passage of time has led to the loss of the following evidence:

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[78] *See EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 857-8 & n.6 (8th Cir. 1978) (laches can apply even if reason for delay is that "Congress does not see fit to adequately staff or fund the Commission").

[79] *See, e.g.*, *Pavlik*, *supra*, 637 P.2d at 1048 n.8 (taking note of analogous statute of limitations when assessing laches); *Shell v. Strong*, 151 F.2d 909, 911 (10th Cir. 1945) (suit not directly governed by a statute of limitations will be barred through laches if the time under most analogous statute of limitations has passed, unless "extraordinary circumstances" are shown); *Brabender v. Kit Mfg. Co.*, 568 P.2d 547, 550 (Mont. 1977) (same).

[80] AS 09.10.120. In a case such as this one where fraud is alleged, the time runs from "the time of discovery by the aggrieved party of the facts constituting the fraud." Here, Mr. Brown is the person allegedly harmed by the misconduct, and he discovered the facts that he considered proof of fraud on October 18, 2002. His knowledge of these facts would be the likely starting point for calculating any limitations period, if the statute applied directly. *See Tennenbaum, supra.*

-- The Soquet brokerage has destroyed its file from the transaction. Having the file would have provided some additional detail about the various closing delays.[81]

-- The home inspector has destroyed his field notes and other materials from the home inspection.[82] These might conceivably have contained information about discussions with Mr. Brown of the water supply and perhaps have shown that Mr. Brown knew about a possible well water source earlier than he acknowledges.

-- The Division itself has lost the records from early interviews of the mortgage originator and of Mr. and Mrs. Soquet, the listing brokers.[83] Again, these might have shed additional light on the closing delays.

As will be seen in the Merits section below, neither the details of the closing delays nor the date Clinton Brown may have learned about the well from a third party is central to the particular, narrow allegations that the Division has pursued in the accusation. Had this been a broader case from the outset, or had the Division sought to amend the accusation to bring charges other than the specific fraudulent conduct it has alleged, laches may well have been a valid partial defense. However, in the context of these allegations, the above examples of lost evidence create little or no harm to Ms. Garrison's ability to mount a defense. She has not, therefore, demonstrated the moderately severe prejudice that would justify dismissing the allegations before deciding them on the merits.

There is one respect in which laches must still play a role in this case. As the Alaska Supreme Court noted in one of the cases the Division relied on in resisting summary adjudication, even where claims are not dismissed on the basis of laches it is appropriate for a hearing officer to discount allegations that have been "prejudicially affected by . . . delay."[84] Here, the Division has alleged in argument that some of the defense witnesses (particularly David Garrison) probably could not truly remember the details they claim to recall because so much time has gone by. Since it is the Division's slowness in pursuing the case that caused this passage of time, it would be inappropriate to discount defense evidence based on such reasoning.

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81 Cross-exam of Soquet. Ms. Garrison's counsel has suggested that the Soquet file might have contained a signed disclosure form from the buyers from some time earlier in the transaction than the closing. This seems very unlikely given Ms. Garrison's acknowledgement that getting the buyer signatures fell through the cracks, and given the paper trail in her office suggesting that the disclosure statement was sent home with the buyers unsigned.

82 Direct exam of Renk.

83 Direct exam of Mandel.

84 *Smith*, 1984 WL 908389 at *1.

B. The Merits

This case is framed by an accusation that the Division filed on March 3, 2009. The accusation in an administrative discipline matter must set out "the acts or omissions with which the respondent is charged" and "the statute and regulation that the respondent is alleged to have violated."[85] There is no basis to impose discipline after a hearing for matters that are not charged in the accusation.

The Division has the burden of proof to establish, by a preponderance of the evidence, each factual element required to establish a violation under one of the counts of the accusation.[86] A preponderance of the evidence is evidence establishing that a fact is more probable than not.[87]

The Division has chosen to prosecute this matter under AS 08.88.071(a)(3)(A)(i) ("substantial misrepresentation"), AS 08.88.071(a)(3)(A)(iii) ("flagrant course of misrepresentation" or "false promise"), and AS 08.88.071(a)(3)(A)(iv) ("fraudulent or dishonest" conduct). Among the matters not placed in issue by the accusation are whether Ms. Garrison acted with competence in the transaction or whether she adequately supervised her licensed assistant. The two counts of the accusation will be addressed in turn.

1. Count I

Count I alleges that Linda Garrison had a duty to inform the Browns that, when they received the disclosure statement, they had three days to void their offer to purchase as provided by AS 34.70.020. It alleges that she failed to do so. It contends that by withholding this information she committed a "substantial misrepresentation." It alleges a violation of AS 08.88.071(a)(3)(A)(i), which authorizes discipline of a licensee who has "made a substantial misrepresentation," and of AS 08.88.071(a)(3)(A)(iii), which authorizes discipline of a broker who has "pursued a flagrant course of misrepresentation or made a false promise through another real estate licensee."

This count fails on the threshold because, as explained in Part II-A and II-B-1 above, it is more likely than not that Linda Garrison—following her rote procedure—did mention the three-day cancellation requirement to Clinton Brown while filling out the offer form with him. Independently, it has been found that it is slightly more likely than not that AAR #1 gave Mr. Brown a copy of the disclosure statement on August 22, 2002, the morning after AAR #1 had

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85 AS 44.62.360.
86 AS 44.62.460(e)(1).
87 *State v. King*, 1994 WL 16196208, *1 n.1 (Alaska App. 1991).

received it. Page 7 of every disclosure statement contains an advisory regarding the buyer's right of rescission under AS 34.70.020.[88]

Moreover, the kind of misrepresentation covered by AS 08.88.071(a)(3) is intentional misrepresentation.[89] As noted in Part II-B-3 above, it cannot reasonably be maintained that Linda Garrison deliberately withheld the disclosure statement—with its advice about rescission rights—from the Browns, because at the time of the alleged withholding she would have had no motive to do so. Thus, if she did fail to provide the written notice of termination rights, her oversight was not a "misrepresentation" under the statute relied upon in the accusation.

2. Count II

Count II alleges that Linda Garrison knew that the water source for 1452 Hillcrest Drive was a community well and that she engaged in "willful nondisclosure" of this "material defect" in a manner that was "fraudulent and dishonest." It alleges a violation of AS 08.88.071(a)(3)(A)(i), which was quoted above, and AS 08.88.071(a)(3)(A)(iv), which authorizes discipline for "conduct that is fraudulent or dishonest."

The Division elucidated this allegation further through the testimony of its expert. According to the expert, the statement in Soquet's advertising that the Hillcrest property was on a public water system was a falsehood. In the expert's view, Linda Garrison aided in the publication of that falsehood by failing to correct it.[90]

The Division has failed to prove the basic facts needed to sustain this allegation. It has not proved that Linda Garrison knew that the property was on a community well, because it has not identified any document or communication from the seller, including the disclosure itself, that unambiguously and correctly described the water source, nor established that she reviewed that document or communication. As discussed in Part II-B-3, the Division has not proved that Ms. Garrison failed to disclose whatever she may have known in this regard; that is, it has not proved that her office failed to deliver the disclosure statement to Clinton Brown on August 22. As discussed in the same Part II-B-3, the Division has not proved that, if Ms. Garrison failed to provide the disclosure statement, she acted deliberately rather than negligently or innocently.

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88 REC 015.

89 Interpreting similar language in the real estate surety fund statute, the Alaska Supreme Court held that the term "misrepresentation," when embedded in statutory language otherwise addressed to fraudulent and dishonest behavior, does not encompass innocent or negligent misstatements. *State, Real Estate Commission v. Johnston*, 682 P.2d 383 (Alaska 1984). Here, the surrounding language refers to "false promise[s]," "fraudulent or dishonest" conduct, and "flagrant" conduct.

90 Direct exam of Kowalczuk (colloquy with ALJ at file 7, minute 1:31).

Each of these failures of proof is sufficient, by itself, to defeat the allegation.[91] Finally, the Division's overall theory that Linda Garrison aided in perpetuating a false claim that the house was on a public water system is fundamentally mistaken, because Soquet's claim that the house is on a public water system was actually true.

IV. Conclusion

The Division has failed to prove the facts necessary to sustain either count of the accusation.

Dated this 9th day of February, 2010.

Signed
Christopher Kennedy
Administrative Law Judge

[91] In addition, albeit of less legal significance, the Division has not shown that 1452 Hillcrest Drive's reliance on a Class A public water system other than the Anchorage Water and Wastewater Utility was a "material defect," as the Division has claimed in the accusation.

Adoption

The Alaska Real Estate Commission adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 23rd day of March, 2010.

By: *Signed*
Signature
Bradford Cole
Name
Chairman AREC
Title

[This document has been modified to conform to technical standards for publication.]