

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 95-4815
)
JOHN P. WICKERSHAM and ALADDIN)
REAL ESTATE OF ROCKLEDGE, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this proceeding before Daniel Manry, a duly designated Hearing Officer of the Division of Administrative Hearings, on December 15, 1995, in Melbourne, Florida.

APPEARANCES

For Petitioner: Steven W. Johnson, Esquire
Department of Professional Regulation
Division of Real Estate
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802

For Respondents: John P. Wickersham, pro se,
Aladdin Real Estate of Rockledge, Inc.
966 South US 1
Rockledge, Florida 32955

STATEMENT OF THE ISSUES

The issues for determination are whether Respondents violated Florida Administrative Code Rule 61J2-14.012(2) 1/ and Section 475.25(1)(e) Florida Statutes, 2/ by committing the acts alleged in the Administrative Complaint and, if so, what, if any, penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner filed an Administrative Complaint against Respondents on June 26, 1995. Respondents timely requested a formal hearing.

At the formal hearing, Petitioner presented the testimony of its investigator and submitted five exhibits for admission in evidence. Respondents called Mr. John P. Wickersham as their only witness and submitted four exhibits for admission in evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the record of the formal hearing. None of the parties requested a transcript of the formal hearing.

Petitioner timely filed its proposed recommended order ("PRO") on January 8, 1996. Respondents timely filed their PRO on December 22, 1995. Proposed findings of fact in the parties' PROs are addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the governmental agency responsible for issuing licenses to practice real estate. Petitioner is also responsible for regulating licensees on behalf of the state.

2. Respondent, John P. Wickersham ("Wickersham"), is licensed as a real estate broker under license number 0095775. Respondent, Aladdin Real Estate of Rockledge ("Aladdin"), is a Florida corporation registered as a real estate broker under license number 0213244. Wickersham is the qualifying broker and corporate officer for Aladdin.

3. Respondents maintain their escrow account at the Barnett Bank of Cocoa. On April 28, 1994, Ms. Marie Ventura, Petitioner's investigator, audited Respondents' escrow account.

4. Ms. Ventura concluded that Respondents' escrow account had a liability of \$46,287.30 and a reconciled balance of \$43,557.26. Ms. Ventura concluded that Respondents' escrow account had a shortage of \$2,730.04.

5. Respondents provided Ms. Ventura with additional information. On May 16, 1994, Ms. Ventura concluded that Respondents' escrow account had a liability of \$43,546.21 and a reconciled balance of \$42,787.26. Ms. Ventura concluded that Respondents' escrow account had an excess of \$11.05.

6. Respondents never had a shortage in their escrow account. Respondents maintained an excess of \$11.05 in their escrow account since September, 1993.

7. In September, 1993, Respondents converted their method of bookkeeping to a computer system. The computer system failed to disclose an excess of \$11.05 due to Respondents' misunderstanding of the appropriate method of labeling inputs to the software system. Respondents discovered and corrected the error prior to the formal hearing.

8. Respondents properly made and signed written monthly reconciliation statements comparing their total escrow liability with the reconciled bank balances of their escrow account. Although Respondents did not use the form suggested in Rule 61J2- 14.012(2), Respondents satisfied the substance of the requirements for record keeping and reporting.

9. Respondents maintained the information required in Rule 61J2-14.012(2) in bank statements, ledger cards, and checkbooks. At the time of the formal hearing, Respondents presented the information in a form that complied with the requirements of Rule 61J2-14.012(2).

10. The shortage determined by Petitioner on April 28, 1994, was caused, in part, by errors made by Petitioner's investigator. It was the investigator's first audit, and the information provided by Respondents was not in an easily

discernible form. However, Respondents never withheld any information, and Respondents maintained and provided all information required by applicable law.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this proceeding. The parties were duly noticed for the formal hearing.

12. Petitioner has the burden of proof in this proceeding. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any penalty to be imposed. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987).

13. Petitioner failed to satisfy its burden of proof in this proceeding. Petitioner did not show by clear and convincing evidence that Respondent violated Section 475.25(1)(b) by failing to make a written statement containing the information required in Rule 61J2-14.012(2). Petitioner's evidence was less than clear and convincing.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a Final Order finding Respondent not guilty of violating Section 475.25(1)(b) and Rule 61J2-14.012(2).

RECOMMENDED this 18th day of January, 1996, in Tallahassee, Florida.

DANIEL MANRY, 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 18th day of January 1996.

ENDNOTES

1/ All references to rules are to rules promulgated in the Florida Administrative Code as of the date of this Recommended Order.

2/ All section and chapter references are to Florida Statutes (1993) unless otherwise stated.

APPENDIX

Petitioner's Proposed Findings of Fact

- 1.-6. Accepted in substance
7. Rejected as not supported by credible and persuasive evidence

Respondents' Proposed Findings of Fact

1. Rejected as irrelevant and immaterial
- 2.-4. Rejected as recited testimony
5. Rejected as conclusion of law
- 6.-10. Rejected as recited testimony

COPIES FURNISHED:

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966 South US 1
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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. 94-82961

DOAH NO. 95-4815

JOHN P. WICKERSHAM and
ALADDIN REAL ESTATE
OF ROCKLEDGE, INC.

Respondents

_____ /

FINAL ORDER

On March 19, 1996, pursuant to s.120.57(1), Florida Statutes, the Florida Real Estate Commission heard this case to issue a Final Order.

Hearing Officer Daniel Manry of the Division of Administrative Hearings presided over a formal hearing on December 15, 1995. On January 18, 1996, he issued a Recommended Order, a copy of which is attached hereto as Exhibit A and made a part hereof.

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

After completely reviewing the record and being otherwise fully advised, the Commission accepts the Petitioner's Exceptions to the Hearing Officer's Recommended Order.

The Commission finds that, said Exceptions are based on competent and substantial evidence. Accordingly, the Commission rejects the Hearing Officer's Finds of Fact and Conclusions of Law and incorporates the Petitioner's Exceptions into the Conclusions of Law.

Based on the foregoing, the Commission finds the Respondents guilty of the violations cited in Counts VII and VIII of the Administrative Complaint.

The Florida Real Estate Commission therefore ORDERS that the Respondents be reprimanded.

The Commission further ORDERS that Respondent John P. Wickersham pay a \$350 administrative fine within 30 days of the filing date of this Order, or his license shall be suspended until such time as the fine is paid in full.

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 5.120.68, 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 19th day of March 1996 in Orlando, Florida.

Henry M. Solares, 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 John P. Wickersham and Aladdin Real Estate of Rockledge, Inc., 966 South US 1, Rockledge, Florida 32955; by regular U.S. Mail to Hearing Officer Daniel Manry, 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 16th day of April 1996.

Brandon L. Moore