

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 96-0038
)
ANTONIO PRADO AND BAYSIDE)
INTERNATIONAL REALTY, INC.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Hearing Officer, Joyous D. Parrish, held a formal videoconference hearing in the above-styled case on March 28, 1996, with the parties located in Miami, Florida.

APPEARANCES

For Petitioner: Theodore R. Gay
Senior Attorney
Department of Business and
Professional Regulation
Division of Real Estate
Rhode Building Phase II
401 Northwest Second Avenue N607
Miami, Florida 33128

For Respondent: Antonio Prado, pro se and as President of
Bayside International Realty, Inc.
1390 Brickell Avenue, Suite 230
Miami, Florida 33131

STATEMENT OF THE ISSUE

The central issue in this case is whether the Respondents committed the violation alleged in the administrative complaint; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

This case began on August 18, 1995, when the Department of Business and Professional Regulation, Division of Real Estate (Department) issued an administrative complaint against the Respondents that alleged four violations of law. More specifically, the complaint alleged that Respondent, Antonio Prado, individually, and through his business, Bayside International Realty, Inc., had been guilty of culpable negligence or breach of trust in a business transaction

in violation of Section 475.25(1)(b), Florida Statutes. Further, the complaint claimed Respondents had placed more than \$200.00 of personal funds in an escrow account in violation of Section 475.25(1)(e), Florida Statutes and Rule 61J2-14.010(2), Florida Administrative Code.

The Respondents timely disputed the allegations of fact and requested a hearing. The matter was forwarded to the Division of Administrative Hearings for formal proceedings on January 5, 1996.

At the hearing, the Respondent, Antonio Prado, testified on behalf of the Respondents. Petitioner relied on the responses to the request for admissions and interrogatories which have been filed in this cause. Petitioner's exhibit 1 was received into evidence without objection.

A transcript of the proceeding has not been filed. Specific rulings on the Respondents' proposed findings of fact are included in the appendix at the conclusion of this order. Petitioner has not filed a proposed recommended order.

FINDINGS OF FACT

1. At all times material to this case, Respondent, Antonio Prado, has been a licensed real estate broker in the State of Florida, license no. 0138312.

2. Respondent, Antonio Prado, is the President and qualifying broker for a real estate company called Bayside International Realty, Inc.

3. Respondent, Bayside International Realty, Inc., has been issued real estate license no. 1001760.

4. The Department is the state agency charged with the responsibility of regulating real estate licensees.

5. On January 13, 1995, an investigator employed by the Department conducted an office inspection and audit of the Respondents' place of business.

6. During the course of the audit, the investigator discovered that the escrow account for the business contained \$1,000.00. None of the \$1,000.00 was, in fact, "trust funds" owed or belonging to a third party as Respondents have not held "trust funds" since August, 1990.

7. The investigator advised Respondent that he was not allowed to hold personal funds in excess of \$200.00 in the company escrow account. Based upon that information, Respondent immediately, on January 13, 1995, removed \$800.00 from the escrow account leaving a balance of \$200.00.

8. The purpose of holding \$1,000.00 in the account related to a Barnett Bank policy which required the minimum balance of \$1,000.00 to avoid service charges on the account.

9. Respondent, Antonio Prado, has not been active in the real estate practice for several years and was unaware of changes to the escrow policy dating back to December, 1991, which prohibit more than \$200.00 of personal funds in an escrow account.

10. Respondent, Antonio Prado, has been licensed for 19 years and has never been disciplined for any violations of the real estate law.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

12. The Department bears the burden of proof to establish, by clear and convincing evidence, the allegations of this case.

13. Section 475.25(1), Florida Statutes, provides, in pertinent part:

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:

* * *

(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.

14. Rule 61J2-14.010(2), Florida Administrative Code, provides:

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.

15. Rule 61J2-24.001, Florida Administrative Code, sets forth the guidelines regarding recommended penalties in this type of case. As to a violation of Section 475.25(1)(e), Florida Statutes, the rule provides for a penalty ranging from a reprimand and/or a fine up to \$1,000.00 per count to up to 8 years suspension or revocation. Such rule also provides for mitigating and aggravating circumstances which may be considered. They are:

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 license.
8. Violation of the provision of Chapter 475,

Florida Statutes, where in a letter of guidance as provided in Sec. 455.225(3), Florida Statutes, previously has been issued to the licensee.

16. In this case, the Department has established that the Respondent, Antonio Prado, maintained in excess of \$200.00 of his personal funds within a company escrow account. Mr. Prado did not, however, maintain trust funds in the account and did not "commingle" personal funds with trust funds. In fact, when he was advised that he was not required to have an escrow account, the account, which had been long inactive, was closed. At best this was a technical violation of a specific rule due to an inadequate understanding of provisions related to escrow accounts.

17. When confronted with the problem during the office audit, Mr. Prado took immediate corrective action. No customer, licensee, or other third party has been adversely impacted by this technical violation. Moreover, the Department has not established that the account was maintained in such a manner as to constitute fraud, misrepresentation, concealment, false promise, false pretenses, culpable negligence or any other act listed in Section 475.25(1)(b), Florida Statutes.

18. Finally, it is concluded that the acts or omissions of Respondent, Antonio Prado, are solely responsible for the technical violation in this cause. Additional disciplinary action against the corporate licensee serves no purpose.

RECOMMENDATION

Based on the foregoing, it is, hereby,

RECOMMENDED:

That the Florida Real Estate Commission enter a final order determining the Respondent, Antonio Prado, committed only a minor technical violation of Section 425.25(1)(e), Florida Statutes, and, in recognition of Respondent's exemplary record as a broker, which, along with his willing, immediate action to correct the error, demonstrates sound judgment, issue a letter of reprimand and guidance regarding escrow account rules and regulations. All other allegations against these Respondents should be dismissed.

DONE AND ENTERED this 15th day of May, 1996, in Tallahassee, Leon County, Florida.

JOYOUS D. PARRISH, 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 15th day of May, 1996.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 96-0038

Rulings on the proposed findings of fact submitted by Petitioner:

None submitted.

Rulings on the proposed findings of fact submitted by Respondent:

1. Paragraphs 1 and 2 are rejected as statements of fact as they are restatement of argument or comment made at the hearing.
2. Paragraphs 3 through 6 are accepted.

COPIES FURNISHED:

Henry M. Solares
Division Director
Division of Real Estate
Department of Business and
Professional Regulation
Post Office Box 1900
Orlando, Florida 32802-1900

Lynda L. Goodgame
General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399

Theodore R. Gay
Senior Attorney
Department of Business and
Professional Regulation
Division of Real Estate
Rhode Building Phase II
401 Northwest Second Avenue N607
Miami, Florida 33128

Antonio Prado, pro se and as President
of Bayside International Realty, Inc.
1390 Brickell Avenue, Suite 230
Miami, Florida 33131

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.

=====

AGENCY FINAL ORDER

=====

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. 95-80228
95-82153
DOAH NO. 96-0038

ANTONIO PRADO and BAYSIDE
INTERNATIONAL REALTY, INC.

Respondents

_____ /

FINAL ORDER

On July 16 1996 pursuant to s.120.57(1), Florida Statutes, the Florida Real Estate Commission heard this case to issue a Final Order.

Hearing Officer Joyous D. Parrish of the Division of Administrative Hearings presided over a formal hearing on March 28 1996. On May 15, 1996 she 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 Conclusions of Law and Penalty in the Recommended Order. A copy of these 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 Petitioner's Exception #1 which addresses Conclusions of Law in paragraph 18 of the Recommended Order. The Commission finds that Antonio Prado and Bayside International Realty Inc. are one in the same entity and therefore both Respondents should be disciplined.

The Commission therefore adopts the Hearing Officer's Findings of Fact and the Conclusions of Law except for paragraph #18. The Commission adopts the Petitioner's Exception in place of paragraph #18. The Commission adopts the Hearing Officer's Recommended Penalty as to Antonio Prado. Based on the acceptance of the Petitioner's Exception the Commission finds Bayside International Realty, Inc. guilty of violating s.475.25(1)(e) Florida Statutes.

The Florida Real Estate Commission therefore ORDERS that Antonio Prado and Bayside International Realty, Inc. be reprimanded. The Commission finds that the Hearing Officer overlooked the rule on maintaining \$200.00 in the escrow

account. Therefore the Commission Orders that the Respondent Bayside International Realty, Inc. pay a \$1000.00 administrative fine.

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 s.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 Suite 309 North Tower, 400 West Robinson Street, 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 16th day of July 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: Antonio Prado, c/o Bayside International Realty, Inc., 1390 Brickell Avenue Suite 230 Miami, Florida 33131; by U.S. Regular Mail to Hearing Officer Joyous Parrish, Division of Administrative Hearings, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550; and a copy provided to Steven D. Fieldman, Esquire, DBPR, Post Office Box 1900, Orlando, Florida 32801, this 27th day of September, 1996.