STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,

Petitioner,

vs. CASE NO. 92-3323

GREGORY T. FRANKLIN and EQUITY OF SOUTH FLORIDA t/a EQUITY REALTY,

Respondents.

RECOMMENDED ORDER

Pursuant to written notice, a formal hearing was held in this case before Daniel Manry, a duly designated Hearing Officer of the Division of Administrative Hearings, on November 5, 1992, in Stuart, Florida.

APPEARANCES

For Petitioner: James H. Gillis, Esquire
Senior Attorney
Department of Professional
Regulation, Division of Real Estate
Legal Section - Suite N 308
Hurston Building North Tower
400 West Robinson Street
Orlando, Florida 32801-1772

For Respondent: Gregory T. Franklin, pro se
c/o Equity Realty of South Florida, Inc.
5809 South East Federal Highway, #200
Stuart, Florida 34997

STATEMENT OF THE ISSUE

The issues for determination in this proceeding are whether Respondents committed multiple acts alleged in the administrative complaint and, if so, what, if any, disciplinary action should be taken against Respondents' licenses.

PRELIMINARY STATEMENT

Petitioner filed an eight-count Administrative Complaint against Respondents on April 23, 1992. Respondents requested a formal hearing on May 12, 1992. The matter was referred to the Division of Administrative Hearings for assignment of a hearing officer on June 1, 1992, and assigned to Hearing Officer Arnold H. Pollock on June 3, 1992.

A formal hearing was scheduled for August 25, 1992, pursuant to a Notice of Hearing issued on July 1, 1992. The matter was transferred to the undersigned on August 21, 1992, and rescheduled for formal hearing on November 5, 1992.

At the formal hearing, Petitioner presented the testimony of the Respondent, Gregory T. Franklin ("Franklin"), and submitted 21 exhibits which were admitted in evidence. Respondent, Franklin, testified in his own behalf and submitted two exhibits for admission in evidence. Respondents' Exhibit 1 is a composite exhibit consisting of two letters containing conflicting demands from the parties to a real estate transaction. Respondents' Exhibit 2 is a letter from the buyer requesting money to be placed in escrow. Respondents' Exhibit 1 and Exhibit 2 were admitted in evidence without objection.

A transcript of the formal hearing was not requested by either party. Petitioner timely filed proposed findings of fact and conclusions of law on November 19, 1992. Respondent timely filed proposed findings of fact and conclusions of law on November 16, 1992. The parties' proposed findings of fact are addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the governmental agency responsible for issuing real estate licenses and regulating licensees on behalf of the state. Respondent, Gregory T. Franklin ("Franklin"), is licensed in the state as a real estate broker; license number 0314387. The last license issued was as a real estate broker, c/o Equity Realty of South Florida, Inc., t/a Equity Realty, 5809 Southeast Federal Highway #200, Stuart, Florida 34997. Respondent, Equity Realty of South Florida, Inc. ("Equity"), is a corporation registered as a real estate broker; license number 0229264. Respondent, Franklin, is the qualifying broker for Respondent, Equity.

2. On or about January 26, 1990, Mr. Robert Warren (the "buyer") entered into a contract to purchase real estate from Ms. J. Zola Miller and Ms. Adrianne Miller Hill (the "sellers"). The buyer gave Respondent an earnest money deposit in the amount of $1,000.

3. On or about April 17, 1990, a second contract was executed by the buyer and sellers. The buyer gave Respondents a second earnest money deposit in the amount of $24,000. Both earnest money deposits were timely deposited to Respondents' escrow account, number 0194101404, Florida Bank, Stuart, Florida.

4. The buyer and sellers had difficulty in closing the contract due to disagreements concerning conditions in the contract. At the buyer's request, Respondents used the earnest money in the amount of $25,606.04 to purchase a certificate of deposit ("CD") in the name Robert Warren Century 21 Equity Realty Escrow Account #050-215-76, located at the First Marine Bank of Florida, Palm City, Florida ("First Marine"). Respondents received the sellers' verbal approval, but not written approval, for the purchase of the CD.

5. Respondents notified the Florida Real Estate Commission (the "Commission") on August 28, 1990, that there were conflicting demands for the $25,000 earnest money deposit. Respondents stated their intent to claim a portion of the earnest money as an earned commission and stated that they were preparing to file an interpleader action to resolve the parties' dispute over the earnest money deposit. The Commission acknowledged Respondents' notification.

6. Negotiations between the buyer and sellers continued until December 12, 1990. At that time, the parties reached an impasse, and each made written requests for the escrow deposit. Respondents maintained the earnest money in the CD until February 8, 1991.

7. On February 8, 1991, Respondents were notified by First Marine that the buyer was attempting to obtain the escrow monies directly from First Marine. Respondents opened a CD in the name of Robert Warren Escrow Account for Equity Realty by Gregory Franklin, Account #200-517-7320, First Union Bank of Florida, Stuart, Florida. When the CD matured on May 15, 1991, the amount of the deposit was $25,989.57.

8. On May 15, 1991, Respondents removed the earnest moneys and invested them in CD #10696954 at Community Savings Bank. On June 19, 1991, Respondents withdrew $500, paid a penalty of $6.21, and closed the CD. The remaining balance was used to open CD #10707413 at Community Savings Bank. On June 21, 1991, Respondents withdrew $600 and paid a penalty in the amount of $8.67. Respondents used half of the $600 withdrawal to pay an attorney to initiate a civil interpleader action without the knowledge or consent of either the buyer or seller. On August 23, 1991, Respondents closed the CD and withdrew the balance.

9. On August 23, 1991, Respondents opened CD 310725647 in the name of Equity Realty, Inc., with the balance at Community Savings Bank. On October 30, 1991, Respondents made a withdrawal in the amount of $175. On November 23, 1991, the CD was renewed. The account was closed on November 27, 1991, with a balance of $25,456.94, and deposited into the court registry. The interpleader action was ultimately resolved pursuant to a settlement agreement between the parties.

10. Respondents obtained the consent of both parties, though not the written consent of both parties, before placing the escrowed funds into an interest bearing account on August 15, 1990. The uncontroverted testimony of Respondent, Franklin, concerning this issue was credible and persuasive. Neither the sellers nor the buyer ever revoked their consent.

11. Respondents deposited the earnest moneys into an interest bearing account without designating who was to receive the interest from such an account without the consent of both parties. Respondents took appropriate action to resolve the conflicting demands made upon the earnest moneys deposited with Respondents but failed to take such action in a timely manner.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto. The parties were duly noticed for the formal hearing.

13. The burden of proof is on Petitioner. Petitioner must show by clear and convincing evidence that Respondents are guilty of the acts alleged in the administrative complaint and the reasonableness of the disciplinary action to be taken against Respondents' licenses. Ferris v. Turlington, 510 So.2d 292 (Fla. 1987).

14. Petitioner did not satisfy its burden of proof with respect to the allegations in Counts III-VI of the Administrative Complaint. Petitioner requested in its Proposed Recommended Order that Counts III-VI of the

Administrative Complaint be dismissed. The uncontroverted evidence established that Respondents did not fail to account and deliver a real estate deposit, did not fail to notify the Commission of a deposit dispute, and did not fail to maintain trust funds in a proper depository in violation of Sections 475.25(1)(d)1., 475.25(1)(e), and 475.(1)(k), Florida Statutes, and Florida Administrative Code Rule 21V-10.032.

15. Petitioner did not satisfy its burden of proof with respect to allegations in Count I and II of the Administrative Complaint. Respondents did not engage in dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in a business transaction. Both the buyer and seller had actual knowledge that the escrow funds were deposited in an interest bearing account, that each party to the transaction demanded the escrow funds, and that the escrow funds were subject to an interpleader action to resolve their dispute. The testimony of Respondent, Franklin, on this issue was credible and persuasive.

16. Petitioner did not satisfy its burden of proof with respect to the allegation in Counts VII and VIII of the Administrative Complaint that Respondents placed escrow funds in an interest bearing account without the consent of the buyer and seller in violation of Florida Administrative Code Rule 21V-14.014. Rule 21V-14.014 provides in relevant part:

> A licensed real estate broker is not prohibited from placing escrow money, entrusted to him by any person dealing with him as a broker in an interest bearing account. The placement of escrow monies in an interest bearing account, and designation of the party who is to receive the interest, must be done with the written permission of all the interested parties.

17. The requirement for "written" permission to place escrow funds in an interest bearing account was not in Florida Administrative Code Rule 21V-14.014 when it was adopted on September 17, 1981, but was added effective April 16, 1991. Therefore, when Respondents initially placed the escrow funds in an interest bearing account on August 15, 1990, Respondents had the requisite consent of both parties. No evidence was presented that either party's consent was ever revoked.

18. At no time were Respondents required under the terms of Florida Administrative Code Rule 21V-14.014 to obtain consent from either party to make changes in the interest bearing account holding the deposited escrow funds. The operative act requiring consent under Rule 21V-14.014 is the act of placing escrow funds in "an" interest bearing account; not changes concerning particular interest bearing accounts. Therefore, when Respondents changed the depository of the interest bearing account on May 15, 1991, June 19, 1991, and August 23, 1991, Respondents were not required under Rule 21V-14.014 to obtain the consent of the parties for such changes. The parties had already given their consent to place the escrow funds in "an" interest bearing account on August 15, 1990.

19. Petitioner satisfied its burden of proof with respect to the allegation in Counts VII and VIII of the Administrative Complaint that Respondents placed escrow funds in an interest bearing account without designating who was to receive the interest in violation of Florida Administrative Code Rule 21V-14.014. No evidence was presented by Respondents that an agreement was ever reached between the parties, in any form, designating who was to receive the interest from an interest bearing account. The testimony

of Respondent, Franklin, that he assumed that the interest belonged to the seller does not satisfy the requirement in Rule 21V-14.014 that the designation of who is to receive the interest from an interest bearing account must be done with the permission of all interested parties. Moreover, Franklin paid himself money from the interest for attorney fees without the consent of the parties.

20. Facts and circumstances surrounding the entire transaction should be considered in determining the appropriateness of the penalty to be imposed in a particular case. This case involves no intent to defraud, failure to remit, or culpable negligence. Respondents ultimately took appropriate action to resolve the dispute between the parties, and Respondents have no prior disciplinary history. However, Respondents failed to take timely action to resolve the dispute between the parties. That factor would not have been a consideration in this case if Respondents had taken appropriate action when they notified the Commission on August 28, 1990, of the parties' competing demands on the escrow deposit instead of waiting until August 23, 1991, to take such action.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner enter a Final Order finding Respondents guilty of placing escrow funds in an interest bearing account without designating who is to receive the interest in violation of Florida Administrative Rule 21V-14.014. It is further recommended that Petitioner should issue a written reprimand to Respondents and require Respondent, Franklin, during the next 12 months, to document to the satisfaction of Petitioner that he has completed 14 hours of the Brokerage Management Course.

RECOMMENDED this 22nd day of January, 1993, in Tallahassee, Florida.

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DANIEL MANRY
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 22nd day of January, 1993.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 92-3323

Petitioner's Proposed Findings Of Fact.

1.-6. Accepted in Finding 1.
7.-8. Accepted in Finding 2.
9.-11. Accepted in Finding 3.
12. Accepted in Finding 4.
13. Accepted in Finding 5.
14. Accepted in Finding 3.
15. Accepted in Finding 6.

16. Accepted in Finding 7.
17.-20. Accepted in Finding 8.
21.-22. Accepted in Finding 9.
23.-24. Accepted in Findings 10.-11.

Respondents' Proposed Findings Of Fact.

1.-6. Accepted in Finding 1.
7.-8. Accepted in Finding 2.
9.-11. Accepted in Finding 3.
12. Accepted in Finding 4
13. Accepted in Finding 5.
14. Accepted in Finding 3.
15. Accepted in Finding 6.
16. Accepted in Finding 7
17.-20. Accepted in Finding 8.
21.-22. Accepted in Finding 9.
23.-24. Accepted in Findings 10.-11.

COPIES FURNISHED:

Darlene F. Keller, Director
Division of Real Estate
Department of Professional Regulation
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32801

Jack McRay, Esquire
General Counsel
Department of Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

James H. Gillis, Esquire
Department of Professional
Regulation, Division of Real Estate
Legal Section - Suite N 308
Hurston Building North Tower
400 West Robinson Street
Orlando, Florida 32801-1772

Gregory T. Franklin, pro se
%Equity Realty of South Fla., Inc.
5809 S.E. Federal Highway, #200
Stuart, Florida 34997

APPENDIX TO RECOMMENDED ORDER, CASE NO. 92-3323

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.