THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 83.1 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")

AND IN THE MATTER OF a Hearing regarding the conduct of **JOHN WILLIAM WADE**, currently registered with brokerage Irealty Calgary Inc. o/a Re/Max IRealty Innovations

Hearing Panel Members:	[K.O], Chair (Public Member) [M.W], Panel Member (License) [M.B], Panel Member (Licensee)
Appearances:	Mitali Kaul, for the Registrar of the Real Estate Council of Alberta Charles Fair, for John William Wade
Hearing Date(s):	January 25, 26, 27, February 11, 2021, virtual hearing, with submissions on sanction and costs provided in writing

DECISION

ON SANCTION AND COSTS

Note: An Erratum has been issued on August 11, 2021, for this decision. The corrections have been made to the text and the Erratum is appended to this decision.

A. Introduction

[1] This decision makes findings on sanction and costs for three administrative penalties issued against the Licensee, John William Wade. The Hearing Panel issued a decision on May 3, 2021 (the "Phase I Decision") that found that the Licensee breached:

a. Section 17(a) of the *Real Estate Act*, R.S.A. 2000, c. R-5 (the "Act"), trading in real estate without authorization;

b. Section 41(d) of the *Real Estate Act Rules* (the "Rules"), failing to fulfill fiduciary obligations; and

c. Section 41(e) of the Rules, failing to ensure his role was understood.

[2] At the conclusion of the Phase I Decision, we asked for submissions on whether the Hearing Panel should quash, vary, or confirm the administrative penalties considering our findings on the breaches. For the reasons that follow, we confirm the administrative penalty for the breaches of s. 17(a) and s. 41(e) and vary the administrative penalty for the breach of ss. 41(d) as follows:

Breach of s. 17(a)	$5,000
Breach of s. 41(d)	$1,500
Breach of s. 41(e)	$1,500

[3] In addition, we award costs against the Licensee in the amount of $2,500.

B. Issues

[4] The evidence was heard in one oral hearing. However, the Hearing Panel has split its decision into two phases. In the Phase I Decision, the issues were focused on whether there were breaches of the Act or the Rules. In this decision, the focus is on sanction and costs. The following issues arise in this decision:

a. Should any of the administrative penalties be quashed after finding breaches of the Act and Rules?

b. Should the Hearing Panel vary or confirm the s. 17(a) administrative penalty?

c. Should the Hearing Panel vary or confirm the s. 41(d) administrative penalty?

d. Should the Hearing Panel vary or confirm the s. 41(e) administrative penalty?

e. Should the Registrar pay costs to the Licensee?

f. What, if any, costs should the Licensee bear of the costs of the investigation and appeal?

C. Factors on Sanction Relevant to All Allegations

[5] The amount of the administrative penalties must account for the unique circumstances of the case by considering both aggravating and mitigating factors. This appeal relates to administrative penalties for breaches of the Act and Rules. It is not a conduct proceeding under Part 3 of the Act where findings of conduct deserving of sanction are at issue. Nevertheless, similar mitigating and aggravating factors as the Hearing Panel applies in conduct proceedings are applicable to administrative penalties.

[6] In *Jaswal v Newfoundland (Medical Board),*1996 CarswellNfld 32, [1996] N.J. No. 50, 138 Nfld. & P.E.I.R. 181, 42 Admin. L.R. (2d) 233 ("*Jaswal*") at paragraph 36 the court identified the following non-exhaustive factors that are relevant to fashioning professional sanctions:

- the nature and gravity of the proven allegations
- the age and experience of the Licensee
- the previous character of the Licensee and in particular the presence or absence of any prior complaints or convictions
- the age and mental condition of the offended client
- the number of times the offence was proven to have occurred
- the role of the Licensee in acknowledging what had occurred
- whether the Licensee had already suffered other serious financial or other penalties as a result of the allegations having been made
- the impact of the incident on the client
- the presence or absence of any mitigating circumstances
- the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper conduct of the profession
- the need to maintain the public's confidence in the integrity of the profession
- the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct
- the range of sentence in other similar cases

[7] These factors are non-exhaustive and must be tailored to the circumstances of each case. There were several mitigating factors in this matter:

a. *the previous character of the Licensee*

   The Licensee has no professional discipline history.

b. *the Broker's decision to terminate the Licensee's license without notice*

   The events that led to the breaches occurred quickly. One day, the Licensee was working on the transaction for the Buyers and the next the broker wrongly accused him of mortgage fraud and terminated his license without hearing his side. The Licensee was undoubtedly distressed and confused by this turn of events. This would have been a difficult position for any licensee to find themselves in.

c. *the Broker's decision to terminate the purchase contract*

   We recognize that the Licensee was placed in a difficult position due to the broker's position that the purchase contract was cancelled. He believed that the broker could not unilaterally terminate a binding contract to which it was not a party, a belief that seems to be supported by both the Practice Advisor and common sense. We reiterate that it was a breach of the Act to trade in real estate while unauthorized and a breach of the Rules to fail to communicate adequately about his role and information relevant to his fiduciary obligations, but we recognize as a mitigating circumstance that this was a challenging position to be in.

d. *the Broker's failure to contact the Buyers*

As we outlined in the Phase I Decision, the Exclusive Buyer Representation Agreement between the Buyers and the brokerage addressed termination of that agreement and circumstances where the designated agent was no longer registered with the brokerage. The brokerage had responsibilities to the Buyers as its clients but it placed the responsibility to communicate with the Buyers entirely on the Licensee, even as it terminated his license and made it unlawful for him to trade in real estate. This hearing is not about the Broker or the brokerage, but about the Licensee. Nevertheless, we recognize as a mitigating factor that the brokerage's failure to address its responsibilities to the Buyers impacted the Licensee.

[8] The Licensee referred to other potentially mitigating circumstances, like an alleged request from the Broker to delay getting licensed elsewhere, alleged misleading statements to the Practice Advisor from the Broker and the failure of the Broker to initiate the return of the Buyers' deposit. We did not hear clear evidence about any of these issues and give these submissions little weight. Nevertheless, we find that there were mitigating factors arising out of the facts, as described above.

[9] In contrast, we find the following aggravating factors in this matter:

a. *the Licensee's experience*

At the time of the breaches, the Licensee had 9 years of experience in the industry and was in his mid-forties. He was experienced and knowledgeable and should have known better.

b. *the nature and gravity of the s. 17(a) breach*

The Licensee traded in real estate while unauthorized. The Hearing Panel agrees with the Registrar that this was the most serious breach here. It is imperative for the protection of the public that licensees only trade in real estate while fully authorized. The Licensee also knew that he was not authorized to trade in real estate.

c. *the nature and gravity of the s. 41(d) breach*

The Licensee breached his fiduciary duties to the Buyers. While this was not as serious on these facts as the s. 17(a) breach, anytime there is a breach of fiduciary duty is a serious concern.

[10] In addition, several *Jaswal* factors were neither aggravating nor mitigating but still relevant, including the following:

a. *the number of times the breaches occurred*

The breaches occurred during a relatively short time in and around April 2014. They involved one transaction with one set of clients. The Registrar argued that because multiple breaches were found that this is aggravating and shows a pattern. We disagree. While there were several breaches, those breaches arose out of one set of circumstances. There is no factual basis to suggest that the Licensee engaged in a pattern of conduct that breached the governing legislation. His breaches appear to be limited to the one transaction.

b. *the impact on the clients*

Fortunately, the Licensee's breaches of the Act and Rules did not cause a substantial impact on the Buyers. The Buyers did not proceed with the transaction for their own reasons. However, there was potential for a negative impact had they wanted to proceed and did not have all the relevant information.

c. *the role of the Licensee in acknowledging his conduct*

The Registrar argued that it was an aggravating factor that the Licensee did not admit to wrongdoing. The Hearing Panel disagrees with the Registrar that the intent of this factor in *Jaswal* is to punish licensees for insisting on their innocence. Rather, this factor creates a mitigating circumstance where a Licensee admits guilt. It is appropriate to give credit to a licensee who takes responsibility in this way.

However, the reverse is not necessarily true that a licensee who proceeds to a hearing to which they are entitled should risk additional punishment because they asserted their rights. Here, the Licensee was entitled to a full hearing and to have the Registrar prove the allegations against him. This was a difficult hearing and it was not obvious from the start whether the Registrar would be successful. This factor is neither mitigating nor aggravating.

d. *the nature and gravity of the s. 41(e) breach*

The failure to ensure that the Licensee's role was understood was the least serious of the breaches here. While it was still a breach of the Rules, it was not particularly egregious and had considerable factual overlap with the breaches of fiduciary duties under s. 41(d). This factor is neither mitigating nor aggravating.

e. *the need for specific deterrence*

Specific deterrence relates to the need for the sanction to sufficiently impact the individual Licensee. It ensures that similar conduct will not occur in the future. Imposing a sanction for each breach of the Act or Rules is important to communicate to the Licensee the seriousness of the breach of these provisions, but we believe that there is not a specific need for a stronger message than what we have directed. While he disagreed with the Registrar about these allegations, his conduct and demeanour did not suggest that he will not comply with the Act and the Rules in the future.

f. *the need for general deterrence*

General deterrence refers to the effect of the sanction on others, including to the industry generally. This is always an important consideration in fashioning a sanction, including for administrative penalties. However, the facts here are somewhat unique including the initial incorrect allegation of mortgage fraud and the sudden upheaval of the Licensee's professional life. We find that general deterrence is a relevant factor but less so than in other cases.

g. *the need to maintain the public's confidence in the profession*

The public's confidence in the industry is compromised when a licensee breaches the Act and Rules. Although the nature and gravity of the offences here were not of the highest level of seriousness, there is still an impact on the public's confidence in the profession and the administrative penalties must adequately address that impact, while dealing proportionally with the Licensee.

D. The Request to Quash the Administrative Penalties

[11] The Licensee requested that the Hearing Panel quash the administrative penalties because he alleged that the breaches do not constitute conduct deserving of sanction. In contrast, the Registrar submitted that the Hearing Panel cannot quash the administrative penalties after finding that there were breaches of the Act and the Rules. It is unnecessary to determine if we can quash an administrative penalty after finding a breach of the legislation because it is not appropriate to do so in these circumstances in any event.

[12] The Hearing Panel has broad authority to quash, vary or confirm an administrative penalty. The hearing of this matter proceeded as a contested *de novo* hearing pursuant to s. 83.1(3) of the Act. Section 83.1(5) then sets out the Hearing Panel's remedial authority:

> The Hearing Panel on an appeal may
>
> (a) quash, vary or confirm the administrative penalty, and
>
> (b) make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the bylaws.

[13] A finding of conduct deserving of sanction is not necessary to issue an administrative penalty. The only finding that is necessary is that there has been a breach of the Act, the regulations, the Bylaws, or the Rules. Section 83(1) of the Act authorizes the Registrar to issue an administrative penalty if there is a breach:

> 83(1) Where the registrar is of the opinion that a person has contravened a provision of
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> (a) this Act,
>
> (b) the regulations,
>
> (c) the bylaws, or

(d) the rules

that is specified in the rules, the registrar may, subject to the bylaws and the rules, by notice in writing given to that person, require that person to pay to the Council an administrative penalty in the amount set out in the notice for each day that the contravention continues.

[14] This contrasts with Part 3 of the Act, which addresses conduct proceedings and conduct deserving of sanction: see s. 43(1). The Legislature clearly anticipated two separate types of professional discipline, (1) professional conduct proceedings under Part 3, and (2) administrative penalties under s. 83. Administrative penalties are issued solely for breaches of the Act, regulations, Bylaws, or Rules without the requirement to find conduct deserving of sanction. In the Phase I Decision, we found that the Licensee breached section 17(a) of the Act and subsections 41(d) and (e) of the Rules.

[15] As outlined above, there were several factors that were both mitigating and aggravating in this matter. The presence of the aggravating factors suggest that this is a matter that is not appropriate for quashing the administrative penalties. In addition, several of the factors that were neither mitigating nor aggravating, but nonetheless important factors, suggest that quashing the administrative penalties would not be appropriate here. These include the need for specific deterrence, the need for general deterrence and the need to maintain the public's confidence in the profession. Accordingly, it is not appropriate in these circumstances to quash any of the administrative penalties.

E. Section 17(a) Administrative Penalty

[16] We confirm the administrative penalty for the breach of s. 17(a) at $5,000. As outlined above, the Licensee requested that we quash the penalty. The Registrar, on the hand, requested that we vary the administrative penalty by increasing it to $10,000.

[17] The facts related to the breach of s. 17(a) are set out in the Phase I Decision. They include that between April 3 and 9, 2014 the Licensee was not authorized to trade in real estate. During this period, however, the Licensee communicated with both the Buyers and the Seller's Agent about an active real estate transaction, which we found to be trading in real estate while unauthorized.

[18] This is the most serious of the breaches. It is imperative for the protection of the public that a licensee only trade in real estate while authorized. This ensures fulsome regulation; the public is protected because the ethical and professional standards of the industry bind the licensee and RECA has the authority to oversee these standards.

[19] The nature and gravity of this breach is made more serious by the fact that the Licensee was fully aware of the limitations on his ability to trade in real estate while unauthorized. The Broker communicated this to him and then the Licensee phoned the Practice Advisor. As we noted in the Phase I Decision, both the Practice Advisor and the Licensee testified that, although most of their discussion centered around the Broker's actions, the Practice Advisor cautioned the Licensee to take care not to trade in real estate while unauthorized. After receiving this instruction, the Licensee proceeded to communicate with both the Buyers and the Seller's Agent about the real estate transaction.

[20] While this was a difficult situation where the Licensee was left without brokerage support in the middle of a deal in which there was now considerable uncertainty, the Licensee still had a professional obligation to ensure that he complied with the Act. He knew that he was not authorized to trade in real estate, but he communicated with both the clients and the Seller's Agent about the transaction while he was unauthorized. It appears that the Licensee had good intentions in trying to initially keep the deal together, then to receive the Buyer's instructions and to provide them advice or confirmation about their decision not to go ahead, and then finally to maintain communication with the Seller's Agent. However, the Licensee was not authorized to trade in real estate, and he ought not to have involved himself in an active transaction while unauthorized.

[21] Looking at all the *Jaswal* factors as addressed above, including the significant mitigating factors here, we find that $5,000 is the appropriate penalty. The Registrar asked us to vary the administrative penalty by increasing it to $10,000. The Registrar relied on the Hearing Panel's decision in *Phipps (Re)*, 2020 ABRECA 500053 where the Hearing Panel increased the administrative penalty from $5,000 to $7,500. While we agree with the Hearing Panel in *Phipps* that s. 83(5) permits us to increase an administrative penalty when it is appropriate to do so, this is not such a case.

[22] *Phipps* is distinguishable in that the licensee in that case was openly defiant and exhibited a "clear inability to accept any responsibility" in a straightforward case where his breaches of the Act and Rules were obvious. Specific deterrence in that case was "a significant concern" due to the licensee's attitude. The Licensee here maintained that there were no breaches, but he was not defiant or devoid of personal responsibility. As outlined above, while there is a need for some specific deterrence here, we do not view this as a significant concern and believe that the Licensee will be governable and compliant with the rules going forward without imposing a harsher penalty.

[23] Comparable cases support the confirmation of the administrative penalty at $5,000.

a. *Gerchick, Head, O'Sullivan, Sears (Re)*, 2013 ABRECA 70

   The licensees were Arizona industry members who were not licensed in Alberta. They planned to come to Alberta and attend a home show with the intent of attracting Alberta clients. The Hearing Panel varied the original administrative penalties, awarding $10,000 against the main actor in this scheme and $1,000 each to the other participants.

Gerchick was a serious violation with a deliberate and preplanned element to it. The circumstances here are different in that the breach of s. 17(a) arose unexpectedly and there was no intent to deceive or thwart the intention of the Act. We find that there was a breach of the Act, and it was significant, but it was not deliberate in the same sense as the *Gerchick* matter.

b. *Dyck (Re)*, 2016 ABRECA 112

The licensee's registration lapsed but she continued to manage properties on behalf of owners, including holding trust funds. There were mitigating circumstances in that case, including personal circumstances and technical issues with renewing the license. The Registrar issued an administrative penalty in the amount of $5,000. We find the circumstances to be analogous to a lapse in registration. In addition, there are also mitigating circumstances here.

c. *Herman (Re)*, 2017 ABRECA 087

The licensee in that case failed to renew his license over the course of three months, despite several reminders. He completed 7 real estate transactions during that time. It was a mitigating factor that he admitted his conduct. The Registrar issued an administrative penalty in the amount of $5,000.

Herman was a more serious situation than the case here. Here there was only one transaction involved, which did not go through, and a limited time. However, the complainant did not admit his conduct. Although we do not find this to be an aggravating factor, we recognize it was a mitigating factor in the *Herman* case that is not present here. Balancing these considerations, we find the *Herman* case to be comparable to the seriousness of the present circumstances.

d. *Mercier (Re)*, 2010 ABRECA 213

The licensee in that case traded in real estate while suspended. The administrative penalty in that case was for $25,000 but accounted for the penalty for two separate breaches of the Act.

Mercier involved a more deliberate element in that the licensee was suspended at the time. It also involved prior serious discipline leading to the suspension.

[24] Looking at all the relevant *Jaswal* factors and the comparable cases, we find that $5,000 is the appropriate amount for the administrative penalty for the breach of s. 17(a).

F. Section 41(d) Administrative Penalty

[25] We vary the s. 41(d) administrative penalty from $3,000 to $1,500. The Licensee asked us to quash this administrative penalty while the Registrar asked us to confirm it at $3,000. The breach of s. 41(d) relates to the three breaches of the Licensee's fiduciary duties:

a. on or about April 7, 2014, the Licensee failed to inform the Buyers that Re/Max Central intended to terminate the transaction of the Centre Street Property;

b. on or about April 7, 2014, the Licensee failed to advise the Buyers that he was no longer licensed to represent their interests in the Centre Street Property; and

c. on April 21, 2014, the Licensee asked the Buyers to sign an Exclusive Buyers Representation Agreement with Re/Max Complete without advising them that it was with a different brokerage than a similar agreement with an overlapping term they had already signed with Re/Max Central at his request.

[26] As outlined above, this is the second most serious of the breaches because it involves a breach of fiduciary duties. However, it was not a particularly serious breach. We noted in the Phase I Decision that the information that the Broker intended to terminate the transaction was a material circumstance that the Licensee had an obligation to disclose to the Buyers, at least when he answered the phone with [MSC]. Instead of disclosing material facts in his possession, the Licensee discussed the property inspection as though the deal was proceeding normally. We agree with the Licensee that the seriousness of this breach was mitigated by the fact that the Buyers did not want to proceed with the transaction in any event and there was no negative impact on them from this failure. Nevertheless, this was still a breach of the Rules as a breach of the Licensee's fiduciary obligations. A penalty is warranted in the circumstances.

[27] Similarly, the failure to advise the Buyers that he was no longer licensed was a breach of the Licensee's fiduciary duties. The Licensee spoke to [MSC] about a live deal and gave her his opinion that he agreed with her about the risks identified in the inspection report about the retaining wall. [MSC] called him as her licensed representative under the understanding that he was her real estate agent. He was not licensed at that time and it was a breach of his fiduciary obligations to communicate with her without disclosing this material fact. Again, there does not appear to have been a negative impact on either of the Buyers because of this breach and we acknowledge the existence of other mitigating factors.

[28] Lastly, the Licensee had the Buyers sign a new exclusive buyers representation agreement with his new brokerage when the term of a previous similar agreement he had asked them to sign had not yet expired. As we noted in the Phase I Decision, the Licensee did not confirm with his former brokerage that their agreement was at an end or advise his clients to take such steps before requesting that they sign the new, potentially conflicting, agreement. Again, there was no negative impact on the Buyers as a result of this breach and the potential for a negative impact on them was low since it was unlikely that the brokerage would seek to enforce its agreement after accusing the Buyers of mortgage fraud. Nevertheless, it was a breach of the Rules to fulfill his fiduciary duties because the information went to the heart of the contract and a penalty is warranted in the circumstances.

[29] The cases that the Registrar cited in favour of confirming the original administrative penalty were more serious than the circumstances here.

a. *Moravec (Re)*, 2019 ABRECA 026

   The licensee undertook to return original copies of a power of attorney and medical certification to a client but failed to do so. The result was that the client had to incur legal expenses to retrieve the documents. The Registrar issued an administrative penalty of $3,000. This failure involved a breach of trust with a significant impact on the clients, unlike the present circumstances.

b. *Randhawa (Re)*, 2019 ABRECA 060

   The licensee failed to present an offer and failed to meet with or communicate directly with the client. The licensee also had a prior disciplinary record. The Registrar issued an administrative penalty of $5,000. This involved a dereliction of duty that was not present here.

c. *Zuk (Re)*, 2018 ABRECA 009

   The licensee placed the interests of potential buyers over the interests of his client, the seller. The seller requested that the buyers make an offer within 24 hours of seeing the property. The buyers asked the licensee to provide them with comparable properties, but he delayed doing so because he believed his client had unreasonably pressured the potential buyers. The potential buyers did not make an offer on the property. The Registrar issued an administrative penalty of $3,000.

   Acting in the interests of another party is one of the more serious forms of a breach of fiduciary obligations. That was not the case here, where the Licensee attempted to assist his clients, although he failed to act in their best interests when he withheld material information.

d. *Kainth (Re)*, 2020 ABRECA 146

   The licensee recommended that his clients waive their financing condition on a property when they did not have written approval. He also failed to address the clients' concerns about the property. The buyers lost their deposit. The Registrar issued an administrative penalty of $4,500.

   Kainth involved a serious breach in providing demonstrably bad advice to the licensee's clients that resulted in significant financial loss to the clients. That was not the case here.

[30] Every penalty must address the public interests of sanctioning, including specific and general deterrence, while maintaining proportionality. To be proportional here, we believe that a penalty is necessary. However, considering the mitigating factors, including the lack of impact on the Buyers and the other *Jaswal* factors listed above, we find that $1,500 is the appropriate balance of protecting the public and recognizing the unique circumstances that arose here.

G. Section 41(e) Administrative Penalty

[31] We would vary the administrative penalty for the breaches of s. 41(e) from $1,500 to $500, but confirm it in light of the language of Schedule 2 of the Bylaws which imposes a minimum penalty of $1,500. The Registrar requested that we confirm the penalty while the Licensee asked that we quash it. In the Phase 1 Decision, we found the following breaches of s. 41(e), failing to ensure that the Licensee's role was understood:

a. on or about April 7, 2014, the Licensee communicated with [MSC] without ensuring that the Buyers understood that he was not licensed to trade in real estate; and

b. on April 21, 2014, the Licensee failed to ensure that the Buyers understood that he was licensed with a new brokerage.

[32] This was the least serious breach. It also overlapped considerably with the facts giving rise to the breach of s. 41(d) for failing in his fiduciary obligations. The Registrar argued that full penalties should be issued for each breach of the Act or the Rules and relied on the Hearing Panel's comments in *Kalia (Re)*, 2018 ABRECA 10 in which the Hearing Panel found:

> Where the same set of facts lead to multiple breaches of the Act or Rules, multiple sanctions may be awarded as each breached provision addresses a specific harm that the legislature or regulating body intended to address.

[33] In *Kalia*, the Hearing Panel noted that the breaches in that case took on a different character under the lens of each of the breached provisions. We agree with the Registrar that each subsection in s. 41 speaks to a different obligation. Here, there was both a failure to ensure that his role was understood and a breach of his fiduciary duty to convey all material information to his clients. These were separate breaches and independent obligations. On that basis, it is appropriate to issue a penalty for each breach, and the s. 41(e) breach is a distinct breach of the Rules.

[34] At the same time, every sanction must be proportional. That is, the penalty must reflect both the facts and the responsibility of the Licensee in the circumstances. Given the administrative penalty imposed for the s. 41(d) breach addressed much of the same facts and conduct, it would be inappropriate to impose an unduly harsh double penalty for this breach. A $500 penalty would reflect the independent nature of the obligations that were breached under s. 41(e) while recognizing that the Licensee has already been punished for much of the conduct at issue in the s. 41(d) administrative penalty. However, the Bylaws impose a minimum penalty of $1,500.

[35] We recognize that the comparable cases that the Registrar cited for breaches of s. 41(e) were in the $1,500 to $2,000 range. We find those cases to be different than the facts of this case. Almost all these cases involved acting for more than one client and failing to ensure that the dual representation was understood. Here, there were no issues about preferring one client's interests over the other's. The issue here was that the Buyers did not know that they no longer had a licensed representative working on their deal and that they did not know the Licensee had changed brokerages and was asking them to sign a new exclusive agreement with a different brokerage with overlapping terms. That is not the same thing as not being clear about the licensee's role in who they were representing.

a. *Theriault (Re)*, 2014 ABRECA 30 involved a licensee who claimed to be neutral in a transaction but was really acting in the seller's interests. The licensee inappropriately tried to aggressively persuade the buyers. A fine of $2,000 was imposed.

b. *Irvine (Re)*, 2019 ABRECA 023 involved a licensee who represented both sellers and buyers without a service agreement with the buyers. Neither party agreed in writing to resolve the conflict of interest. A fine of $1,500 was imposed.

c. *Logue (Re)*, 2020 ABRECA 109 similarly involved a licensee representing both parties with no agreement in place to resolve the conflict. The sellers were confused about the licensee's role, which was not explained until after the offer had been presented and accepted. A fine of $1,500 was imposed.

d. *Simmons (Re)*, 2015 ABRECA 109 involved self interest. The licensee was selling his own property but never made clear to the clients that he was not representing them. A fine of $1,500 was imposed.

[36] Considering the absence of relevant comparable cases, the *Jaswal* factors discussed above, the overlap in the circumstances of the s. 41(d) breach for which the Licensee is already being punished, we find that $500 would be the proportional amount of administrative penalty for the Licensee's failure to ensure that his role was understood, but we confirm the minimum amount set out in the Bylaws.

H. Costs

[37] We order costs in the amount of $2,500 against the Licensee. The Registrar asked for costs of $7,500 while the Licensee asked that he be awarded costs for his partial success. Section 83.1(5)(b) authorizes the Hearing Panel to make an award of costs:

> The Hearing Panel on an appeal may
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> ...
>
> (b) make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the bylaws.

Costs Against the Registrar

[38] It is not clear that the Act and Bylaws authorize us to make an award of costs against the Registrar during an appeal under s. 83.1. In any event we decline to do so. The Registrar was able to prove the three sections of the Act and Rules alleged, even if all the particulars were not proven. Overall, the Registrar was the successful party.

[39] The Licensee asserted that he did not materially dispute many of the facts relevant to the final findings and that the Registrar had not clarified the issues in dispute in advance. We disagree with these submissions. The Licensee contested all three of the administrative penalties and pursued a fully contested hearing, as was his right, with lengthy cross examination, some of which delayed the hearing. It was not the Registrar's conduct that required the hearing to need additional time. We do not fault the Licensee for vigorously defending himself, but the suggestion that the Registrar was not cooperative or acting prejudicially is not supported.

[40] We give little weight to the email correspondence between counsel that the Licensee produced in his submissions on sanctions and costs. This was correspondence between counsel, was produced without consent and was not entered as evidence in the hearing. In any event, the content of this correspondence appears to support the Registrar's submissions about cooperation as much as the Licensee's.

Costs Against the Licensee

[41] As outlined above, we award costs of $2,500 against the Licensee, using the top range of the Guide to Costs outlined in s. 28(3) of the Bylaws. The Licensee was unsuccessful in the appeal on the three main alleged breaches of the Act and Rules, even if he had partial success on some of the particulars. It is appropriate that he bear some of the costs of the investigation and appeal.

[42] Section 28(4) of the Bylaws provides factors that the Hearing Panel may consider in determining an order for costs.

(a) the degree of cooperation by the licensee

The Registrar acknowledged that the Licensee was fairly cooperative during the hearing but noted the Licensee's application for or submissions on particulars, the lengthy cross-examination and the without notice application to make one of the witnesses an expert. We agree with these observations. This is a neutral factor.

(b) the result of the matter and degree of success

There was mixed success in this matter. Overall, the Registrar was successful in proving the breaches cited in each administrative penalty but did not prove all the particulars. We consider this factor in not exercising our discretion to exceed the range of costs recommended in s. 28(3) of the Bylaws.

(c) the importance of the issues

The s. 17(a) breach for trading while unauthorized was the most important issue. The other breaches, while significant because they were breaches of the Rules, were not as important on these facts. This is a neutral factor.

(d) the complexity of the issues

This was a complex hearing, with arguments and evidence about what conduct constituted trading in real estate, and serious factual disputes about what was communicated and when. We consider this factor in setting the costs at the higher range of the recommended Guide to Costs in s. 28(3) of the Bylaws.

(e) the necessity of incurring the expenses

The expenses for the successful aspects of the investigation and appeal were reasonably necessary to prove the allegations. This, of course, does not apply to the unsuccessful particulars. However, as outlined below, there was no reasonable anticipation of the case outcome on of the allegations or particulars. This made all the expenses reasonably necessary. We consider this factor in setting the costs at the higher end range of the Guide to Costs in s. 28(3).

(f) the reasonable anticipation of the case outcome

There was no reasonable anticipation of the case outcome. This hearing involved questions of credibility and difficult factual findings. The mixed success is reflective of the difficulty in reasonably anticipating the case outcome. This is not a matter where it was obvious that either party should have taken a different position. We consider this factor in not exercising our discretion to exceed the range of costs recommended in s. 28(3) of the Bylaws.

(g) the reasonable anticipation for the need to incur the expense

There was a reasonable anticipation for the need to incur the expenses. The Licensee fully contested each administrative penalty. There were no witnesses who were unnecessary or any expenses that appeared unreasonable. We consider this factor in setting the costs at the higher end range of the Guide to Costs in s. 28(3).

(h) the financial circumstances of the licensee and any financial impact experienced to date by the licensee

We heard no evidence about the Licensee's financial circumstances. This is a neutral factor.

(i) any other matter related to an order reasonable and proper costs as determined appropriate by the Hearing Panel

The Guide to Costs in s. 28(3) provides only a small portion of even the low end of the costs of the investigation and appeal. We consider this factor in setting the amount of costs at the higher end of the range of the Guide to Costs in s. 28(3) of the Bylaws.

At the same time, this matter occurred 7 years after the alleged events in question and after initially being an investigation into mortgage fraud. No evidence was provided about why the delay occurred, but we recognize that the pending nature of the allegations for this amount of time was undoubtedly challenging for the Licensee. We also observed that the delay likely contributed to hostility and a negative view of RECA from some of the witnesses. We consider this factor in not exercising our discretion to go beyond the range of costs recommended by s. 28(3).

[43] Section 83.1(5)(b) requires us to make a costs award in accordance with the Bylaws, subject to our discretion. Unlike conduct proceedings where there are two potential approaches, under either s. 28(1) as a cost recovery approach or s. 28(3) under a Guide to Costs, only s. 28(3) applies to administrative penalty appeals. Section 28(1) outlines that it applies to the following sections of the Act:

a. s. 40(4), costs against a complainant who makes a frivolous or vexatious complaint;

b. s. 43(2), costs after a conduct proceeding;

c. s. 43(2.1), costs of an appeal of a disposition by the Registrar in a conduct proceeding; or

d. s. 50(5), costs awards of the Appeal Panel.

[44] None of these provisions apply. Section 40(4) does not apply to an administrative penalty since there is no complainant. Similarly, the two subsections of s. 43 do not apply because s. 83.1(4) expressly outlines that sections 43 to 47 of the Act do not apply to administrative penalty appeals. Lastly, s. 50(5) does not apply because this is a decision of the Hearing Panel, not the Appeal Panel. This leaves only s. 28(3), the Guide to Costs.

[45] Section 28(3) of the Bylaws provides the Hearing Panel a range of recommended costs, subject to the Hearing Panel's discretion, of which the relevant portions include:

Item	Column 2
Total fine or penalty	$5,000 - $9,999
Costs for fully Contested Hearing, including Administrative Penalty Appeal	$0 - $2,500

[46] We find that it is appropriate to award $2,500 in this case. This award is in accordance with the range permitted by s. 28(3) of the Bylaws and is only a small portion of the actual costs of the investigation and appeal. Considering all the factors in s. 28(4), we find this to be an appropriate amount of costs in the circumstances. We believe that the broad discretion in s. 28(3) would allow us to award costs higher than the recommended range in s. 28(3), but we decline to award higher than that range in the circumstances.

I. Conclusion

[47] The Hearing Panel makes the following orders under s. 83.1 of the Act:

(i) We confirm the administrative penalty for the breach of s. 17(a) of the Act at $5,000;

(ii) We vary the administrative penalty for the breach of s. 41(d) of the Rules

to $1,500;

(iii) We confirm the administrative penalty for the breach of s. 41(e) of the Rules at $1,500; and

(iv) the Industry Member shall pay to the Real Estate Council of Alberta costs associated with the investigation and appeal in the amount of $2,500.

This decision is dated at the City of Edmonton in the Province of Alberta, this 25th day of June 2021.

"Signature"

[K.O], Hearing Chair

August 11, 2021

An Erratum has been issued for this decision as follows:

ERRATUM OF THE DECISION

After issuing our decision on sanction and costs on June 25, 2021 (the Phase II Decision), the Hearing Panel became aware of an error in the Phase II Decision relating to the administrative penalty for the breach of s. 41(e) of Rules. Schedule 2 of the Bylaws directs that the minimum penalty for a breach of s. 41(e) is $1,500, while the Phase II Decision varied the administrative penalty to $500.

The Hearing Panel recognizes that while we have broad discretion to confirm, vary or quash an administrative penalty, we must do so in accordance with the Bylaws. We issue this erratum to correct the Phase II Decision to ensure that decision's compliance with the Bylaws.

The Supreme Court of Canada addressed the concept of *functus officio* in *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848. *Chandler* speaks to the general rule that once a tribunal has reached a final decision, the decision cannot usually be reconsidered. There are some exceptions to the general rule, including to correct an inadvertent mistake or to express the tribunal's manifest intent. *Chandler* also recognizes that *functus officio* should be applied less rigidly to administrative proceedings where there are limited appeal mechanisms. Here, there is no statutory appeal from the Hearing Panel on an administrative penalty appeal.

The intent of the Hearing Panel was to issue an award in accordance with the Bylaws. Accordingly, the following corrections have been made to this decision which was issued on June 25, 2021:

1. In paragraph 2, the penalty for the breach of s. 41(e) was changed from $500 to $1,500.

2. In paragraph 31, the first sentence was changed from:

   "We vary the administrative penalty for the breaches of s. 41(e) to $500."

   To

   "We would vary the administrative penalty for the breaches of s. 41(e) from $1,500 to $500, but confirm it in light of the language of Schedule 2 of the Bylaws which imposes a minimum penalty of $1,500."

3. In paragraph 34, the third sentence was changed from:

   "A $500 penalty reflects the independent nature of the obligations that were breached under s. 41(e) while recognizing that the Licensee has already been punished for much of the conduct at issue in the s. 41(d) administrative penalty."

   To

   "A $500 penalty would reflect the independent nature of the obligations that were breached under s. 41(e) while recognizing that the Licensee has already been punished for much of the conduct at issue in the s. 41(d) administrative penalty."

4. In paragraph 34, a fourth sentence was added:

   "However, the Bylaws impose a minimum penalty of $1,500."

5. Paragraph 36 was amended from:

   "Considering the absence of relevant comparable cases, the *Jaswal* factors discussed above, the overlap in the circumstances of the s. 41(d) breach for which the Licensee is already being punished, we find that $500 is the proportional amount of administrative penalty for the Licensee's failure to ensure that his role was understood.

   To

"Considering the absence of relevant comparable cases, the *Jaswal* factors discussed above, the overlap in the circumstances of the s. 41(d) breach for which the Licensee is already being punished, we find that $500 would be the proportional amount of administrative penalty for the Licensee's failure to ensure that his role was understood, but we confirm the minimum amount set out in the Bylaws."

6. Paragraph 46 corrected a typographical error. The word "be" was added to the third sentence.

7. Paragraph 47(iii) was amended from:

   "We vary the administrative penalty for the breach of s. 41(e) of the Rules to $500"

   To

   "We confirm the administrative penalty for the breach of s. 41(e) of the Rules at $1,500"

This decision is dated at the City of Edmonton in the Province of Alberta, this 11th day of August 2021.

"Signature"
[K.O], Hearing Panel Chair