

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, DIVISION )  
OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 94-2094  
 )  
CHARLES A. MCKEE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on September 1, 1994 in Fort Pierce, Florida, before J. Stephen Menton, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven W. Johnson, Senior Attorney  
Department of Business and  
Professional Regulation  
Division of Real Estate  
Hurston North Tower, No. 308A  
400 West Robinson Street  
Orlando, Florida 32801

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent is guilty of the violations alleged in the Administrative Complaint filed by Petitioner and, if so, whether Respondent's real estate license should be suspended, revoked or otherwise disciplined.

PRELIMINARY STATEMENT

In a four count Administrative Complaint filed on March 9, 1994, Petitioner, the Department of Business and Professional Regulation, Division of Real Estate, charged Respondent with violating several sections of Chapter 475, Florida Statutes. Specifically, Petitioner sought to discipline Respondent's real estate license charging that Respondent (1) was guilty of dishonest dealing by trick, scheme or device, culpable negligence or breach of trust in a business transaction in violation of Subsection 475.25(1)(b), Florida Statutes; (2) failed to maintain an office and office entrance sign as required by Subsection 475.22(1), Florida Statutes and 61J2-10.024, Florida Administrative Code and, therefore, Respondent had violated Subsection 475.25(1)(e); was guilty of violating Rule 61J2-10.027, Florida Administrative Code, and Subsection

475.25(1)(e), Florida Statutes, as a result of his use of an identification or designation of an association or organization having to do with real estate in such a manner as to lead persons to believe that he was a member in good standing of such association or organization, when in fact he was not a member thereof in good standing and was not otherwise entitled to use such identification or designation; and, (4) was in violation of Subsection 475.25(1)(o), Florida Statutes, because he was guilty for a second time of misconduct that warrants his suspension or was guilty of a course of conduct or practices which show that he is so incompetent, negligent, dishonest, or untruthful that the money, property, transactions, and rights of investors, or those with whom he may sustain a confidential relation, may not safely be entrusted to him.

Respondent disputed the charges and requested a hearing pursuant to Section 120.57(1), Florida Statutes. The case was referred to the Division of Administrative Hearings which noticed and conducted the hearing.

Efforts by a previously assigned Hearing Officer to reach Respondent by phone during the week preceding the hearing were unsuccessful. Respondent did not appear at the time and place scheduled for the hearing. A review of the file confirmed that the Notice of Hearing was sent to Respondent at the address listed on the Election of Rights form which Respondent filed to request a formal hearing. There is no indication in the record that Respondent has relocated nor is there any indication that the Notice of Hearing was returned as undeliverable. Respondent did not notify Petitioner or the Division of Administrative Hearings that he was unavailable on the scheduled hearing date and/or that he wanted a continuance of the hearing. After waiting for approximately 20 minutes for Respondent to appear, the hearing was commenced and Petitioner presented its evidence. One of the witnesses at the hearing was Respondent's former wife who stated that she had seen Respondent earlier in the week and he was aware of the scheduled hearing. No communications from Respondent have been received subsequent to the hearing.

At the hearing, Petitioner presented the testimony of three witnesses: Terry Addleburg, an investigator for the Department; Loretta McKee; and Fran Annette. Petitioner offered five exhibits into evidence, all of which were accepted. No transcript of the proceeding has been filed. Only Petitioner submitted proposed findings of fact and conclusions of law. A ruling on each of Petitioner's proposed findings of fact is included in the Appendix to this Recommended Order.

#### FINDINGS OF FACT

Based upon the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following findings of fact are made:

1. Petitioner is a state licensing and regulatory agency charged with the responsibility and duty to prosecute Administrative Complaints pursuant to the laws of the State of Florida, in particular, Section 20.30, Florida Statutes, Chapters 120, 455, and 475, Florida Statutes and the rules promulgated pursuant thereto.

2. At all times pertinent to this proceeding, Respondent Charles A. McKee was a licensed real estate broker in Florida having been issued license no. 0335079 in accordance with Chapter 475, Florida Statutes. The last license

issued to Respondent was c/o McKee Realty, 10157 S. Federal Hwy., Port St. Lucie, Florida 34952-5607 (the "Federal Highway Office").

3. On November 23, 1992, the Florida Real Estate Commission (the "Commission") entered a Final Order finding Respondent guilty of failing to timely notify the Commission of an escrow deposit dispute and, based on that violation, assessing a fine of \$500 against Respondent and placing him on probation for one year with a requirement that he complete a 30 hour broker management course.

4. Respondent's former wife, Loretta McKee, is also a licensed real estate broker, and she was a partner with Respondent in McKee Realty. McKee Realty began operating as a Century 21 franchise in approximately 1986 at the Federal Highway Office.

5. McKee Realty maintained four separate bank accounts: a general operating account; a general escrow account; a property management operating account; and a property management escrow account. Both Respondent and Loretta McKee were signatories on all of the accounts.

6. In January of 1993, Respondent and Loretta McKee separated. Divorce proceedings were initiated in June. During the summer of 1993, Respondent and Loretta McKee engaged in mediation in an effort to resolve the property issues between them, including the distribution of the business.

7. While the parties were attempting to finalize a property settlement agreement, they divided their time in the office. As part of their negotiations, Respondent and Loretta McKee discussed an arrangement whereby Respondent would continue the property management portion of the business and his former wife would take over the general real estate business.

8. Sometime in the fall of 1993, Respondent transferred all of the funds in the McKee Realty general operating account and both property management accounts to a new "property management escrow account" which he opened. Respondent transferred the funds and opened the new escrow account without the knowledge or consent of Loretta McKee, one of the brokers for McKee Realty. As a result of Respondent's actions, approximately twenty checks written to clients by McKee Realty on the old accounts were returned for insufficient funds.

9. On November 16, 1993, Respondent, without the knowledge or consent of broker Loretta McKee (his wife), removed the property management files and office equipment from the McKee Realty Federal Highway Office and took them to the new office opened by Respondent at 1926 Port St. Lucie Boulevard in Port St. Lucie. Many of the files he removed were open or pending and his actions resulted in a great deal of confusion and uncertainty for clients.

10. On January 10, 1994, Petitioner's Investigator Terry Addleburg inspected Respondent's new office located at 1926 Port St. Lucie Boulevard and audited the escrow/trust accounts.

11. The audit confirmed that on November 12, 1993, Respondent closed the Century 21 McKee Realty property management escrow account #2274025969 maintained at Barnett Bank of Port St. Lucie. Respondent then reopened a new escrow account bearing the name Century 21 McKee Realty Property Management Escrow Account #3388673741 at Barnett Bank.

12. The audit also revealed that Respondent intermingled trust funds by combining \$24,227.30 from the Century 21 McKee Realty property management operating account #2274025951 with money deposited in the new property management escrow account #338867341.

13. The new property management escrow account had a total trust liability of \$44,299.35 and a reconciled bank balance of \$43,498.43 indicating a shortage of approximately \$800.92.

14. Petitioner's auditor also noted that Respondent had failed to maintain the required office entrance sign at the 1926 Port St. Lucie Boulevard location. In addition, Respondent failed to register this location with the Petitioner until after Petitioner's auditor pointed out that the location had to be registered.

15. The evidence established that a Century 21 franchise is purchased for a specific location. A franchisee is not permitted to open a new location unless it is purchased and cleared through the franchisor. Respondent opened his new office and placed a Century 21 sign on the door of that location without the authority of the franchisor. Accordingly, it is concluded that Respondent incorrectly represented he was a Century 21 franchisee at the 1926 SE Port St. Lucie Boulevard location.

#### CONCLUSIONS OF LAW

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

17. The parties were duly noticed of the hearing.

18. Pursuant to Section 475.25, Florida Statutes, the Florida Real Estate Commission is authorized to suspend a license for up to ten years, revoke a license, impose an administrative fine not to exceed \$1,000 for each count or separate offense, impose a reprimand, or any or all of the foregoing, if it finds that a licensee has violated any of the provisions of that Statute. In this case, the Administrative Complaint charges Respondent with violating Sections 475.25(1)(b), (e) and (o), Florida Statutes.

19. Section 475.25(1)(b), Florida Statutes, proscribes dishonest dealing and culpable negligence, as well as breach of trust. Section 475.25(1)(e), Florida Statutes, includes violations of the Florida Administrative Code, specifically Rules 61J2-10.024 and 61J2-10.027, which require the maintenance of an office sign and prohibits the use of an organizational designation in a manner that is misleading. Section 475.25(1)(o), Florida Statutes, proscribes being found guilty a second time of misconduct that warrants suspension or being found guilty of a course of conduct showing incompetence, dishonesty or negligence such that the money and/or property of others may not safely be entrusted to the licensee.

20. Petitioner has the burden of proof in this license disciplinary proceeding and, since Petitioner has requested revocation or suspension of Respondent's license, the allegations against Respondent must be proven by clear and convincing evidence. See *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); *Pic N' Save v. Department of Business Regulation*, 601 So.2d 245 (Fla. 1st DCA 1992); *Munch v. Department of Professional Regulation*, 592 So.2d 1136 (Fla. 1st DCA 1992); *Newberry v. Florida Department of Law Enforcement*, 585 So.2d 500

(Fla. 3d DCA 1991). "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).

21. Disciplinary action may be based only upon the violations specifically alleged in the administrative complaint. See *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).

22. As a real estate licensee in Florida, Respondent occupies a status under law with recognized privileges and responsibilities. *Zichlin v. Dill*, 25 So.2d 4 (Fla. 2d DCA 1946). "The law specifically requires that a person, in order to hold a real estate license, must make it appear that he is honest, truthful, trustworthy, of good character, and that he bears a good reputation for fair dealing." *McKnight v. Real Estate Commission*, 209 So.2d 199 (Fla. 2d DCA 1967). Anyone who deals with a licensee should be able to assume he is dealing with an honest and ethical person. *Shelton v. Real Estate Commission*, 120 So.2d 191 (Fla. 2d DCA 1960).

23. The clear and convincing evidence presented in this case established that Respondent was guilty of culpable negligence and breach of trust as alleged in Count I of the Administrative Complaint. Respondent neglected the duties manifest in his office as broker by closing the operating account and property management accounts without Loretta McKee's knowledge and without making arrangements to insure that all clients were notified and necessary steps were taken to protect their interests.

24. The evidence also established that Respondent was guilty of the violations alleged in Count II and III of the Administrative Complaint. Respondent failed to register his new office with the Florida Real Estate Commission until the failure was brought to his attention by Petitioner. More significantly, Respondent used the Century 21 tradename at his new office without authority and in violation of the company's policy.

25. The evidence did not establish that Respondent was guilty of the violation alleged in Count IV of the Administrative Complaint. The prior disciplinary action taken against Respondent did not result in the suspension of his license. Furthermore, it can not be concluded based on the evidence presented that Respondent engaged in a course of conduct which demonstrates that the money and property of others can not be entrusted to him. It appears that all of Respondent's actions in this case were related to his on-going marital problems. Those problems apparently prompted him to exercise extremely poor judgment, but it cannot be concluded that Respondent is dishonest or has deliberately schemed to defraud any clients.

26. While Respondent was apparently experiencing a great deal of stress in his personal life at the time of the instances alleged in this case, his personal problems do not excuse his failure to handle his responsibilities nor was Respondent justified in unilaterally closing the bank accounts and transferring the files from the business he operated with his estranged wife. Respondent was obligated to place the interests of the clients first and to await a proper legal distribution of the jointly owned business.

27. Rule 61J2-24.001, Florida Administrative Code, sets forth the disciplinary guidelines adopted by the Commission for Violations of Section 475.25, Florida Statutes. Subsection (3), of Rule 61J2-24.001, Florida

Administrative Code, provides that the normal range of penalties for violations of Section 475.25(1)(b), Florida Statutes, is "[u]p to 5 years suspension or revocation." Subsection (4)(a) of Rule 61J2.21.001 provides the Commission authority to impose a penalty outside the normal range where there are mitigating and aggravating circumstances. The mitigating or aggravating circumstances that may warrant such a deviation are described in Subsection (4)(b) of Rule 61J2-24.001, Florida Administrative Code, which provides 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 or 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, where in a letter of guidance as provided in Section 455.225(3), Florida Statutes, previously has been issued to the licensee.

28. In this case, Respondent's actions have caused some harm to consumers who received the checks issued by McKee Realty which were returned for insufficient funds. The evidence indicates that some of the clients who received these checks have still not been paid the money owed to them.

#### RECOMMENDATION

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

RECOMMENDED that a Final Order be entered finding Respondent guilty of the allegations alleged in Counts I, II and III of the Administrative Complaint and dismissing Count IV. As a penalty for the violations, an administrative fine of \$1,500 should be imposed against Respondent, his real estate license should be suspended for 1 year followed by a two year probationary period with such terms and conditions as may be imposed by the Commission.

DONE and ENTERED this 4th day of October, 1994, at Tallahassee, Florida.

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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 4th day of October, 1994.

APPENDIX TO RECOMMENDED ORDER

Only Petitioner submitted a proposed recommended order. The following rulings are made with respect to the proposed findings of fact submitted by Petitioner.

Petitioner's proposed findings of fact

1. Adopted in substance in Findings of Fact 1.
2. Adopted in substance in Findings of Fact 2.
3. Adopted in substance in Findings of Fact 10.
4. Adopted in substance in Findings of Fact 11.
5. Adopted in substance in Findings of Fact 12.
6. Adopted in substance in Findings of Fact 8.
7. Adopted in substance in Findings of Fact 8 and 9.
8. Adopted in substance in Findings of Fact 14.
9. Adopted in substance in Findings of Fact 13.
10. Adopted in substance in Findings of Fact 15.
11. Adopted in substance in Findings of Fact 3.

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.