

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND,)
PROFESSIONAL REGULATION, DIVISION)
OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 96-2347
)
MARIA E. VACA, t/a VACA REALTY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case was heard on September 11, 1996, in Fort Lauderdale, Florida, by David M. Maloney, hearing officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Daniel Villazon, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802

For Respondent: Maria Vaca, pro se
1731 Southeast 13th Street
Fort Lauderdale, Florida 33316

STATEMENT OF THE ISSUES

Whether Respondent, a licensed Florida real estate broker, failed to make available to the department, as charged in the administrative complaint in this case, such books, accounts and records as would have enabled the department to determine whether Respondent is in compliance with the provisions of Chapter 475, Florida Statutes? If so, what is the appropriate discipline?

PRELIMINARY STATEMENT

On May 16, 1996, the Division of Administrative Hearings received a request for a formal proceeding pursuant to Section 120.57(1), Florida Statutes, from the Department of Business and Professional Regulation.

Attached to the request was a copy of an Administrative Complaint and an Election of Rights form. Reciting allegations of fact first, the complaint ultimately charged respondent with failure "to make all books and accounts available to the [department] at all reasonable times during regular hours as required by [Section] 475.5015, Fla. Stat. and Fla. Admin. Code R. 61J2-

14.012(1) ...". Administrative Complaint, p. 2. It, therefore, charged Respondent to be "in violation of [Section] 475.25(1)(e), Fla. Stat." Id.

The copy of the Election of Rights form, signed by Ms. Vaca, indicated that she disputed all of the allegations of fact contained in the complaint and requested the form "be considered a petition for a formal hearing pursuant to Section 120.57(1), [Florida Statutes,] ...".

The case was assigned to a hearing officer at the Division of Administrative Hearings and re-assigned to the undersigned. A proposed recommended order was submitted by petitioner on September 23, 1996. Respondent did not submit a proposed recommended order. Rulings on the proposed findings of fact are contained in the appendix to this order.

FINDINGS OF FACT

The Parties

1. Petitioner, the Division of Real Estate, Department of Business and Professional Regulation, (the "division" or the "department,") created by Section 20.165, Florida Statutes, and, in part, comprised of the Florida Real Estate Commission, provides "[a]ll services concerning [Chapter 475, Florida Statutes], including ... recordkeeping services, examination services, legal services, and investigative services, and those services in Chapter 455 [general provisions in regard to the state's regulation of professions and occupations] necessary to perform the duties of [Chapter 475, Florida Statutes]." Section 475.021, Florida Statutes. Chapter 475, Florida Statutes, is the law which regulates real estate brokers.

2. Respondent, Maria E. Vaca t/a Vaca Realty, is now, and at all times material to this case, has been a real estate broker licensed by the State of Florida. The number of her license, originally issued in June 1, 1981, is 0333239. Her license, current through September 30, 1997, shows the location of her brokerage to be 120 E. Oakland Park Boulevard 105, Fort Lauderdale, Florida, 33334.

Books, Accounts and Records to be Available

3. Section 475.5015, Florida Statutes, requires that "[e]ach 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."

4. 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.

Attempts at an Audit

5. In March of 1994, the department decided to conduct an audit of Respondent's escrow account.

6. Two of the department's investigators, Monroe Berger and Margaret Hoskins, with fifteen years of experience at the department between them, scheduled a meeting with Ms. Vaca for April 11, 1994, in order to conduct the audit.

7. Ms. Vaca, indicating that her records were in storage, cancelled the meeting.

8. A second meeting was scheduled for April 20, 1994, in order to allow Ms. Vaca to retrieve the records.

9. Ms. Vaca failed to attend the meeting. Instead, she transmitted by facsimile to Investigator Hoskins copies of nine bank statements under the name of "Vaca Realty Trust Account," for what appears to be the period from June 5, 1993 through April 5, 1994. (Generally monthly statements, one of the statements appears to be for the first quarter of 1994, from January 6 through April 5, 1994.) There were no reconciliation statements attached to the bank statements.

10. The bank statements provided were insufficient to conduct an audit of the escrow account.

11. On April 21, 1994, another meeting was scheduled with Ms. Vaca for April 29, 1994.

12. In addition, Investigator Berger sent Ms. Vaca a letter confirming the April 29, 1994, meeting and asking Ms. Vaca to bring with her specific records necessary to allow the audit to be conducted. Investigator Berger wrote:

This is to confirm our telephone conversation of 4-21-94. It is unfortunate that some personal problems have caused you to cancel the two previous appointments with Investigator Hoskins.

In any event we are looking forward to seeing you on 4-29-94 at 1:00PM, at which time you will provide your office records for the last year. They will include but not be limited to (i) Trust liability reconciliations, (ii) Bank statements with cancelled check vouchers and deposit slips and (iii) files relating to both closed and open transactions.

Petitioner's Exhibit No. 2.

13. Ms. Vaca failed to appear for the April 29, 1994, meeting. Again, another meeting was schedule, this one for May 2, 1994.

14. Ms. Vaca failed to appear for the May 2, 1994 meeting.

15. On September 22, 1994, Investigator Berger and his supervisor, Don Piersol, went to Ms. Vaca's office to conduct the audit. Ms. Vaca did not have her escrow account records on hand. She agreed, however, to bring them to a meeting scheduled for October 10, 1994.

16. At the October 10, 1994 meeting, Ms. Vaca provided a check book but she did not provide any trust liability reconciliations or deposit slips for the previous year's transactions. Without these records an audit cannot be conducted. In addition, Ms. Vaca did not provide all files relating to open and closed transactions for the previous year, which also are necessary to conduct an audit.

17. Ms. Vaca remembers missing only one, (perhaps two) of the meetings scheduled by the department and that because of the emergency hospitalization of her father. Certainly, her father's illness excuses abrupt cancellation of a meeting. This record is clear, however; Ms. Vaca repeatedly failed to produce the required records.

Production at Hearing

18. At hearing, Ms. Vaca produced six bank statements for what appears to be the period of the first week of September 1993 through May 5, 1994. (Five of these statements match five of the nine statements faxed to the department in April of 1994. Again, the statements are for one month's time, with the exception of the quarterly statement for the first quarter of 1994.) Attached to each of the six bank statements is a Real Estate Trust Account Monthly Statement Reconciliation form including a "Brokers Trust Liability Reconciliation."

19. Had the reconciliation statements been provided earlier, there still would not have been enough records provided for an audit to be conducted. Deposit slips and cancelled check vouchers, records necessary to conduct the audit, have never been provided the department. Nor has Ms. Vaca to date produced all the files of transactions, open or closed, conducted during the year prior to whenever an audit has been attempted.

20. As of the date of hearing, Ms. Vaca continued to fail to appreciate what records should be provided the department, records she was clearly on notice of as deemed necessary to an audit by the department at least since Mr. Berger's letter in April of 1994. This record does not disclose any legitimate reason for Ms. Vaca's repeated failure to produce the requested records.

21. As of the date of hearing, an audit had still not been conducted of Ms. Vaca's escrow accounts because the department has never been given access to the records necessary to conduct the audit.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case. Section 120.57(1), Florida Statutes.

Violations Proven

23. The burden of proof is on the department in this case. *Balino v. Department of Health and Rehabilitative Services*, 348 So. 2d 349 (Fla. 1st DCA 1977). The department has carried that burden of proof.

24. The department has shown by clear and convincing evidence that beginning more than two years ago, on six separate occasions, it attempted to meet with Ms. Vaca to conduct an escrow account audit. After Ms. Vaca's inability to meet with the department the first two times and the production by facsimile of records insufficient to allow an audit to be conducted, the department wrote Ms. Vaca with clear instructions of what records she was required to produce. Following this letter of instruction, the records were not produced at two additional times scheduled by the department that constituted opportunities for Ms. Vaca to comply with the statute and the rule. When Ms. Vaca's place of business was visited by the department, the records were not available. In one last chance following this visit, at a meeting scheduled by the department, Ms. Vaca failed once again to produce the necessary records.

25. The department has proven that Ms. Vaca is in violation of Section 475.5015, Florida Statutes and Rule 61J2-14.012(1), Florida Administrative Code.

Penalty

26. In its proposed recommended order, the department seeks suspension of Ms. Vaca's license for one year followed by one year of probation, with the condition that she attend and successfully complete a seven hour escrow management course. In addition, the department seeks imposition of an administrative fine of \$1,000.

27. The department has the authority to place a licensee on probation and may impose an administrative fine of \$1,000 for a broker's violation of provisions of Chapter 475, Florida Statutes, or a rule made under those provisions. Section 475.25(1)(e), F.S. In addition, the department may suspend a license for such a violation, *id.*, but only if the violation is proven by clear and convincing evidence. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); and, *Pic 'N' Save v. Department of Business and Professional Regulation*, 601 So.2d 245 (Fla. 1st DCA 1992).

28. The violations of Section 475.5015, Florida Statutes, and Rule 61J2-14.012(1), Florida Administrative Code, were proven in this case by clear and convincing evidence.

29. The Florida Real Estate Commission in its Disciplinary Guideline Rule provides for up to 8 years suspension or revocation of a license for the violation of any provision of Chapter 475, Florida Statutes, or rule made under the provisions of the chapter, such as occurred in this case. Rule 61J2-24.001(3)(f), F.A.C. Furthermore, the minimum penalty for the violation "is a reprimand and/or a fine up to \$1,000 per count." Rule 61J2-24.001(3), F.A.C.

30. The penalties sought by the department are within the range provided by the applicable disciplinary guidelines. But, the motive for Ms. Vaca's failure to provide the records was not proven in this case. It is not shown on

this record whether she was unable or simply unwilling to comply or if something more sinister was involved. Moreover, an administrative fine, suspension and probation, seem unnecessarily cumulative. An administrative fine, by itself, other than creating pecuniary punishment, might not accomplish what the department seems to hope to achieve: any future practice by Ms. Vaca as a real estate broker in compliance with the laws of the state and with respect for state authorities. Suspension and probation have the better chance of producing such a result, particularly if the probationary period is conditioned in the manner advanced by the department.

RECOMMENDATION

Based on the foregoing, it is, hereby,

RECOMMENDED:

That the Commission suspend the license of Maria E. Vaca t/a Vaca Realty for six months and that at the end of the suspension Ms. Vaca be placed on probation for as long as it takes to attend and complete a seven-hour course in management of escrow accounts. In addition, probation should be conditioned upon production of the records the Department needed to conduct the audit attempted in 1994.

DONE AND ENTERED this 27th day of September, 1996, in Tallahassee, Leon County, Florida.

DAVID M. MALONEY, 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 27th day of September, 1996.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 96-2347

1. Paragraphs 1 through 16, insofar as material, are adopted, with the exception of the statement in paragraph 8 that respondent sent by facsimile "six copies of her escrow account bank statements to Investigator Hoskins." (e.s.) Respondent sent copies of nine bank statements by facsimile.

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 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.