

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF BUSINESS)
AND PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 93-2423
)
DANESE B. SLOAN-KENDALL, THE)
SLOAN KENDALL GROUP, INC., and)
S. K. G., MANAGEMENT, INC.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on December 30, 1993 in West Palm Beach, Florida, before J. Stephen Menton, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James H. Gillis, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32801

For Respondent: Danese B. Sloan-Kendall, pro se
5 Alford Court
Palm Beach Gardens, Florida 33418

STATEMENT OF THE ISSUE

The issue in this case is whether the real estate licenses issued to Respondents should be suspended, revoked, or otherwise disciplined based upon the alleged violations of Chapter 475, Florida Statutes, set forth in the Administrative Complaint.

PRELIMINARY STATEMENT

On March 18, 1993, the Petitioner, the Department of Business and Professional Regulation, Division of Real Estate (the "Department"), filed an Administrative Complaint against the Respondents, alleging a total of nine violations of Chapter 475, Florida Statutes. Specifically, the Administrative Complaint alleged that Respondents' real estate broker licenses should be disciplined for: culpable negligence or breach of trust in a business transaction in violation of Section 475.25(1)(b), Florida Statutes, (Counts I, II and III); violating Section 475.25(1)(e), Florida Statutes, by having

operated as a broker without being the holder of a valid and current license as a broker (Counts IV, V and VI); failing to maintain trust funds in a real estate brokerage escrow bank account or some other proper depository until disbursement was properly authorized in violation of Section 475.25(1)(k), Florida Statutes, (Counts VII 1/ and IX); and failing to assure that the Respondent Sloan-Kendall Group, Inc., was registered with the Petitioner as required by Rule 21V-5.019, Florida Administrative Code, which has subsequently been renumbered as Rule 61V-2.019 (Count X). The Respondents contested the allegations contained in the Administrative Complaint and requested a formal administrative hearing pursuant to Section 120.57, Florida Statutes. The case was referred to the Division of Administrative Hearings which noticed and conducted a hearing.

At the commencement of the hearing, the Department voluntarily dismissed Counts I, II, III, VII and IX. Petitioner called Respondent Danese B. Sloan-Kendall to testify and offered five exhibits into evidence, all of which were accepted without objection.

Respondent Danese B. Sloan-Kendall also testified on behalf of Respondents who offered ten exhibits into evidence, all of which were accepted without objection.

At Petitioner's request, official recognition has been taken of Chapters 120, 455 and 475, Florida Statutes.

No transcript of the proceedings has been filed. Both parties filed proposed recommended orders. A ruling on each of the parties' proposed findings of fact is contained in the Appendix attached to this Recommended Order.

FINDINGS OF FACT

1 At all times pertinent to this proceeding, Respondent Danese B. Sloan-Kendall ("Sloan-Kendall") was a real estate broker in the State of Florida, having been issued license numbers 3000323, 0264296, and 0396811 in accordance with Chapter 475, Florida Statutes. Sloan-Kendall has been involved in the real estate business for 20 years, eleven of which have been in Florida. She was first licensed in Florida in February of 1984. There is no evidence of any prior disciplinary action against her.

2 Over the last several years, Sloan-Kendall has owned or been affiliated with several companies engaged in property management and real estate brokerage, including the corporate Respondents in this case. As discussed in more detail below, there was some confusion on the part of Respondents as to when a corporation or other entity needed to be separately licensed and/or registered with the Department. Because of address changes and corporate changes, there were brief periods when one or more of the Respondents was not properly registered and/or licensed. Any such lapses were inadvertent and it does not appear that there was ever an attempt on the part of any of the Respondents to operate under a non-registered name.

3 As of June 1993, License No. 0396811 was issued to Sloan-Kendall for the address 4362 Northlake Boulevard, Palm Beach Gardens, Florida 33410. This license was previously issued to Sloan-Kendall while she was employed by the Allen Morris Co. In March 1987, she filed a request for License or Change of Status form with the Department indicating that she was going to work as a sole proprietor under the trade name of the Sloan-Kendall Group.

4. In March of 1990, Sloan-Kendall filed a Request for License or Change of Status form with the Department. On this form, she disclosed her affiliation with the Sloan-Kendall Group and S. K. G. Management, Inc. As best can be determined from the evidence presented, Sloan-Kendall submitted this form to insure that she was properly licensed for her activities undertaken on behalf of S. K. G. Management, Inc. As discussed below, an application for the corporation was filed at the same time. Apparently, as a result of the filing of this form, the Department issued License No. 0264296 to Sloan-Kendall and License No 0264295 to the corporate entity S. K. G. Management, Inc. As of June 1993, License No. 0264296 was issued to Sloan-Kendall as broker at the address 631 U.S. Highway One, Suite 406, West Palm Beach, Florida 33408.

5. As of March 1993, License No. 3000823 was issued to Sloan-Kendall, c/o the Sloan-Kendall Group, Inc., 631 U.S. 1, Suite 200, North Palm Beach, Florida 33408. As best can be determined, this license was issued in January 1993 after the issues in this case came to light. In March 1993, Sloan-Kendall advised the Department that she had moved her office to suite 406 at the same address.

6. Sloan-Kendall's current business address for all of her licenses is 8895 North Military Trail, Suite D-104, Palm Beach Gardens, Florida 33408. She notified the Department of this address in August 1993.

7 Respondent, the Sloan Kendall Group, Inc. (the "Group"), is a Florida corporation which became registered as a real estate brokerage corporation in the State of Florida effective January 13, 1993, having been issued License No. 1000359. As of June 1993, the registration for the Group listed the address as 631 U.S. Highway One, Suite 406, West Palm Beach, Florida 33408. This was the same address listed on License No. 0264296 issued to Sloan-Kendall. As of March 1993, it was also the same address listed for License No. 3000823 issued to Sloan-Kendall.

8 The Respondent S. K. G. Management, Inc. ("S. K. G."), is a Florida corporation registered as a real estate broker in the State of Florida, having been issued license number 0264295. S. K. G. was incorporated in November 1989. The application for registration as a real estate brokerage corporation for S. K. G. was submitted in March 1990 and listed the address as 631 U.S. Highway 1, Suite 200, North Palm Beach, Florida 33408. S. K. G.'s affiliation with the Group was noted on the application and Sloan-Kendall was listed as the President. At some point, the Department was advised that the office was moved to Suite 406 at the same address. This change was noted on the registration for S. K. G. as of June, 1993. As noted above, in August 1993, Sloan-Kendall advised that all of her operations were being conducted at 8895 North Military Trail, Suite D-104, Palm Beach Gardens.

9 At all times pertinent hereto, Sloan-Kendall was licensed and operating as qualifying broker and officer of the Group and S. K. G.

10 At some point in 1993, the Department began an investigation of Respondents. The investigation focused on whether Respondents properly placed escrow funds in an appropriate trust account. Sloan-Kendall and the Group were managing several properties for the Resolution Trust Corporation ("RTC"). For each property, an account entitled "operating account" was maintained. The Respondents had authority to sign on the account, but did not own it. These accounts were used as the depository accounts for the daily operation of the RTC's various properties being managed by Respondents. Respondents' records

indicate rental funds were being placed into the "operating accounts" and expenses were paid from the "operating accounts." All funds were accounted for. Respondents' contract with the RTC mandated the funds be handled this way.

11 At the beginning of the hearing in this case, the Department announced its determination that Respondents' handling of the operating accounts and the escrow funds was proper. Accordingly Counts I, II, III, VII and IX were dismissed.

12 During the course of the investigation, the Department's investigator, Sue Williams, discovered that S. K. G. was an inactive corporation according to the Florida Secretary of State. The corporation was administratively dissolved in November 1990 for failure to file the necessary corporate reports. This failure occurred after the business moved and no one noticed that the corporate filing forms were not received and filed. Despite its dissolution, S. K. G. continued to renew its registration with the Department.

13 As noted above, the Group did not become licensed with the Department until January 1993. The evidence indicates that the Group was originally a trade name under which Sloan-Kendall operated. Sloan-Kendall timely registered the Group as a trade name and listed it on her filings with the Department. The entity was incorporated in March 1989. When the Group was incorporated, Sloan-Kendall did not immediately obtain a license for the corporation. In March 1990, Sloan-Kendall filed an Application and Request for Licensure of a Real Estate Brokerage Corporation on behalf of S. K. G. Around the same time, she filed a Request for License or Change of Status form with the Department. That form noted her affiliation with S. K. G. and the Group and indicated that she wanted a license issued in the name of the Group. The circumstances surrounding these filings have not been fully explained and the evidence did not clearly establish what action the Department took with respect to this request. Sloan-Kendall assumed that she had taken the appropriate steps to notify the Department of her business affiliations and obtain whatever licenses were necessary. Apparently, the Department assumed from the information submitted that the Group was simply a trade name so no corporate license was issued for the Group. A license in the name of S. K. G. was issued at this time and a new license was issued to Sloan-Kendall to reflect her role with that company.

CONCLUSIONS OF LAW

14 The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57, Florida Statutes (1993).

15 Section 475.25, Florida Statutes, authorizes the Department to take disciplinary action against licensed real estate brokers for certain specified violations. Among other things, Section 475.25(1)(e), Florida Statutes, authorizes disciplinary action if a real estate broker:

(e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

16 The Department has the burden of proof in this license discipline case and must prove the allegations set forth in the Administrative Complaint by clear and convincing evidence. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); *Evans Packing Company v. Department of Agriculture and Consumer Services*, 550

So.2d 112, 116 (Fla. 1st DCA 1989); Pic 'n Save v. Department of Business Regulation, 601 So.2d 245 (Fla. 1st DCA 1992). The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983). Furthermore, the disciplinary action taken may be based only upon the offenses specifically alleged in the Administrative Complaint. See, *Sternberg v. Department of Professional Regulation, Board of Medical Examiners*, 465 So.2d 1324, 1325 (Fla. 1st DCA 1985); *Kinney v. Department of State*, 501 So.2d 129, 133 (Fla. 5th DCA 1987); *Hunter v. Department of Professional Regulation*, 458 So.2d 842, 844 (Fla. 2d DCA 1984).

17 In determining whether the licensee has violated Section 475.25, Florida Statutes, as charged in the Administrative Complaint, one "must bear in mind that it is, in effect, a penal statute . . . this being true the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." *Lester v. Department of Professional and Occupational Regulations*, 348 So.2d 923, 925 (Fla. 1st DCA 1977).

18 As noted in the Preliminary Statement, the Department voluntarily dismissed Counts I, II, III, VII and IX of the Administrative Complaint at the commencement of the hearing in this matter. Thus, only Counts IV, V, VI and X remain for disposition.

19 In Counts IV, V and VI of the Administrative Complaint, the Department alleged that Respondents violated Section 475.25(1)(e), Florida Statutes, by violating Section 475.42(1)(a), Florida Statutes. Section 475.42(1)(a) provides:

No person shall operate as a broker or salesman without being the holder of a valid and current license therefore.

20 In Count X, the Department alleged that Sloan-Kendall violated Section 475.25 (1)(e) by failing to insure that the Group was properly registered as required by Rule 21V-5.019, Florida Administrative Code, which has subsequently been transferred to 61J2-5.019.

21. The evidence established that at all pertinent times, Sloan-Kendall held a real estate broker license from the Department for each office from which she was operating. S. K. G. maintained a registration with the Department even though the corporation was dissolved for a period as a result of its failure to file the necessary corporate report. The Group was not registered with the Department until January 1993. It is clear, however, that the Department was timely notified that Sloan-Kendall was conducting business in the name of the Group. Apparently, there was some confusion as to whether it was necessary to obtain a separate license for the Group. The confusion was due in part to the fact that the Group was originally just a trade name and was not separately incorporated. It does not appear that any of the Respondents were deliberately attempting to avoid licensure requirements. Based upon these facts, it is concluded that the Department has established the violations alleged in Counts V, VI and X of the Administrative Complaint. Count IV should be dismissed since Sloan-Kendall was properly licensed.

22 Section 475.25(1), Florida Statutes, authorizes the imposition of the following penalties for a violation of the prohibited acts contained therein:

(1) The commission . . . may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$1,000 for each count, or separate offense; and may issue a reprimand, and any or all of the foregoing.

23 In determining what disciplinary action should be taken against Respondents for having committed the violations alleged in Counts V, VI and X of the Administrative Complaint, it is necessary to consult Rule 61J2-24.001, Florida Administrative Code. *Williams v. Department of Transportation*, 531 So.2d 994, 996 (Fla. 1st DCA 1988). Subsection (3) of Rule 61J2-24.001, Florida Administrative Code, provides that the normal range of penalties for a violation of 475.25(1)(e), Florida Statutes, is "Up to 8 years suspension or revocation." Subsection (3) of the Rule provides that the minimum penalty is a reprimand and/or a fine up to \$1,000.

24 Subsection (4)(a) of Rule 61J2-24.001, Florida Administrative Code, provides that the Commission may impose a penalty outside the normal range where there are mitigating or aggravating circumstances. The mitigating or aggravating circumstances that may warrant such a deviation are described in subsection (4)(b) of the Rule, as follows:

Aggravating or mitigating circumstances may include, but are not limited to, the following:

- 1 The severity of the offense.
- 2 The degree of harm to the consumer or public.
- 3 The number of counts in the Administrative Complaint.
- 4 The number of times the offenses previously have been committed by the licensee.
- 5 The disciplinary history of the licensee.
- 6 The status of the licensee at the time the offense was committed.
- 7 The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the licensee.
- 8 Violation of the provision of Chapter 475, Florida Statutes, wherein a letter of guidance as provided in Section 455.225(3), Florida Statutes, previously has been issued to the licensee.

25 In *Munch v. Department of Professional Regulation, Division of Real Estate*, 592 So.2d 1136, the First District Court of Appeal recently commented on the role of the Commission in reviewing minimal, technical violations. Quoting from *Brod v. Jernigan*, 188 So.2d 575, 581 (Fla. 2d DCA 1966), the court stated as follows:

Chapter 475 vests in the Florida Real Estate Commission a broad discretionary power and authority to supervise the privileged business of real estate broker and to deal firmly with

those engaged in it, even to the point of taking away their means of livelihood by revocation or suspension of license. But such potent administrative weapons must always be reasonably and cautiously, and even sparingly, utilized. The administrative processes of the Commission should be aimed at the dishonest and unscrupulous operator, one who cheats, swindles, or defrauds the general public in handling real estate transactions. [citation omitted] 592 So.2d 1144-1145.

26 There is no evidence in this case of any prior disciplinary action against the Respondents. Some of the original allegations in the Administrative Complaint were potentially very serious. After a considerable amount of time and effort was expended by the Department and Respondents, the Department concluded that Respondents were not guilty of the more serious allegations. By that time, Respondents had already incurred legal and other expenses. In view of the technical nature of the violations established in this case, the facts surrounding these violations, the lack of any prior disciplinary history, and the expenses already incurred by Respondents in defending the dismissed charges, it is concluded that no further financial penalty should be imposed on Respondents.

RECOMMENDATION

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

RECOMMENDED that Counts I, II, III, IV, VII and IX of the Administrative Complaint should be dismissed. It is further

RECOMMENDED that a final order be entered finding that Respondents have violated Section 475.25(1)(e), Florida Statutes, by failing to comply with Section 475.42, Florida Statutes, and Rule 21V-5.019, Florida Administrative Code, as alleged in Counts V, VI and X. It is further

RECOMMENDED that Respondents receive a written reprimand.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 13th day of April 1994.

J. STEPHEN MENTON
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 14th day of April 1994.

ENDNOTE

1/ The Administrative Complaint did not contain a Count VIII.

APPENDIX

Both parties have submitted proposed recommended orders. The following constitutes my ruling on the proposed findings of fact submitted by the parties.

Petitioner's Proposed Findings of Fact.

1. Addressed in the preliminary statement.
2. Adopted in substance in Finding of Fact 1.
3. Adopted in substance in Findings of Fact 3-5.
4. Subordinate to Finding of Fact 7.
5. Subordinate to Finding of Fact 7.
6. Subordinate to Finding of Fact 8.
7. Subordinate to Finding of Fact 8.
8. Subordinate to Finding of Fact 9.
9. Adopted in substance in Finding of Fact 12
10. Adopted in substance in Finding of Fact 12.
11. Adopted in substance in Finding of Fact 12.
12. Rejected as vague and ambiguous.
13. Adopted in substance in Finding of Fact 10.
14. Adopted in substance in Finding of Fact 10.

Respondent's Proposed Findings of Fact.

Respondent's proposed recommended order adopts the proposed findings of fact submitted by Petitioner and does not propose any additional findings. Accordingly, the rulings made on Petitioner's proposed findings are applicable to Respondent's as well.

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.