

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 93-2043
)
ROBERT A. SCHWARTZ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Errol H. Powell, a duly designated Hearing Officer of the Division of Administrative Hearings, on October 13, 1993, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: James H. Gillis, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street
Orlando, Florida 32801-1772

For Respondent: Robert A. Schwartz, pro se 1/
295 Pine Shadow Way
West Palm Beach, Florida 33414

STATEMENT OF THE ISSUE

The issue for determination at final hearing was whether Respondent committed the offenses set forth in Petitioner's amended administrative complaint, and if so, what disciplinary action should be taken against Respondent's real estate license.

PRELIMINARY STATEMENT

On February 25, 1993, the Department of Professional Regulation 2/ , Division of Real Estate (Petitioner), filed an amended administrative complaint, with supporting documents, against Robert A. Schwartz (Respondent). Petitioner alleged in the amended administrative complaint that Respondent had violated Subsection 475.25(1)(b), Florida Statutes (1991), by being guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in any business transaction; and Subsection 475.25(1)(d)1, Florida Statutes (1991),

by being guilty of failure to account or deliver a deposit. Because of the alleged violations, Petitioner seeks to discipline Respondent's license as a real estate broker.

On April 6, 1993, Respondent filed an election of rights with Petitioner requesting a formal hearing. On April 12, 1993, the matter was referred to the Division of Administrative Hearings for assignment of a Hearing Officer. A formal hearing was scheduled on October 13, 1993, pursuant to notice.

At the formal hearing, Petitioner presented the testimony of three witnesses, including Respondent, and entered 12 exhibits into evidence. 3/ Petitioner testified on his own behalf, presenting no other witnesses, and entered no exhibits into evidence.

A transcript of the formal hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the conclusion of the hearing. Subsequently, Respondent was granted additional time in which to file his post-hearing submissions. Both Petitioner and Respondent filed proposed findings of fact which are addressed in the appendix to this recommended order.

FINDINGS OF FACT

1. The Department of Business and Professional Regulation, Division of Real Estate (Petitioner), is the state licensing and regulatory agency charged with the responsibility and duty to prosecute administrative complaints filed pursuant to Chapters 455 and 475, Florida Statutes, and the rules promulgated pursuant thereto.

2. At all times material hereto, Robert A. Schwartz (Respondent) was a Florida licensed real estate broker, having been issued license number 0481297, with an address of American Real Estate Properties, Inc., 13833 Wellington Trace, West Palm Beach, Florida.

3. Respondent was initially licensed on or about May 23, 1988.

4. At all times material hereto, Respondent was the qualifying broker and officer of American Real Estate Properties, Inc. (American Real Estate).

5. On or about May 18, 1992, Respondent met with Ms. Renate Schuetze in West Palm Beach. 4/ Ms. Schuetze was from the State of New York and was interested in buying lots, building homes on the lots and renting the homes. Respondent had been referred to Ms. Schuetze by her friend, Ms. Mary Ann Runer.

6. A few years ago, on behalf of Ms. Runer and using monies provided by her, Respondent had purchased a lot in West Palm Beach, overseen the contracting and construction of her home on the lot and rented out the home. All for which he charged Ms. Runer a fee. Ms. Schuetze wanted Respondent to do the same for her.

7. On that same day, after meeting with Respondent, visiting prospective lots and model homes with him and discussing his process and procedure, Ms. Schuetze gave Respondent a check for \$15,120 made payable to American Real Estate and returned to New York. Although Ms. Schuetze noted on the check that the money was for a deposit on one of the model homes, the monies were actually for a deposit of \$2,000 on two certain lots (\$1,000 each) and Respondent's fee of \$13,000 (\$6,500 per house) 5/ for performing the same service for her that

he had performed for Ms. Runer. Ms. Schuetze wanted to pay Respondent his fee in advance instead of waiting until the homes had been built and rented. This was the first time that Respondent had received his fee in advance.

8. The following day, on May 19, 1992, Respondent deposited the \$15,120 into the operating account of American Real Estate which did not have an escrow account. Furthermore, Respondent had no intentions of opening an escrow account.

9. However, the day before, on May 18, 1992, Respondent wrote two checks for \$1,000 each to Miki S. Murray Realty (Murray Realty) for a deposit on two certain lots on behalf of Ms. Schuetze, leaving a balance of \$13,120 from the monies given by her to Respondent. The deposits held the lots for Ms. Schuetze.

10. On May 19, 1992, Murray Realty completed a document entitled "Reservation Deposit" for each of the lots. The document represented an acknowledgment of a deposit and the terms associated therewith. Murray Realty sold the lots and the homes to be constructed as a package deal. Each Reservation Deposit indicated, among other things, a lot deposit of \$1,000 on a certain lot, the location of the lot, the purchase price of the house to be constructed on the lot, the representative for the builder/seller (Murray Realty), and the buyer who was indicated as Respondent.

11. Also, each Reservation Deposit indicated that the deposit was an "earnest money deposit," that the contract was to be entered into on June 10, 1992, and that the deposit could be returned for any reason on or before June 10, 1992. Murray Realty required no further monies until after the signing of a contract for purchase from which construction draws would come from an account specifically setup for that purpose.

12. This was not the first time that Respondent had entered into such a transaction with Murray Realty. Respondent used the same transaction for Ms. Runer.

13. From on or about May 12, 1992, through on or about June 1, 1992, Respondent wrote checks from American Real Estate's operating account, totalling \$10,403.01, from the remaining \$13,120 given to Respondent by Ms. Schuetze. The expenditures were for Respondent's own use and benefit; none were associated with the services requested by Ms. Schuetze.

14. On or about June 1, 1992, Respondent sent a completed contract for sale and purchase of the lots and homes and a blank buyer-broker contract, by express mail, to Ms. Schuetze for her signature. The contract for sale and purchase reflected that a "deposit" of \$15,120 had been paid to American Real Estate, as seller, toward the purchase price and that the deposit was being held in "escrow." The blank buyer-broker agreement contained spaces for Respondent to insert an agreed upon fee but these were also left blank. Prior to sending these documents, Respondent had discussed the contracts with her and informed her that he was sending them to her.

15. At the same time, on or about June 1, 1992, Ms. Schuetze wrote to Respondent requesting the return of her "deposit" of \$15,120 within three days, indicating that she had decided not to sign a contract for the purchase of the homes.

16. After she received the contracts, Ms. Schuetze returned them to Respondent unsigned.

17. At no time prior to June 1, 1992, had Respondent presented to Ms. Schuetze for her signature a buyer-broker contract or a contract for sale and purchase. At no time pertinent hereto has Ms. Schuetze executed a buyer-broker contract or a contract for sale and purchase.

18. Not having received a response to her letter of June 1, 1992, on or about June 8, 1992, Ms. Schuetze again made a demand by way of a letter for return of the \$15,120 within three days.

19. On or about June 11, 1992, at the request of Ms. Schuetze, Murray Realty returned her deposit of \$2,000 on the two lots. At that time, Respondent had not contacted Murray Realty regarding her request, and he was unaware that Murray Realty had returned the deposit.

20. Shortly thereafter, but also in the month of June 1992, Respondent agreed to return the \$13,120, less the value of services he had already rendered, to Ms. Schuetze but requested additional time in which to do so since he had spent the money. She agreed to give Respondent additional time.

21. On or about December 4, 1992, Respondent gave a statement to Petitioner in which he agreed to return, within 12 months, the \$13,120 less 10 percent for the services that he believed that he had already rendered, leaving a balance of \$11,808 to be returned.

22. At the time of hearing on October 13, 1993, Respondent had failed to refund any of the money to Ms. Schuetze.

23. Respondent has no history of disciplinary action.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Subsection 120.57(1), Florida Statutes. The parties were duly noticed for the formal hearing.

25. License revocation proceedings are penal in nature. The burden of proof is on the Petitioner to establish the truthfulness of the allegations of the amended administrative complaint by clear and convincing evidence. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); *Balino v. Department of Health and Rehabilitative Services*, 348 So.2d 349 (Fla. 1st DCA 1977).

26. Respondent agreed to perform certain services on behalf of Ms. Schuetze, relating to the purchasing and renting of real property, for a fee which she paid to him prior to any services being actually performed and any written agreement or contract being entered into. Throughout the transaction, his actions were that of a broker as contemplated by Chapter 475, Part I, Florida Statutes (1991). Subsection 475.01(1)(c), Florida Statutes (1991). Furthermore, Respondent's actions are not exempted from Chapter 475, Part 1, Florida Statutes (1991). Section 475.011, Florida Statutes (1991).

27. Subsection 475.25(1), Florida Statutes (1991), provides in pertinent part that a licensee may be disciplined when the licensee:

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction

28. Subsection 475.25(1)(b) contemplates that "an intentional act be proved before a violation may be found." *Munch v. Department of Professional Regulation, Division of Real Estate*, 592 So.2d 1136, 1144 (Fla. 1st DCA 1992). The evidence is compelling that Respondent was intentionally attempting to circumvent the requirements placed upon him as a broker under Chapter 475, Part I. This situation was the first time that he had encountered someone who wanted to pay his fee in advance and he intended to take advantage of the situation and acquire immediate access to the \$13,120; and the only way to accomplish this was to circumvent his responsibilities and duties as a broker, which he did.

29. Several written documents indicated that the \$15,120 paid to Respondent by Ms. Schuetze was a "deposit." However, of the \$15,120, only the \$2,000 for the lots was a "deposit" as defined by Rule 61J2-14.008, Florida Administrative Code, formerly Rule 21V-14.008, Florida Administrative Code. 6/ As a result, Respondent was required to place only \$2,000 in a trust or escrow account which he failed to do and had no intentions of doing. In fact, Respondent had no escrow or trust account and had no intentions of establishing one.

30. Also, although Respondent had intentions of returning Ms. Schuetze's \$13,120 to her, he had no intentions of returning the money within a reasonable time. Ms. Schuetze paid to Respondent \$15,120, and of that amount, only \$2,000 was returned to her by Murray Realty, the realty company owning the lots. She made a demand twice on Respondent for the return of the balance, i.e., \$13,120, and Respondent agreed twice to return the monies: once shortly after June 11, 1992, but requested additional time in which to do so and the last time in December 1992, agreeing to return the monies within one year, less what he considered the value of services already rendered. However, at the time of hearing which was over a year after Respondent agreed to return the money, Respondent had not returned any of the money.

31. Respondent, as the broker for the real estate transaction, was in a position of trust, and he breached that trust. Petitioner has met its burden in showing that Respondent is guilty of a breach of trust in the business transaction.

32. Subsection 475.25(1), Florida Statutes (1991), provides in pertinent part that a licensee may be disciplined when the licensee:

(d)1. Has failed to account or deliver to any person . . . at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check draft

33. Petitioner has failed to meet its burden of proof in showing that Respondent violated Subsection 475.25(1)(d)1, Florida Statutes (1991). Petitioner charged Respondent with being guilty of failing to account or deliver a "deposit," namely \$13,120. As discussed above, only the \$2,000 for the lots was a deposit within the meaning of Petitioner's promulgated rules applicable hereto. When Ms. Schuetze made her two demands in June 1992 for the return of the \$15,120, Respondent agreed to after the second request, but requested additional time and she agreed. Subsequently, in June 1992 and upon Ms. Schuetze's request, Murray Realty returned her \$2,000 "deposit." She had received her "deposit" upon demand, albeit not from Respondent. Also, there was an accounting of the \$2,000 in that Ms. Schuetze was well aware that the \$2,000 had been paid to Murray Realty as a deposit on two lots.

34. Regarding penalty, Subsection 475.25(1), Florida Statutes (1991), provides that for a violation of Subsection 475.25(1)(b) or (d)1, the Real Estate Commission may place a licensee on probation; may suspend a license not to exceed 10 years; may revoke a license; may impose an administrative fine not to exceed \$1,000; may issue a reprimand, and any or all of the foregoing. Also, Petitioner's Disciplinary Guidelines found at Chapter 21V-24, Florida Administrative Code, 7/ provide that, except as otherwise provided, the minimum penalty which may be imposed for each violation is a reprimand, or a fine up to \$1,000 per count, or both and that the recommended penalty imposed for a violation of Subsection 475.25(1)(b), Florida Statutes (1991), is up to five years suspension or revocation and of Section 475.25(1)(d)1, Florida Statutes (1991), is up to five years suspension. Further, the Disciplinary Guidelines also provide for the consideration of mitigating or aggravating circumstances in the imposition of discipline.

35. As a mitigating factor, in Respondent's almost 4 1/2 years as a licensed broker, he has had no disciplinary action taken against him.

36. As aggravating factors, Respondent was intentionally attempting to circumvent the duties and responsibilities placed upon him as a licensed broker, and he has not refunded any of Ms. Schuetze's money even though he has agreed to so do.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Real Estate Commission enter a final order

1. DISMISSING Count II of the amended administrative complaint; and
2. SUSPENDING the broker's license of Robert A. Schwartz for five years. Provided, however, that the duration of his suspension may be lessened upon the return to Ms. Schuetze of the \$13,120.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 26th day of May 1994.

ERROL H. POWELL
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 26th day of May 1994.

ENDNOTES

1/ At the final hearing Respondent was represented by counsel, Mark K. Koenig, Esquire. However, subsequent to the final hearing, but prior to the filing of post-hearing submissions, Respondent discharged his counsel and proceeded pro se.

2/ Subsequent to the hearing, the Department of Professional Regulation was statutorily merged with the Department of Business Regulation and is now the Department of Business and Professional Regulation.

3/ At the hearing Petitioner's Exhibit #10 was incorrectly identified. The date of the document was incorrectly given as "May 29, 1992," but it should have been, and is now corrected as, "July 31, 1992."

4/ Ms. Schuetze did not testify at final hearing nor was her testimony presented by deposition. At final hearing, Petitioner made an ore tenus motion to late-file her deposition which was granted; however, Petitioner later withdrew its request. (By Order rendered September 29, 1993, Petitioner was granted leave to take her deposition by telephone and perpetuate her testimony.)

5/ After a deposit on the two lots was made, there was a balance of \$13,120. Respondent testified that his fee was \$6,500 per lot which included the construction of the homes, totalling \$13,000. The evidence is not clear what the remaining balance of \$120 was for.

6/ Deposit is defined as "a sum of money, or its equivalent, delivered to a real estate licensee, as earnest money, or a payment, or a part payment, in connection with any real estate transaction named or described in s. 475.01(1)(c), Florida Statutes." Rule 61J2-14.008, Florida Administrative Code, formerly 21V-14.008, Florida Administrative Code.

7/ Changed to Chapter 61J-24, Florida Administrative Code.

APPENDIX

The following rulings are made on the parties' proposed findings of fact.

Petitioner's Proposed Findings of Fact

1. Partially accepted in finding of fact 1.
2. Partially accepted in finding of fact 2.
3. Partially accepted in finding of fact 4.
4. Partially accepted in finding of fact 7.
- 5 & 6. Partially accepted in findings of fact 7 and 8. Also, Petitioner's cite to the transcript refers to Respondent's testimony regarding Ms. Runer, not Ms. Schuetze.
7. Partially accepted in finding of fact 17.
8. Partially accepted in finding of fact 9.
9. Partially accepted in finding of fact 10.
10. Partially accepted in finding of fact 13.
11. Partially accepted in finding of fact 15.
12. Partially accepted in finding of fact 14.
13. Partially accepted in finding of fact 18.
14. Partially accepted in finding of fact 19.
15. Partially accepted in findings of fact 13 and 21.
16. Partially accepted in finding of fact 21.
17. Partially accepted in finding of fact 22.

Respondent's Proposed Findings of Fact

(Respondent did not number his proposed findings of fact. His paragraphs, after the Statement of the Issues, are addressed.)

- Paragraph one: Discussed in Preliminary Statement.
Paragraphs two and three: Rejected as contrary to the evidence.
Paragraph four: Partially accepted in finding of fact 4.
Paragraph five: Partially accepted in findings of fact 5-7, 9-14 and 20-21.
- Paragraph six: Partially accepted in findings of fact 9-11 and 14.
Paragraph seven: Rejected as contrary to the evidence.
Paragraph eight: Partially accepted in findings of fact 20-21.
Paragraph nine: Rejected as constituting argument, or a conclusion of law.
Paragraph ten: Partially accepted in findings of Fact 7 and 9.
Paragraph eleven: Partially accepted in findings of fact 6-7.
Paragraph twelve: Partially accepted in findings of fact 7 and 21.
Paragraph thirteen: Partially accepted in findings of fact 7, 9-11.
Paragraph fourteen: Rejected as contrary to the evidence.
Paragraphs fifteen, sixteen and seventeen: Rejected.
Paragraphs eighteen, nineteen and twenty: Partially accepted in findings of fact 5-6.
- Paragraph twenty-one: Rejected as constituting argument, or a conclusion of law.
Paragraph twenty-two: Partially accepted in finding of fact 23.
Paragraph twenty-three: Partially accepted in findings of fact 9-12 and 14.
Paragraphs twenty-four and twenty-five: Rejected as constituting argument, or a conclusion of law.

Paragraph twenty-six: Partially accepted in findings of fact 7 and 16-17.

Paragraph twenty-seven: Partially accepted in findings of fact 6-7.

Paragraphs twenty-eight through thirty: Rejected as constituting argument, or a conclusion of law.

NOTE: Where a proposed finding has been partially accepted, the remainder has been rejected as being irrelevant, unnecessary, cumulative, not supported by the evidence, argument, recitation of testimony, or a conclusion of law.

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.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
FLORIDA REAL ESTATE COMMISSION

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE

Petitioner,

vs.

CASE NO. 92-83928
DOAH NO. 93-2043

ROBERT A. SCHWARTZ

Respondent.

_____ /

FINAL ORDER

On August 16, 1994, pursuant to s.120.57(1), Florida Statutes, the Florida Real Estate Commission heard this case to issue a Final Order.

Hearing Officer Errol H. Powell of the Division of Administrative Hearings presided over a formal hearing on October 13, 1993. On May 26, 1994, he issued a Recommended Order, a copy of which is attached hereto as Exhibit A and made a part hereof.

The Respondent filed Exceptions to the Recommended Order. A copy of these Exceptions is attached hereto as Exhibit B and made a part hereof.

After completely reviewing the record and being otherwise fully advised, the Commission rejects Respondent's Exception #1, which addresses Finding of Fact #6, because there is nothing in the record to specifically indicate when the transaction with Ms. Runer occurred. The Hearing Officer's finding in #6 is also partially rejected regarding the words "a few years ago," as there is no support in the record. What is known is that the Runer transaction occurred previous to the Schuetze transaction. Therefore, the Commission substitutes the word "previously" for the phrase "a few years ago."

The Commission rejects Respondent's Exception #2, which addresses Finding of Fact #7. The Commission concluded that the Hearing Officer's finding is supported by competent, substantial evidence.

The Commission rejects Respondent's Exception #3, which addresses Finding of Fact #8, because the Hearing Officer's finding is supported by competent, substantial evidence.

The Commission rejects Respondent's Exception #4, which addresses Finding of Fact #17, because the Hearing Officer's findings are supported by competent, substantial evidence.

The Commission rejects Respondent's Exception #5, which addresses Finding of Fact #11, because the Hearing Officer's findings are supported by competent, substantial evidence.

The Commission rejects Respondent's Exception #6, which addresses Finding of Fact #12, because the Hearing Officer's findings are supported by competent, substantial evidence.

The Commission rejects Respondent's Exception #7, which addresses Conclusion of Law #31. Based upon the record and the facts, the Hearing Officer's conclusion is correct.

The remainder of the Respondent's Exceptions appear to be directed at the Recommended Penalty. The Commission finds the penalty of a 5-year suspension to be within the disciplinary guidelines and supported by the facts. In addition, the Commission agrees that the Respondent may shorten the suspension simply by making restitution.

After completely reviewing the record and based upon the Hearing Officer's Findings of Fact, the Commission rejects the Hearing Officer's Conclusion of Law #33. The Commission finds that there is a violation of s.475.25(1)(d)1, and failure to account and deliver.

Therefore, the Commission rejects the Respondent's Exceptions and adopts the Hearing Officer's Findings of Fact, Conclusions of Law (except for Conclusion of Law #33 as stated above), and Recommended Penalty.

The Florida Real Estate Commission therefore ORDERS that the license of Robert A. Schwartz be suspended for a period of five (5) years. The period of suspension can be shortened if the Respondent makes restitution to Ms. Schuetze.

At the conclusion of the period of suspension, the Respondent is directed to contact the Records Section of the Division of Real Estate at Post Office Box 1900, Orlando, Florida 32802, or (407) 423-6060, to secure the proper forms for reinstatement of the suspended license.

This Order shall be effective 30 days from date of filing with the Clerk of the Department of Business and Professional Regulation. However, any party affected by this Order has the right to seek judicial review, pursuant to s.120.68, Florida Statutes, and to Rule 9.110, Florida Rules of Appellate Procedure.

Within 30 days of the filing date of this Order, review proceedings may be instituted by filing a Notice of Appeal with the Clerk of the Department of Business and Professional Regulation at 400 West Robinson Street, Suite 309, Orlando, Florida 32801. At the same time, a copy of the Notice of Appeal, with applicable filing fees, must be filed with the appropriate District Court of Appeal.

DONE AND ORDERED this 16th day of August 1994 in Orlando, Florida.

Darlene F. Keller, Director
Division of Real Estate

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by U.S. Certified Mail to Robert A. Schwartz, 295 Pine Shadow Way, West Palm Beach, Florida 33414; by U.S. Mail to Hearing Officer Errol H. Powell, Division of Administrative Hearings, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550; and a copy provided to Steven Johnson, Esquire, DBPR, Post Office Box 1900, Orlando, Florida 32801, this 3rd day of October 1994.

Sarah Wachman
Agency Clerk