

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 95-2125
)
MARY A. BELOTTO,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on August 23, 1995, in Fort Lauderdale, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Daniel Villazon, Esquire
Senior Attorney
Department of Business and
Professional Regulation
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802

For Respondent: Mary A. Belotto, pro se
1571 Southeast 23rd Avenue
Pompano Beach, Florida 33062

STATEMENT OF THE ISSUES

1. Whether Respondent committed the violations alleged in the Administrative Complaint?
2. If so, what disciplinary action should be taken against her?

PRELIMINARY STATEMENT

On February 24, 1995, the Department of Business and Professional Regulation (hereinafter referred to as the "Department") issued a four-count Administrative Complaint against Respondent alleging: in Count I, that she was "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 in violation of Section 475.25(1)(b), Fla. Stat.;" in Count II, that she was "guilty of failure to maintain trust funds in the real estate brokerage escrow bank account or some other proper depository until disbursement thereof was properly authorized in

violation of Section 475.25(1)(k), Fla. Stat.;" in Count III, that Respondent was "guilty of failure to prepare and sign the required written monthly escrow statement-reconciliations in violation of Fla. Admin. Code R. 61J2-14.012(2) and (3) and therefore in violation of Section 475.25(1)(e), Fla. Stat.;" and in Count IV, that she "was guilty of depositing or intermingling personal funds with funds being held in escrow or trust or on condition in violation of Fla. Admin. Code R. 61J2-14.008(1)(c) and therefore in violation of Section 475.25(1)(e), Fla. Stat." On May 4, 1995, after receiving Respondent's March 14, 1995, letter in response to these allegations, the Department referred the matter to the Division of Administrative Hearings for the assignment of a hearing officer to conduct a formal hearing on the matter.

At the hearing, which was held on August 23, 1995, four witnesses testified: Judith Williams, a Barnett Bank employee; Edward Gruskin, a Department investigator; Peter Rettig, a real estate broker and an old acquaintance of Respondent's; and Respondent. In addition, six exhibits (Petitioner's Exhibits 1 through 6) were offered and received into evidence.

At the close of the evidentiary portion of the hearing on August 23, 1995, the Hearing Officer, on the record, advised the parties of their right to file post-hearing submittals and established a deadline (September 6, 1995) for the filing of such post-hearing submittals. Respondent and the Department filed proposed recommended orders on August 28, 1995, and September 6, 1995, respectively. These proposed recommended orders have been carefully considered by the Hearing Officer. The findings of fact proposed by the parties in their proposed recommended orders are specifically addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. The Department is a state government licensing and regulatory agency.
2. Respondent is now, and has been at all times material to the instant case, a licensed real estate broker in the State of Florida holding license number 0005609.
3. She is 72 years of age.
4. The money she earns as a real estate broker helps to supplement her retirement income.
5. In the almost 40 years that she has been broker, the only complaint that has been made against her in connection with the practice of her profession is the complaint that is the subject of the instant case.
6. Peter Rettig is a longtime acquaintance of Respondent's.
7. He too is a Florida real estate broker.
8. Rettig is the operating and qualifying broker for La Costa Real Estate, Inc.
9. In September of 1993, as a favor to Rettig, Respondent agreed to act, without compensation, as Rettig's escrow agent.

10. Thereafter, Rettig deposited trust funds received from his buyer/clients in the "Mary A. Belotto Escrow Account" (account number 3431110272) that Respondent had established at Barnett Bank.

11. On various occasions from September of 1993, to July of 1994, Respondent, unthinkingly, appropriated a portion of these funds for her own personal use, but acted swiftly to replace the appropriated funds with her own personal funds. As a result, no one was actually harmed by her actions.

12. During this period of time, Respondent was suffering from severe emotional distress and a resulting inability to think clearly due to the death of her husband and the subsequent death of a close friend who had provided her with needed assistance and support following her husband's death.

13. On January 18, 1995, Edward Gruskin, an investigator with the Department, conducted an office inspection/audit of La Costa Real Estate, Inc. and the "Mary A. Belotto Escrow Account."

14. The inspection/audit revealed that Respondent had engaged in the conduct previously described in Finding of Fact 11 of this Recommended Order and that, in addition, she had failed to prepare and sign monthly reconciliation statements for her escrow account.

15. Respondent now realizes that she erred in engaging in such conduct and in failing to prepare and sign these reports. She has apologized for making these errors and has promised, with apparent sincerity, not to repeat them in the future.

CONCLUSIONS OF LAW

16. The Florida Real Estate Commission (hereinafter referred to as the "Commission") is statutorily empowered to take disciplinary action against a Florida-licensed real estate broker based upon any of the grounds enumerated in Section 475.25(1), Florida Statutes.

17. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension (for a period not exceeding ten years); imposition of an administrative fine not to exceed \$1,000 for each count or separate offense; issuance of a reprimand; and placement of the licensee on probation. Section 475.25(1), Fla. Stat.

18. Where the disciplinary action sought is the revocation or suspension of the broker's license, the proof of guilt must be clear and convincing. See *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); *Nair v. Department of Business and Professional Regulation*, 654 So.2d 205, 207 (Fla. 1st DCA 1995); *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).

19. Where the discipline sought does not involve the loss of licensure, the broker's guilt need be established by only a preponderance of the evidence. See *Allen v. School Board of Dade County*, 571 So.2d 568, 569 (Fla. 3d DCA 1990).

20. Regardless of the disciplinary action taken, it may be based only upon the violations specifically alleged in 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).

21. Furthermore, in determining whether Section 475.25(1), Florida Statutes, has been violated in the manner 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).

22. The Administrative Complaint issued in the instant case alleges that Respondent committed four violations of Section 475.25(1), Florida Statutes: one violation of subsection (1)(b) (Count I); one violation of subsection (1)(k) (Count II); and two violations of subsection (1)(e) (Counts III and IV).

23. Subsection (1)(b) of Section 475.25, Florida Statutes, authorizes the Commission to discipline a Florida-licensed broker who "[h]as been guilty of . . . culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory." "It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public." Section 475.25(1)(b), Fla. Stat.

24. Section 475.25(1)(k), Florida Statutes, authorizes the Commission to discipline a Florida-licensed broker who "[h]as failed . . . to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to him by any person dealing with him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly authorized."

25. Section 475.25(1)(e), Florida Statutes, authorizes the Commission to discipline a Florida-licensed broker who "[h]as violated any . . . rule made or issued under the provisions of [Chapter 475, Florida Statutes]."

26. The "rule[s] made or issued under the provisions of [Chapter 475, Florida Statutes]" that Respondent is alleged to have violated are Rules 61J2-14.012(2) and (3) and 61J2-14.008(1)(c), Florida Administrative Code.

27. Subsections (2) and (3) of Rule 61J2-14.012, Florida Administrative Code, provide as follows:

(2) At least monthly, a broker shall cause to be made a written statement comparing the broker's total liability with the reconciled bank balance(s) of all trust accounts. The broker's trust liability is defined as the sum total of all deposits received, pending and being held by the broker at any point in time. The minimum information to be included in the

monthly statement-reconciliation shall be the date the reconciliation was undertaken, the date used to reconcile the balances, the name of the bank(s), the name(s) of the account(s), the account number(s), the account balance(s) and date(s), deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the bank account balance(s) with the balance per the broker's checkbook(s) and other trust account books and records disclosing the date of receipt and the source of the funds. The broker shall review, sign and date the monthly statement-reconciliation.

(3) Whenever the trust liability and the bank balances do not agree, the reconciliation shall contain a description or explanation for the difference(s) and any corrective action taken reference shortages or overages of funds in the account(s). Whenever a trust bank account record reflects a service charge or fee for a non-sufficient check being returned or whenever an account has a negative balance, the reconciliation shall disclose the cause(s) of the returned check or negative balance and the corrective action taken.

28. Subsection (1)(c) of Rule 61J2-14.008, Florida Administrative Code, provides as follows:

"Trust" of "escrow" account means an account in a bank or trust company, title company having trust powers, credit union, or a savings and loan association within the State of Florida. Only funds described in this rule shall be deposited in trust or escrow accounts. No personal funds of any licensee shall be deposited or intermingled with any funds being held in escrow, trust or on condition except as provided in Rule 61J2-14.010(2), Florida Administrative Code.

29. Subsection (2) of Rule 61J2-14.010, Florida Administrative Code, provides as follows:

A broker is authorized to place and maintain up to \$200 of personal or brokerage business funds in the escrow account for the purposes of opening the account, keeping the account open and/or paying for ordinary service charges.

30. The evidence adduced at hearing in the instant case clearly and convincingly establishes that Respondent committed each of the violations charged in the Administrative Complaint.

31. In determining what disciplinary action should be taken against Respondent for having committed these violations, it is necessary to consult Rule 61J2-24.001, Florida Administrative Code, which contains the disciplinary guidelines adopted by the Commission. Cf. Williams v. Department of

Transportation, 531 So.2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

32. Subsection (3) of Rule 61J2-24.001, Florida Administrative Code, provides that the normal range of penalties for violations of Sections 475.25(1)(b), 475.25(1)(k), and 475.25(1)(e), Florida Statutes, are as follows:

Section 475.25(1)(b)-
Up to 5 years suspension or revocation;

Section 475.25(1)(k)-
A minimum of a 90 day suspension and \$1,000
fine up to revocation;

Section 475.25(1)(e)-
Up to 8 years suspension or revocation.

33. Subsection (4)(a) of Rule 61J2-24.001, Florida Administrative Code, provides that the Commission may impose a penalty outside the normal range where it has been shown by clear and convincing evidence that there are mitigating or aggravating circumstances warranting such deviation.

34. 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, 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 s. 455.225(3), Florida Statutes, previously has been issued to the license.

35. Having considered the facts of the instant case in light of the provisions of Rule 61J2-24.001 set forth above, the Hearing Officer finds that the appropriate disciplinary action for the Commission to take against Respondent in the instant case is to fine her \$250.00, issue her a reprimand, and place her on probation for a period of three years. Although such disciplinary action is less severe than that the Commission, as indicated in subsection (3) of Rule 61J2-24.001, Florida Administrative Code, would normally take against a broker who has committed the violations Respondent has committed, the record in the instant case clearly and convincingly establishes that there are mitigating circumstances present that justify the taking of disciplinary action less severe than otherwise would be warranted. These mitigating

circumstances include: Respondent's personal situation and her state of mind at the time the violations were committed; the absence of any actual harm caused by the violations; Respondent's acknowledgment of her guilt and her sincerely-made pledge not to engage in similar misconduct in the future; the absence of any other complaints having been made against Respondent in the 40 years she has been a real estate broker; and the financial hardship that a suspension and the imposition of a larger fine would cause Respondent to suffer.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order finding Respondent guilty of the violations alleged in the Administrative Complaint and fining her \$250.00, issuing her a reprimand, and placing her on probation for a period of three years for having committed these violations.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 14th day of September, 1995.

STUART M. LERNER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of September, 1995.

APPENDIX TO RECOMMENDED ORDER

The following are the Hearing Officer's specific rulings on the findings of fact proposed by the parties in their proposed recommended orders:

The Department's Proposed Findings

1-2. Accepted and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order.

3. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

4-5. Accepted and incorporated in substance, except for 5c. and 5d., which have not been incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer.

Respondent's Proposed Findings

First unnumbered paragraph: To the extent that this proposed finding states that Respondent is 72 years of age and has been a real estate broker in the State of Florida for almost 40 years, it has been accepted and incorporated in substance.

Second unnumbered paragraph: Accepted and incorporated in substance.

Third unnumbered paragraph: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

Fourth and fifth unnumbered paragraphs: Accepted and incorporated in substance.

Sixth unnumbered paragraph: Rejected as a finding of fact because it is more in the nature of argument than a finding of fact.

Seventh unnumbered paragraph- First sentence: Accepted and incorporated in substance; Second sentence: Rejected as a finding of fact because it is more in the nature of argument than a finding of fact.

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 of time 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.