

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL)
REGULATION, DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 90-6199
)
LARRY NEIL HECKERD and JAYNE)
R. PHOENIX,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings by its duly designated Hearing Officer, William R. Cave, held a public hearing in the above-captioned case on February 6, 1991 in Clearwater, Florida.

APPEARANCES

For Petitioner: Steven W. Johnson, Esquire
Department of Professional Regulation
Division of Real Estate
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802

For Respondent: Leslie M. Conklin, Esquire
Phoenix LARSON CONKLIN STANLEY & PROBST, P.A.
16120 US 19 North, Suite 210
Clearwater, Florida 34624

For Respondent: Larry Neil Heckerd, Pro se
Heckerd 119 Allens Ridge Drive East
Palm Harbor, Florida 34683

STATEMENT OF THE ISSUES

1. Whether the license of Larry Neil Heckerd to act as a real estate salesman in the state of Florida should be revoked, suspended or otherwise disciplined under the facts and circumstances of this case.

2. Whether the license of Jayne R. Phoenix to act as a real estate salesperson in the state of Florida should be revoked, suspended or otherwise disciplined under the facts and circumstances of this case.

PRELIMINARY STATEMENT

By a two-count Administrative Complaint dated August 24, 1990 and filed with the Division of Administrative Hearings on October 1, 1990 the Petitioner, Department of Professional Regulation, Division of Real Estate (Department) seeks to revoke, suspend or otherwise discipline the Respondents' license as real estate salesmen in the state of Florida. As grounds therefor, it is alleged that each of the Respondents violated Section 475.25(1)(b), Florida Statutes, and are guilty of misrepresentation, culpable negligence or breach of trust in a business transaction in that each separately misrepresented to the purchasers of a home in a flood zone the use to which a particular area of that home could be put.

At the hearing, the Department presented the testimony of Barbara Lopez, Rafael C. Lopez, Edward J. Shea and David Livesay. Petitioner's exhibits 1 through 5 were received into evidence.

Respondent Phoenix testified in her own behalf but presented no other witnesses. Respondent Phoenix's exhibit 1 was received into evidence. Respondent Heckerd testified in his own behalf but presented no other witnesses. Respondent Heckerd offered no documentary evidence.

No transcript was filed with the Division of Administrative Hearings. The Department and Respondent Phoenix timely submitted Proposed Findings of Fact and Conclusions of Law. Respondent Heckerd waived the filing of Proposed Findings of Fact and Conclusions of Law. A ruling on each Proposed Finding of Fact submitted by the Department and Respondent Phoenix has been made as reflected in an Appendix to the Recommended Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. At all times material to this proceeding, Respondent Larry Neil Heckerd (Heckerd) was licensed as a real estate salesman in the state of Florida, holding license number 0431546. Heckerd's license is presently in an inactive status.

2. At all times material to this proceeding, Respondent Jayne R. Phoenix (Phoenix) was licensed as a real estate salesman in the state of Florida, holding license number 0069088.

3. At all times material to this proceeding, both Heckerd and Phoenix were working under the brokerage license of Charles E. Earhart of Charles Earhart Realty.

4. During June 1988 the owners of the property located at 317 Lagoon Drive, Ozona, Pinellas County, Florida retained Charles Earhart Realty to list and sell the property. Heckerd was the listing agent and prepared the multiple listing service (MLS) information sheet on this property.

5. Sometime before December 8, 1988, Rafael C. Lopez and his wife, Barbara Lopez were driving through the neighborhood and viewed the property at 317 Lagoon Drive, Ozona, Florida during an "open-house". Rafael and Barbara Lopez were aware at this time that the property was in a flood zone, and there were certain restrictions on the use of this property.

6. Phoenix was the salesperson present at the "open-house" and was advised by the Lopezes that they were looking for a 4-bedroom home so that Rafael Lopez could convert one of the bedrooms into an office.

7. Before showing the Lopezes through the house, Phoenix provided them with the MLS information sheet prepared by Heckerd. This sheet described a 3-bedroom stilt house with a 4-car garage and a 10'6" x 19' game room on the first level.

8. On the day the Lopezes were shown the house the game room was enclosed and was being used as a storage room. Shelving was built on all of the wall space, and the only visible electrical outlet was a single bulb ceiling light with a pull string switch. Additionally, there were no phone lines or phone jacks visible in this room.

9. While showing the Lopezes this home during the open-house, Phoenix never suggested, inferred or advised the Lopezes that this room could be converted into, or utilized as, an office.

10. The Lopezes left after viewing the home without any commitment on the purchase of the house, and Phoenix did not expect to hear from them again since the house did not meet their stated needs.

11. However, the Lopezes did contact Phoenix, and on or about December 8, 1988 entered into a Contract For Sale And Purchase (contract) with Bonnie Conover as seller.

12. The contract was prepared by Phoenix, and it referred to the "game room" as the "downstairs storage area".

13. The contract called for the closing to be on January 31, 1989, and on that day, Heckerd and Phoenix gave the Lopezes a "walk-through" inspection of the house.

14. During the walk through inspection it was evident that the so called game room was being used as a storage area, since boxes were packed on all the shelves and on the floor.

15. Again, the only electrical outlet that could be observed that day was a single bulb ceiling light with a pull-string switch. Although it was later determined that there were no other electrical outlets in this room and that there were no phone jacks or phone lines in this room, that could not have been determined during the walk through inspection because of the boxes being stacked against the walls.

16. During the walk through inspection, Heckerd pointed out to Rafael Lopez the electrical outlets on the walls in the garage, and their unusual high placement on the wall was due to the mean high water level established for the flood zone in this area.

17. Heckerd thought the storage area could be used as a game room, and he may have referred to the storage area as a game room during the walk through inspection on January 31, 1989. However, Heckerd did not advise the Lopezes that the storage area could be used as an office.

18. Likewise, Phoenix did not advise the Lopezes that the storage area could be used as an office.

19. During the walk-through inspection on January 31, 1989, neither Phoenix nor Heckerd, while together or apart, heard either or both of the Lopezes discuss or refer to using the storage area as an office.

20. After purchasing the house the Lopezes converted the storage room into an office, and on July 25, 1989 was issued a notice of violation for the use of the storage area as an office in that such use was an alleged violation of Section A107 of the Standard Building Code or Pinellas County Ordinance 77-12 as amended.

21. Rafael Lopez abated the alleged violation without requesting a hearing, and there was no further action taken to determine if the use of the storage area as an office was in fact a violation of the building code or the county ordinance.

22. Neither Section A107 of the Standard Building Code or Pinellas County Ordinance 77-12, as amended, were placed into evidence or made a part of the record by submitting them for official recognition.

23. There was insufficient evidence to show that the use of the storage area as an office or a game room was in fact a violation of the building code or the county ordinance.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.57(1), Florida Statutes.

25. Section 475.25(1), Florida Statutes, empowers the Florida Real Estate Commission (Commission) to revoke, suspend or otherwise discipline the license of a real estate salesman if he or she is found guilty of any one of those enumerated acts listed in Section 475.25(1)(a-p), Florida Statutes.

26. Section 475.25(1)(b), Florida Statutes, provides in pertinent part as follows:

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or devise, culpable negligence, or breach of trust in any business transaction . . . has violated a duty imposed upon him by law or by the terms of a listing contract, written, oral, express or implied, in a real estate transaction . . .

27. In a disciplinary proceeding, the burden is upon the regulatory agency to establish facts upon which its allegations of misconduct are based by clear and convincing evidence *Ferris v. Turlington*, 510 So.2d 293 (Fla. 1987). The Department has failed to sustain the burden on both counts of the Administrative Complaint.

28. First, the Petitioner has failed to prove by clear and convincing evidence that the use of the storage area on the first level of the home as an office or as a game room was in fact a violation of the building code or the county ordinance as alleged in the Administrative Complaint. Secondly, assuming arguendo that a violation of the building code or the county ordinance has been proven, there is still a lack of clear and convincing evidence that Heckerd's or Phoenix's conduct violated Section 475.25(1)(b), Florida Statutes. The purchasers were on notice from the very beginning that this house was in a flood zone area, and that there may be certain restrictions placed on the use of this property. Knowing this, the purchasers made no effort to inquire about such restrictions from the appropriate county official, nor did they specifically inquire of Heckerd or Phoenix as to such restrictions.

RECOMMENDATION

Having considered the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Petitioner enter a Final Order finding the Respondents not guilty of violating Section 475.5(1)(b), Florida Statutes, and that both Count I and Count II of the Administrative Complaint be dismissed.

RECOMMENDED this 7th day of March, 1991, in Tallahassee, Florida.

WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of March, 1991.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 90-6199

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties in this case.

Rulings on Proposed Findings of Fact Submitted by the Petitioner

1. Not necessary.
- 2.-3. Adopted in Findings of Fact 1 and 2, respectively.
4. Adopted in Findings of Fact 5, 6, and 7.
5. First sentence adopted in substance in Finding of Fact 5. Second sentence rejected as not being supported by substantial competent evidence in the record.
6. Adopted in Finding of Fact 8 but modified.
7. First sentence adopted in Finding of Fact 13. The second sentence is rejected as not being supported by substantial competent evidence in the record. The third sentence is neither material nor relevant.

8. Neither material nor relevant.
9. Adopted Finding of Fact 19, but modified.
10. Neither material nor relevant.
- 11.-12. Restatement of testimony, not a finding of fact, but see Finding of Facts 21, 22 and 23.
13. Restatement of what Phoenix said to investigator, not a finding of fact but see Findings of Fact 6 and 9, otherwise not material or relevant.
14. Adopted in Finding of Fact 7 but modified.
15. Adopted in Findings of Fact 18 and 19 but modified.
- 16.-17. Restatement of testimony, but see Findings of Fact 16, 17 and 19.
18. Rejected as not being supported by substantial competent evidence in the record.

Rulings on Proposed Findings of Fact
Submitted by the Respondent

1. Not necessary.
- 2.-3. Adopted in Findings of Fact 1 and 2.
4. Adopted in Finding of Fact 4 but modified.
- 5.-6. Neither material nor relevant.
- 7.-8. Adopted in Findings of Fact 5 and 6, respectively.
9. Restatement of testimony, not stated as a finding of fact, but see Finding of Fact 6.
10. Adopted in Finding of Fact 7.
11. Restatement of testimony, not stated as a finding of fact, but see Finding of Fact 9.
12. Unclear as to whether a finding of fact, but see Finding of Fact 8, 9, 14, 15, 17, 18 and 19.
- 13.-15. Adopted in Finding of Fact 8, 11, 12 and 13 but modified.
16. First sentence adopted in Finding of Fact 13. Second sentence a restatement of testimony and not a finding of fact, but see Findings of Fact 17, 18 and 19.
- 17.-18. Not material or relevant.
19. More a restatement of testimony than a finding of fact, but see Findings of Fact 9, 17, 18 and 19.
20. Adopted in Finding of Fact 20 but modified.
- 21.-24. More of a restatement of testimony than a finding of fact, but see Findings of Fact 20, 21 and 23.
25. Adopted in Finding of Fact 22 but modified.
26. More of a restatement of testimony than a finding of fact, but see Finding of Fact 6.
27. More of a restatement of testimony than a finding of fact, but see Findings of Fact 9, 17, 18 and 19.
- 28.-29. More of a restatement of testimony than a finding of fact, but see Findings of Fact 17 and 19.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.