STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	CASE NO. 95-4153
EUGENE A. OATHOUT AND C I ASSOCIATES, INC.,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on December 12, 1995, in Vero Beach, Florida.

APPEARANCES

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

For Respondent: Michael O'Haire, Esquire
O'Haire, Quinn & Candler, Chartered
3111 Cardinal Drive
Vero Beach, Florida 32963

STATEMENT OF THE ISSUE

Whether the Respondents committed the offenses alleged in the administrative complaint and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

Eugene A. Oathout is a licensed real estate broker and C I Associates, Inc., is the real estate company he owns and operates. Petitioner discovered a discrepancy in an escrow account during a routine audit of the escrow accounts maintained by the Respondents. Petitioner thereafter filed an administrative complaint against the Respondents that alleged certain facts and, based on those facts, alleged in Counts One and Two that the Respondents violated the provisions of Section 475.25(1)(b), Florida Statutes, alleged in Counts Three and Four that the Respondents violated the provisions of Section 475.25(1)(k), Florida Statutes, and alleged in Counts Five and Six that the Respondents violated the provisions of Rule 61J2-14.012(2) and (3), Florida Administrative

Code, thereby violating the provisions of Section 475.25(1)(e), Florida Statutes. Respondents timely denied the material allegations of the administrative complaint, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the formal hearing, the Petitioner presented the testimony of Dawn Luchik and presented four exhibits, each of which was admitted into evidence. Ms. Luchik is an investigator employed by the Petitioner and performed the audit that led to this proceeding. Eugene Oathout testified on his own behalf and presented the additional testimony of Eric Price, an expert in the field of computer programs and computer programming. Respondents presented three exhibits, each of which was accepted into evidence.

No transcript of the proceedings has been filed. 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 formal hearing. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the conclusion of the formal hearing. See, Rule 60Q-2.031, Florida Administrative Code. Rulings on the parties' proposed findings of fact may be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

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

2. Respondent, Eugene A. Oathout, is now and at all times pertinent to this proceeding has been a duly licensed real estate broker in the State of Florida. Mr. Oathout's license number is 0064983. The last license issued to him was as a broker in care of C I Associates, Inc., trading as C I, 5075 N. A1A, Post Office Box 3070, Vero Beach, Florida 32964-3070.

3. Respondent, C I Associates, Inc., trading as C I, is now and at all times pertinent to this proceeding has been a duly licensed real estate broker in the State of Florida. C I's license number is 0232366. The last license issued to it was for the address 5075 N. A1A, Post Office Box 3070, Vero Beach, Florida 32964-3070.

4. At all times pertinent to this proceeding, Respondent Oathout was licensed and operating as the qualifying broker and officer of Respondent C I.

5. On August 30, 1994, Dawn R. Luchik, an investigator employed by Petitioner, paid an unannounced visit to Respondents' real estate brokerage office for the purpose of performing a random audit of Respondents' escrow accounts. Respondent Oathout was present at the Respondents' office on August 30, 1994, but because his secretary was not there, he had difficulty finding all the files and records Ms. Luchik wanted to review.

6. At that time, Respondents maintained two escrow accounts, one for real estate sales matters (the sales account) and one for rental and property management matters (the management account).

7. After her review of the records on August 30, 1994, Ms. Luchik tentatively concluded that there was no problem with the sales account but that there existed a shortage in the management account of $4,111.00.

8. Ms. Luchik testified that Mr. Oathout appeared shocked at her tentative finding as to the management account.

9. An appointment was scheduled for Ms. Luchik to return to complete her audit on September 6, 1994. This second appointment was made so Respondent Oathout could, with the assistance of his secretary, attempt to locate certain files and determine how a deficiency in the escrow account occurred.

10. Rule 61J2-14.012(2), Florida Administrative Code, requires real estate brokers to reconcile escrow accounts monthly. Respondent Oathout attempted to reconcile this account by comparing the liabilities of the account with the monthly bank balance that reflected the actual amount in the account at the end of each month. At all times pertinent to this proceeding, Respondent Oathout determined the liabilities of the account from computer generated data using a computer data base contained in a commercial software computer program known as "Ability". Respondents had purchased and installed this software program between five and six years prior to the audit and used it until the audit.

11. This software program determined the liabilities against the management escrow account by adding four columns of numbers. The program then added together the sums of the four columns and the resulting number was supposedly the total liabilities against the management escrow account.

12. In reviewing his records in an effort to determine the existence and extent of any problem with the management account, Respondent Oathout determined that this "Ability" computer program had regularly misadded two of the four columns summaries that he prepared monthly.

13. The two columns erroneously totalled by the computer program were the one for last month's rental deposits and the one for security deposits. No pattern or reason for the miscalculations by the accounting program is apparent. Unlike other recurring monthly income and expense items, disposition of these payments occurred only on the termination of a tenancy. Consequently, Respondent Oathout did not regularly review or reconcile the entries in these columns.

14. Because the two incorrect columns consistently under-reported Respondents' liability for last month's and security deposit payments, Respondents' balances showed a lower escrow account liability than actually existed.

15. In addition to managing rental properties for clients, Respondent Oathout had his own rental properties.

16. Respondents maintained in the management account deposits made by tenants of Respondent Oathout in addition to deposits made by their clients.

17. Each month, near month's end, Respondent Oathout would take a trial balance of the management account. Based on the information contained in the computer printout and after accounting for uncleared and outstanding checks and unrecorded current deposits, he would determine whether there existed a surplus

in the management account. Because the calculation of liabilities was consistently understated, his calculation of the surplus was consistently overstated.

18. Respondent Oathout would thereafter assume that any surplus reflected in the account belonged to him and he would withdraw the excess from the account.

19. Respondents' reconciliation statements contained small discrepancies that were inadequately explained and failed to provide the corrective action that Respondents would take to resolve the discrepancies.

20. Because the computer software error had gone undetected for so long, Respondents' accounting records had been overstated a total of $27,992.30 with a corresponding shortage in the management bank account in the sum of $23,482.97.

21. When Ms. Luchik returned to Respondents's office on September 6, 1994, Respondent Oathout told her that he calculated the shortage in the management account as being $23,482.97 as opposed to $4,111.00, showed her his records, and explained that he had detected an error in the computer program.

22. Ms. Luchik amended her final investigation report to reflect that the amount of shortage in the management account was the amount calculated by Respondent Oathout.

23. When the existence of a shortage was verified and the amount confirmed, Respondent Oathout promptly corrected the shortages. On September 6, 9, and 12, 1994, he made deposits from his own funds into the management account in the respective amounts of $12,000, $2,500, and $8,982.97.

24. There was no evidence that Respondent Oathout knew of this computer problem or that he was aware that a shortage existed before Ms. Luchik's audit. The software problem was a glitch that was not caused by Respondents or manipulated by them.

CONCLUSIONS OF LAW

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

26. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondents. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So.2d 112 (Fla. 1st DCA 1989).

27. Section 475.25, Florida Statutes, provides, in pertinent part, as follows:

> (1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; 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, if it finds that the licensee, registrant, permittee, or applicant:
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> * * *
>
> (b) Has been guilty of . . . culpable negligence, or breach of trust in any business transaction in this state . . .
>
> * * *
>
> (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.
>
> * * *
>
> (k) Has failed, if a broker, 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 . . . wherein the funds shall be kept until disbursement thereof is properly authorized . . .

28. Rule 61J2-14.012(2) and (3), Florida Administrative Code, provides, in pertinent part, 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 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 in reference to shortages or overages of funds in the account(s). . . .

29. Counts One and Two of the Administrative Complaint allege that the Respondents violated the provisions of Section 475.25(1)(b), Florida Statutes. Petitioner alleges that Respondents's escrow shortage proves that Respondents are guilty of "culpable negligence" and "breach of trust." Petitioner argues,

in part, that Respondents would have discovered this shortage had they properly reconciled the escrow account referred to as the management account. While this may be true, this fact was not established by clear and convincing evidence. In this proceeding, there was no evidence that the Respondents knew of the escrow account shortage prior to the audit and there was insufficient evidence to establish that they should have known of the shortage.

30. The appellant in Munch v. Department of Professional Regulation, Division of Real Estate, 592 So.2d 1136 (Fla. 1st DCA 1992) was a real estate salesman who had been charged in Count I of an administrative complaint with "fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence or breach of trust in a business transaction" in violation of Section 475.25(1)(b), Florida Statutes. The following observations made in that opinion are pertinent to this proceeding:

> It is clear that Section 475.25(1)(b) is penal in nature. As such, it must be construed strictly, in favor of the one against whom the penalty would be imposed. . . . Reading the first clause of Section 475.25(1)(b) (the portion of the statute which appellant was charged with having violated in Count I of the complaint), and applying to the words used their usual and natural meaning, it is apparent that it is contemplated that an [intentional] act be proved before a violation may be found. (592 So. 2d 1136, at 1143-1144. Citations omitted. [Emphasis in the original.]

31. Based on the foregoing, it is concluded that Petitioner failed to establish by clear and convincing evidence that Respondents violated the provisions of Section 475.25(1)(b), Florida Statutes, as alleged in Counts One and Two of the Administrative Complaint.

32. Counts Three and Four of the Administrative Complaint allege that the Respondents violated the provisions of Section 475.25(1)(k), Florida Statutes. Petitioner proved by clear and convincing evidence that Respondents placed funds in the escrow account and that a total of $23,482.97 was withdrawn from this escrow account without proper authorization, thereby establishing the violations alleged in Counts Three and Four. Respondents correctly assert that this should be considered a technical violation that does not merit suspension or revocation of licensure since there was no showing of dishonest or unscrupulous conduct. See, Rivard v. McCoy, 212 So.2d 672 (Fla. 1st DCA 1968). The conclusion that suspension or revocation is inappropriate does not compel the conclusion that no penalty is appropriate. Respondents violated the provisions of Section 475.25(1)(k), Florida Statutes, and an appropriate penalty should be imposed.

33. Counts Five and Six of the Administrative Complaint allege that the Respondents violated the provisions of Rule 61J2-14.012(2) and (3), Florida Administrative Code, thereby violating the provisions of Section 475.25(1)(e), Florida Statutes. These violations were established by clear and convincing evidence. Respondents failed to properly address discrepancies that appeared on the reconciliation statements that were prepared and failed to address measures to correct those discrepancies.

34. In considering the recommended penalties that follow, the undersigned has considered the fact that the violations in Counts Three and Four are technical as opposed to intentional, that Respondent Oathout has been a real estate professional approximately 24 years without prior incident, that Respondent Oathout cooperated fully with Petitioner's investigator, that Respondent promptly corrected the shortage in the escrow account, and that no harm has come to any member of the public as a result of this error. The undersigned has also considered the disciplinary guidelines found at Rule 61J2-24.001(1)(f) and (l), Florida Administrative Code, and the discretion to deviate from those guidelines in the event of mitigating factors, as authorized by Rule 61J2-24.001(4)(a), Florida Administrative Code. While the penalty guideline for a violation of Section 475.25(1)(k), Florida Statutes, includes a suspension of licensure for a minimum of 90 days, it is appropriate to deviate from that minimum suspension since the violation has been found to be a technical one.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order that adopts the findings of fact and conclusions of law contained herein, dismisses the charges alleged in Counts One and Two, finds Respondents guilty of the charges alleged in Counts Three, Four, Five, and Six. It is recommended that Respondent Oathout be placed on probation for a period of one year for these violations. 1/ Administrative fines in the total amount of $500.00 should be imposed against the Respondents for the violations of Counts Three and Four. Administrative fines in the total amount of $2,000.00 should be imposed against the Respondents for the violations of Counts Five and Six.

DONE AND ENTERED this 29th day of March, 1996, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON, 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 29th day of March 1996.

ENDNOTE

1/ In its proposed order, Petitioner proposes that the penalty imposed on Respondent Oathout include the imposition of an administrative fine, six month suspension of licensure, and following the suspension the imposition of a term of probation for a period of one year. Petitioner also recommends that the term of probation include a requirement that Respondent Oathout complete a 7 hour real estate brokerage escrow management course in addition to any other education required of him to remain current and active as a real estate broker in the State of Florida. For the reasons discussed, the suspension of licensure

is not recommended in this proceeding. The recommended term of probation is reasonable under the circumstances of this case.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-4153

The proposed findings of fact submitted by Petitioner are adopted in material part by the Recommended Order.

The following rulings are made as to the proposed findings of fact submitted by the Respondent.

1. The proposed findings of fact in paragraphs 1 - 14 are adopted in material part by the Recommended Order.
2. The proposed findings of fact in paragraphs 15 and 16 are subordinate to the findings made.
3. The proposed findings of fact in paragraph 17 and 18 are treated as preliminary matters, but are unnecessary as findings 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 ten 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.