

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, DIVISION )  
OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 95-5301  
 )  
JOSEPH A. QUEIPO, JR., and )  
QUEIPO INTERNATIONAL REALTY, INC., )  
T/A CENTURY 21 QUEIPO INTERNATIONAL )  
REALTY, )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Claude B. Arrington, held a formal hearing in the above-styled case on May 29, 30, 31 and June 17, 1996, in Miami, Florida.

APPEARANCES

For Petitioner: Theodore R. Gay, Esquire  
Department of Business and  
Professional Regulation  
Division of Real Estate  
401 Northwest 2nd Avenue, Suite N-607  
Miami, Florida 33128

For Respondent: Mark A. Dienstag, Esquire  
Brenner and Dienstag, P.A.  
21 Southeast 1st Street, Suite 800  
Miami, Florida 33131

STATEMENT OF THE ISSUES

Whether the Respondents committed the offenses alleged in the Amended Administrative Complaint and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

Respondent, Joseph A. Queipo, Jr., is a licensed real estate broker and was, at all times pertinent to this proceeding, the sole owner and broker of record of Respondent, Queipo International Realty, Inc. (REALTY). On September 20, 1995, the Petitioner filed an administrative complaint containing 18 counts against the Respondents that alleged certain facts and based on those facts alleged multiple violations of statutes or rules regulating the real estate profession. The Respondents timely requested a formal administrative hearing to

challenge the administrative complaint, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

By order dated January 23, 1996, the Petitioner's motion for leave to file an amended administrative complaint was granted without objection and the amended administrative complaint (containing 22 counts) that was attached to the motion was deemed filed. The odd numbered counts of the Amended Administrative Complaint alleged violations by Mr. Queipo and the even numbered counts alleged violations by REALTY.

Counts I-VI of the Amended Administrative Complaint pertained to a transaction wherein the sellers were Tony and Ellen Cadet and the buyer was Tangela Bynum. Petitioner conceded in its post-hearing submittal that it failed to prove these allegations by clear and convincing evidence.

Counts VII-XIII of the Amended Administrative Complaint pertained to a listing agreement for the sale of property owned by Wilma Sue Lawton to Mario and Elisa Machin. This transaction involved a dispute over a commission with another real estate company. Counts VII and VIII alleged that Respondents were guilty of culpable negligence or breach of trust in a business transaction in violation of Section 475.25(1)(b), Florida Statutes. Petitioner conceded in its post-hearing submittal that it failed to prove the allegations of Counts IX and X by clear and convincing evidence. Counts XI and XII alleged that Respondents were guilty of having failed to implement the procedures provided by Section 475.25(1)(d)1, Florida Statutes, to resolve a REALTY's disputed claim of entitlement to deduct a real estate commission from a deposit held by it in violation of Rule 61J2-14.011, Florida Administrative Code, and therefore in violation of Section 475.25(1)(e), Florida Statutes.

Counts XIII-XVIII pertained to efforts by Petitioner's investigators to subpoena Respondents' records, including records of escrow accounts, and its efforts to audit those records. Counts XIII and XIV alleged that Respondents were guilty of failure to preserve and make available to the Petitioner, all books, records, and supporting documents and failed to keep accurate account of all trust fund transactions together with such additional data as good accounting practice requires in violation of Rule 61J2-14.012(1), Florida Administrative Code, and Section 475.5015, Florida Statutes, and therefore in violation of Section 475.25(1)(e), Florida Statutes. Counts XV and XVI alleged that Respondents were guilty of 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. Counts XVII and XVIII alleged that Respondents were 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), Florida Statutes.

Counts XIX-XXII pertained to an interpleader action in Dade County Circuit Court filed by REALTY against Aristomanis Atheras and Sergio Rodriguez to resolve competing demands for a deposit held by REALTY in the amount of \$15,500. Counts XIX and XX alleged that Respondents were guilty of culpable negligence or breach of trust in a business transaction in violation of Section 475.25(1)(b), Florida Statutes. Counts XXI and XXII alleged that Respondents were guilty of failure to account or deliver funds in violations of Section 475.25(1)(d)1, Florida Statutes.

At the formal hearing, Petitioner presented the testimony of 13 witnesses and offered 52 exhibits, 47 of which were admitted into evidence. Respondents presented the testimony of 10 witnesses (including Mr. Queipo and his wife) and offered 13 exhibits, each of which was admitted 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 hearing. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the conclusion of the hearing. Rule 60Q-2.031, Florida Administrative Code.

#### FINDINGS OF FACT

1. Petitioner is the agency of the State of Florida charged with the responsibility and duty to administer the statutes and rules regulating the real estate profession in Florida.

2. At all times pertinent to this proceeding, the Respondent, Jose A. Queipo, Jr., was licensed by the Petitioner as a real estate broker, having been issued license numbers 0415475 and 3001474.

3. At all times pertinent to this proceeding, the Respondent, Queipo International Realty, Inc. (REALTY), was licensed by the Petitioner as a real estate brokerage corporation, having been issued license number 0271997.

4. At all times pertinent to this proceeding, Mr. Queipo was the sole corporate officer, sole owner, and sole broker of record for REALTY.

5. At all times pertinent to this proceeding, until January 27, 1995, REALTY's offices were located at 2320 Red Road, Miami, Florida.

6. In 1994, Mr. Queipo made the business decision to form Queipo International Realty Group, Inc., (GROUP) as a separate corporation and, through GROUP, to open a real estate office on Crandon Boulevard, Key Biscayne, Florida. Andrew Marrero, a licensed real estate broker had been a long term friend of Mr. Queipo and had worked with him at REALTY. Mr. Queipo gave Mr. Marrero 50 percent ownership interest in GROUP and had Mr. Marrero act as the qualifying broker of record for GROUP.

7. In December, 1994, Mr. Queipo became ill. On medical advice, he took an extended vacation, leaving Mr. Marrero in charge of REALTY and GROUP. Mr. Queipo and Mr. Marrero agreed that the REALTY offices on Red Road would be closed and that all pending transactions for which REALTY was responsible (15 to 20 in number) would be closed by GROUP. The GROUP office was thereafter opened on Key Biscayne.

8. Before he left on his vacation, Mr. Queipo signed a number of blank checks on REALTY's various trust and operating bank accounts and he signed several sheets of stationery with REALTY's letterhead. Mr. Queipo turned these signed blank checks, signed sheets of stationery, and all books and records of REALTY over to Mr. Marrero. Mr. Queipo also pre-signed checks on GROUP's bank accounts and executed a corporate document that allowed Mr. Marrero to change those accounts so that only Mr. Marrero's signature was necessary.

9. On January 27, 1995, Mr. Queipo was still out of state on his vacation. On that date, Mr. Marrero closed the REALTY offices without advance notification to the sales persons and other personnel employed at that office. Mr. Marrero

took possession of all equipment, furniture, files, and corporate records and moved these items either to the GROUP office on Key Biscayne or to his personal residence.

10. Between the time he left on his vacation in December 1994, and March 1995, Mr. Queipo returned to Miami only for a day to attend the closing of the sale of the REALTY office building on Red Road. While he was away from Miami between December 1994 and March 1995, Mr. Queipo stayed with relatives in New York and rested. During this period, Mr. Marrero was in control of REALTY and GROUP. Mr. Queipo did not return to Miami permanently until March 1995.

11. When he returned to Miami in March 1995, Mr. Queipo sought an accounting from Mr. Marrero as to the status of REALTY and GROUP. Mr. Marrero responded by locking Mr. Queipo out of the offices of GROUP.

12. Mr. Queipo filed suit in circuit court in Miami against Mr. Marrero in May 1995. In June 1995, Mr. Marrero was ordered by the presiding circuit judge to turn all books and records of GROUP and of REALTY to the Century 21 Regional Offices so that an accounting could be performed. It was not until August 1995 that Mr. Queipo regained control of REALTY and of GROUP.

13. Petitioner determined that it would be appropriate to audit the escrow accounts and other books and records of REALTY in January 1995, prior to the abrupt closing of the REALTY offices on January 27, 1995. Two of Petitioner's investigators, Kenneth Rehm and Roberto Castro, went to the REALTY office during regular business hours prior to January 27, 1995, for the purpose of conducting the audit. The investigators asked to see Mr. Queipo and were told by a receptionist that Mr. Queipo was not available. The investigators were unable to conduct the planned audit.

14. Shortly after the REALTY office on Red Road was closed on January 27, 1995, the Petitioner was notified of this fact by sales persons who had worked at that office.

15. REALTY never maintained or operated an office at any other location after January 27, 1995.

16. Petitioner's investigators made diligent efforts to subpoena the REALTY records so that they could perform an audit and they attempted to communicate with Mr. Queipo through his brother-in-law and through Martha Lara, a secretary who worked for REALTY. 1/ Petitioner's investigators were unable to perfect the service of a subpoena for REALTY's records until Mr. Rehm served Mr. Queipo in person at the Dade County Courthouse on May 30, 1995. Mr. Queipo was at the Courthouse for a hearing pertaining to the litigation he instigated against Mr. Marrero. This subpoena required Mr. Queipo to produce the following records of REALTY:

. . . brokerage records for the period  
January 1, 1994 to present including:

All listing agreements.

All sales/purchase agreements/rental/  
lease agreements.

All escrow account monthly bank state-  
ments, bank deposit slips and cancelled  
checks.

Operating account bank statements,  
deposit slips, and cancelled checks.

Monthly reconciliations showing broker's total trust liability.

17. In response to that subpoena, counsel for Mr. Queipo responded by letter dated June 12, 1995, that stated, in pertinent part, as follows:

Please be advised that the undersigned represents Jose Queipo, broker, owner of a corporation no longer in business called Queipo International Realty, Inc. Mr. Kenneth Rehm personally served a subpoena . . . upon Mr. Queipo in relation to Queipo International Realty, Inc. . . .

\* \* \*

. . . all matters contained within the body of the subpoena are presently lodged with and or controlled by Queipo International Group, Inc. and Mr. Andrew Marrero.

As Mr. Kenneth Rehm knows, Queipo International Group Inc. has been controlled by a Mr. Andrew Marrero since a dispute arose with Mr. Queipo.

As of this date Mr. Marrero retains all of the relevant records of Queipo International Realty Inc. that were taken by him in January of 1995 to Queipo International Group, Inc.'s new headquarters on Crandon Blvd. as part of the merger and formation of the new company . . . .

18. As of the time of the formal hearing, the Respondents had not provided Petitioner with records that would enable Petitioner to audit the REALTY escrow accounts.

19. At the times pertinent to this proceeding, REALTY had more than one escrow account. One of these escrow accounts was account number 0024012750 at the Interamerican Bank. Petitioner established that as of January 31, 1995, the account liability (at least \$28,200) exceeded the account balance (\$13,794.41). This discrepancy was detected after Mr. Queipo had given Mr. Marrero control of the escrow accounts and had given him signed, blank checks that enabled him to make withdrawals from the escrow accounts. Although Respondents established that REALTY had more than one escrow account, that fact does not explain the apparent discrepancy in account number 0024012750 at the Interamerican Bank.

20. At all times pertinent to this proceeding, Respondents knew that the records of REALTY were subject to audit by the Petitioner. REALTY's records had been routinely audited on three separate occasions prior to 1995 with no errors having been detected.

21. Prior to October 1994, REALTY had a listing agreement for the sale of property owned by Wilma Sue Lawton. The REALTY sales persons for this transaction were Ann Freeman and Yolanda Rocabado. On October 19, 1994, a contract for the sale of the Lawton property was executed between Ms. Lawton as seller and Mario N. and Elisa V. Machin as buyers. This contract provided for REALTY to receive a six percent commission when the sale closed. Since the sales price equalled \$100,000, the amount of the real estate commission was

\$6,000. In connection with this transaction, the Machins paid to REALTY a deposit in the amount of \$10,000, which was placed in account number 0024012750 at the Interamerican Bank.

22. After REALTY closed its office on January 27, 1995, Ms. Freeman became associated with a real estate company named Vision International Realty (VISION) and Ms. Rocabado became associated with GROUP.

23. On January 31, 1995, REALTY's listing agreement with Ms. Lawton expired. On February 3, 1995, Ms. Lawton executed a listing agreement with VISION. This listing agreement provided for VISION to receive the six percent real estate commission.

24. On February 3, 1995, Ms. Lawton and Mr. and Ms. Machin executed a "Release on (sic) Deposit Receipt" that released the \$10,000 deposit that had been placed in escrow by REALTY pursuant to the contract dated October 19, 1994.

25. By an instrument executed by the Machins on February 3, 1995, and by Ms. Lawton on February 8, 1995, the parties entered into a second contract for the purchase and sale of the Lawton property. There were no material differences between the contract executed in February 1995 and the contract dated October 19, 1994. This second contract provided that VISION and GROUP would evenly split the six percent commission. The closing for this transaction was scheduled for on or before March 4, 1995.

26. Approximately two weeks prior to the scheduled closing, VISION asked that REALTY transfer the \$10,000 escrow deposit to a VISION escrow account so that the funds would be available for the closing and provided a copy of the "Release on Deposit Receipt".

27. At the time REALTY received the "Release on Deposit Receipt" and the request to transfer those funds, Mr. Marrero was in de facto control of both REALTY and GROUP. Thereafter, a REALTY check that had been pre-signed in blank by Mr. Queipo and an unsigned cover letter on REALTY letterhead were sent to the attorney who was acting as the closing agent for the transaction. The amount of the check sent to the closing agent was \$7,000. The unsigned transmittal letter referenced the Lawton to Machin transaction and provided, in pertinent part, as follows:

Receipt is hereby acknowledged in the amount of \$6,000 (Six Thousand Dollars) as a professional fee for the above referenced property.  
Please be advised that the [sic] \$3,000 of the above captioned in dispute is being forwarded to the title agent as agreed until this matter is settled among the brokers.

28. The closing agent correctly understood the cover letter to mean that REALTY was keeping \$3,000 of the \$10,000 that had been deposited as part of its commission and that REALTY was also claiming it was entitled to receive an additional commission of \$3,000 from the \$7,000 check it forwarded to the closing agent.

29. There was no dispute that the total commission, in the amount of \$6,000, was to be paid from the \$10,000 deposit that had been placed in REALTY's escrow account in October 1994. There was also no dispute that either REALTY or

GROUP was entitled to \$3,000, representing one half of the total real estate commission. The other half of the commission was in dispute and was forwarded by REALTY as part of the \$7,000 it forwarded to the closing agent. Since Mr. Marrero was in control of REALTY and GROUP, it is concluded that REALTY's claims to the entire commission effectively waived any claim GROUP may have had to half of the commission.

30. As a result of the commission dispute between REALTY and VISION, the closing agent treated \$3,000 of the \$7,000 as being in dispute and not available for use in closing the transaction. VISION objected to the transaction closing without it being paid the \$3,000 commission it was claiming. The transaction closed because the buyers paid into the closing agent's escrow account an additional sum of \$3,000, which was used to pay VISION's commission. The sum of \$3,000 remains in the closing agent's escrow account pending resolution of the dispute over this part of the commission. Depending on the resolution of REALTY's commission claim, the sum belongs to either REALTY or to the Machins.

31. No formal action has been taken to resolve the dispute over this commission. The sum of \$3,000 remained in the closing agent's escrow account at the time of the formal hearing.

32. In conjunction with a transaction involving a seller named Sergio Rodriguez and a buyer named Aristomanis Atheras, REALTY received an escrow deposit in the amount of \$15,500. Respondents thereafter received conflicting demands for that deposit. On November 17, 1994, REALTY filed an interpleader action in Dade County Circuit Court. REALTY was represented in this matter by an attorney named Raymond Albo. On June 6, 1995, REALTY was ordered by the circuit court to deposit the escrowed funds into the registry of the court "forthwith". Respondents did not comply with that order. Mr. Queipo testified, credibly, that Mr. Albo failed to advise him of that order. On October 19, 1995, the circuit court entered an "Order to Show Cause" which ordered Mr. Queipo to show cause at a hearing scheduled for November 9, 1995, why he should not be held in contempt of court for failing to comply with the order of June 6, 1995. On November 8, 1995, Mr. Albo contacted Mr. Queipo for the first time in a year and told him about the Order to Show Cause. Mr. Queipo determined that the remaining REALTY escrow account had a balance of \$11,000. He withdrew the sum of \$11,000 from the escrow account, added \$4,500 of his personal funds to that figure, and paid into the registry of the court the sum of \$15,500 on November 9, 1995, thereby avoiding the contempt proceeding.

i 33. Jorge Areces was acting as the general counsel for Respondents in November 1994. It was Mr. Areces who recommended that Mr. Albo be retained to represent REALTY in the interpleader action. Both Mr. Areces and Mr. Queipo made repeated efforts to contact Mr. Albo about the status of the interpleader action, but they were unable to locate him. Respondents relied on the advice of their attorneys in dealing with the interpleader action.

#### CONCLUSIONS OF LAW

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

35. 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).

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

(1) The commission . . . 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:

\* \* \*

(b) Has been 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 this state or any other state, nation, or territory; has violated a duty imposed upon him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has 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.

\* \* \*

(d)1. Has failed to account or deliver to any person, including a licensee under this chapter, at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check, draft . . . which has come into his hands and which is not his property or which he is not in law or equity entitled to retain under the circumstances. However, if the licensee, in good faith, entertains doubts as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon him for the escrowed property, or if conflicting demands have been made upon him for the



escrowed property, which properly he still maintains in his escrow account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

- a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;
  - b. With the consent of the parties, submit the matter to arbitration;
  - c. By interpleader or otherwise, seek adjudication of the matter by a court, or;
  - d. With the written consent of all parties, submit the matter to mediation . . . .
- If the licensee promptly employs one of the escape procedures contained herein, and if he abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property.

\* \* \*

(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 with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by him with some bank, 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 . . .

37. Section 475.5015, Florida Statutes, provides, in pertinent part, as follows:

Each broker shall keep and make available to the department such books, accounts and records as will enable the department to determine whether such broker is in compliance with the provisions of this chapter. Each broker shall preserve at least one legible copy of all books, accounts, and records pertaining to his real estate brokerage business for at least 5 years . . . .

38. Rule 61J2-14.012(1), Florida Administrative Code, implements Section 475.5015, Florida Statutes. The rule provides:

A broker who receives a deposit as previously defined shall preserve and make available to the BPR, or its authorized representative, all deposit slips and statements of account rendered by the depository in which said deposit is placed, together with all agreements between the parties to the transaction. In addition, the broker shall keep an accurate account of each deposit transaction and each separate bank account wherein such funds have been deposited. All such books and accounts shall be subject to inspection by the BPR or its authorized representatives at all reasonable times during regular business hours.

39. Rule 61J2-14.012(4), Florida Administrative Code, reads as follows:

(4) The books, accounts and records pertaining to the broker's real estate brokerage business shall be preserved for a period of not less than 5 years after receipt of any money, funds, deposit, check or drafts entrusted to the broker or the conclusion of the broker's involvement in the transaction, whichever results in a greater period of retention of records. If any brokerage record has been the subject of or has served as evidence in litigation, relevant books, accounts and records must be retained for at least 2 years after the conclusion of the civil action or the conclusion of any appellate proceeding, whichever is later, but not less than a total of 5 years as set above.

40. Rule 61J2-14.011, Florida Administrative Code, pertains to the rights of a broker to funds that have been deposited in escrow and provides as follows:

A broker who receives a deposit shall not have any right to or lien upon said deposit, except upon the written agreement or order of the depositor so long as the depositor has sole control of said deposit, until the transaction involved has been closed, and no person has any claim except the party ultimately to receive the same, in which case the broker may deduct the agreed commission unless the amount or time of payment is disputed. In case of a dispute as to the amount of the commission, or the time of payment, the broker may retain only the amount of the claim in said account and in trust, until the dispute is settled by agreement, arbitration, mediation or court

proceedings, as provided in s. 475.25(1)(d)1, Florida Statutes. A depositor has the right to demand return of a deposit until such time as another party has acquired some interest or equity, subject to the right to make an express agreement to compensate the broker for time and expense incurred prior to a demand for the return of the deposit; and such right to demand return of the deposit shall again accrue upon a breach by the other party to the contract or agreement under which it is held, or the expiration of the time fixed or a reasonable time, for performance of the things necessary to establish the exclusive right of such other party to said deposit. A broker shall not deliver the deposit to the other party to the transaction until such transaction is closed, except as otherwise directed or agreed to specifically by the depositor. The interested parties involved, other than the broker, may by express agreement, alter the disposal of the deposit, but the burden shall be on the broker to establish good faith in the matter if such agreement is to the broker's advantage. The broker shall recognize and comply with the joint directions of said parties in such cases, except where the parties act in bad faith with intent to deprive the broker of a commission, in which case the broker shall proceed as provided in s. 475.25(1)(d)1.

41. The law in Florida imposes a high standard of ethical conduct upon real estate brokers. See, for example, *Zichlin v. Dill*, 25 So.2d 4 (Fla. 1946).

42. Petitioner failed to establish by clear and convincing evidence the facts that underpin the alleged violations in Counts I-VI of the Amended Administrative Complaint. Consequently, those counts should be dismissed.

43. Counts VII-XII of the Amended Administrative Complaint pertained to the Lawton to Machins transaction and the commission dispute pertaining to that transaction. Counts VII and VIII alleged that Respondents were guilty of culpable negligence or breach of trust in a business transaction in violation of Section 475.25(1)(b), Florida Statutes. Petitioner failed to establish these alleged violations by clear and convincing evidence. At most, Petitioner established that REALTY deducted a commission to which it was entitled before delivering the balance of the escrowed funds to the closing agent and thereafter claiming entitlement to a portion of the funds delivered to the closing agent. Petitioner failed to establish that those facts constitute culpable negligence or a breach of trust. Counts VII and VIII should be dismissed.

44. Petitioner failed to prove by clear and convincing evidence the facts that underpin the allegations of Counts IX and X. Consequently, those counts should be dismissed.

45. Counts XI and XII alleged that Respondents were guilty of having failed to implement Section 475.25(1)(d)1, Florida Statutes, procedures to

resolve a broker's disputed claim of entitlement to deduct a real estate commission from a deposit held by the broker in violation of Rule 61J2-14.011, Florida Administrative Code, and therefore in violation of Section 475.25(1)(e), Florida Statutes. There was no allegation that Respondents violated these provisions by delivering to the closing agent the balance of the escrowed funds in the amount of \$7,000 with the claim that REALTY was entitled to an additional commission of \$3,000 to be paid from the \$7,000. There was no dispute that a real estate commission of \$6,000 was owed and there was no dispute that the commission was to be paid out of the \$10,000 that had been initially deposited in escrow with REALTY. It was undisputed that VISION was only claiming half of the total commission. The only possible dispute as to the \$3,000 retained by REALTY, representing the other half of the commission, was whether GROUP or REALTY was entitled to that portion of the commission. Because Mr. Marrero was in control of both REALTY and GROUP when the Lawton to Machin transaction closed, it is concluded that there was no dispute. Consequently, it is concluded that REALTY had the right to withhold \$3,000 in payment of its undisputed portion of the commission. Counts XI and XII should be dismissed.

46. Counts XIII-XVIII pertained to efforts by Petitioner's investigators to subpoena Respondents' records, including records of escrow accounts, and its efforts to audit those records. Counts XIII and XIV alleged that Respondents were guilty of failure to preserve and make available to the Petitioner, all books, records, and supporting documents and failed to keep accurate account of all trust fund transactions together with such additional data as good accounting practice requires in violation of Rule 61J2-14.012(1), Florida Administrative Code, and Section 475.5015, Florida Statutes, and therefore in violation of Section 475.25(1)(e), Florida Statutes. Counts XVII and XVIII alleged that Respondents were 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), Florida Statutes. Petitioner established these violations by clear and convincing evidence. Mr. Queipo's misplaced trust in Mr. Marrero has been considered as mitigating evidence in this proceeding, but it is not a defense to these charges. Mr. Queipo, despite his illness and his extended vacation, remained responsible for his business, for his trust accounts, and for compliance with these trust accounting requirements. The fact that the subpoenaed records were not available because Mr. Queipo gave them to Mr. Marrero, the fact that the shortages in the escrow account were detected after Mr. Queipo gave control of REALTY to Mr. Marrero, and the fact that there was insufficient evidence to establish that these violations occurred before Mr. Queipo became ill have been considered in determining the recommended penalty. However, the fact that these violations would not have occurred if Mr. Queipo had not given virtually unfettered control of REALTY's records and escrow accounts to Mr. Marrero has also been considered.

47. Counts XV and XVI alleged that Respondents were guilty of 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. Petitioner did not allege that Mr. Queipo's turning over control of REALTY and giving him signed escrow accounts constitutes the violation. These violations should be considered subsumed in the violations alleged in Counts XIII, XIV, XVII, and XVIII. Petitioner failed to establish that the same facts that underpin those counts also establish a violation of Section 475.25(1)(b), Florida Statutes. Consequently, Counts XV and XVI should be dismissed.

48. Counts XIX-XXII pertained to an interpleader action in Dade County Circuit Court filed by REALTY against Aristomanis Atheras and Sergio Rodriguez to resolve competing demands for a deposit held by REALTY in the amount of \$15,500. Counts XIX and XX alleged that Respondents were guilty of culpable negligence or breach of trust in a business transaction in violation of Section 475.25(1)(b), Florida Statutes. Counts XXI and XXII alleged that Respondents were guilty of failure to account or deliver funds in violations of Section 475.25(1)(d)1, Florida Statutes. Respondents reasonably relied on attorneys in handling this matter and ultimately complied with the court order. That this compliance was not timely was the fault of the attorney who was representing REALTY in the interpleader action. Consequently, it is concluded that Counts XIX-XII should be dismissed.

49. Petitioner has adopted disciplinary guidelines pertinent to this proceeding by Rule 61J2-24.001, Florida Administrative Code. For a violation of Section 475.25(1)(e), Florida Statutes, the recommended penalty ranges up to revocation. For a violation of Section 475.25(1)(k), Florida Statutes, the recommended range is from a minimum 90-day suspension and a fine in the amount of \$1,000 to revocation.

50. Pursuant to Rule 61J2-24.001(4), Florida Administrative Code, deviation from the foregoing guidelines is permitted upon consideration of mitigating or aggravating circumstances, which may include, but are not limited to, the following:

- (a) The severity of the offense;
- (b) The degree of harm to the consumer or public;
- (c) The number of counts in the Administrative Complaint;
- (d) The number of times the offenses previously have been committed by the licensee;
- (e) The disciplinary history of the licensee;
- (f) The status of the licensee at the time the offense was committed;
- (g) The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license; and
- (h) Whether a letter of guidance has been previously issued to the licensee.

51. Petitioner correctly argues that the escrow violations found herein are serious offenses. It was clear that Mr. Queipo did not cooperate with the investigators to the extent one would expect. Those factors should be considered, but there are mitigating factors that also should be considered. As discussed above, Mr. Queipo's illness and the fact that he was away from his business on medical advice has been considered. That Mr. Queipo would turn to Mr. Marrero, his long time friend and fellow real estate broker, when he became ill is understandable and should be given weight in determining the appropriate penalties for the violations found. There exist sufficient mitigating factors to conclude that neither suspension or revocation is necessary or appropriate.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order that incorporates the findings of fact and conclusions of law contained herein, that finds Respondents guilty of the offenses alleged in Counts XIII, XIV, XVII, and XVIII, and that dismisses the remaining counts of the Amended Administrative Complaint. It is recommended that for the violations found herein, Respondents be fined in the total amount of \$4,000 and that their respective licenses be placed on probation for a period of five years.

DONE AND ENTERED this 21st day of October, 1996, in Tallahassee, Florida.

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CLAUDE B. ARRINGTON  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675 SUNCOM 278-9675  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of October, 1996.

ENDNOTE

1/ Mr. Queipo denied that he had knowledge that the investigators were trying to contact him. While that testimony is difficult to believe in light of the extensive efforts of the investigators, there was no clear and convincing evidence that Mr. Queipo had actual knowledge that Petitioner wanted to audit the REALTY records until he was personally served with a subpoena at the Dade County Courthouse on May 30, 1995.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.