STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case Nos. 96-5163 97-0062
S. DUDLEY CARSON,	)	
Respondent.	)	

RECOMMENDED ORDER

On July 21, 1997, a formal administrative hearing was held in this case in Sarasota, Florida, before Carolyn S. Holifield, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Geoffrey T. Kirk, Senior Attorney
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Division of Real Estate
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Orlando, Florida 32802

For Respondent: Frederick Wilsen, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether S. Dudley Carson, the Respondent (1) failed to comply with a lawful order of the Florida Real Estate Commission; (2) deposited or intermingled personal or operating funds in the broker's trust account; (3)

concealed a violation during the course of an investigation; (4) improperly disbursed funds from the broker's trust account; (5) engaged in fraudulent or dishonest dealing in a business transaction; and (6) is guilty of a course of conduct to the extent that he is not trustworthy. If yes, to one or more of the foregoing, what penalty should be imposed.

PRELIMINARY STATEMENT

On April 21, 1996, Petitioner Department of Business and Professional Regulation, Florida Real Estate Commission, (Petitioner/Commission) filed a one-count Administrative Complaint against Respondent S. Dudley Carson (Respondent). The Administrative Complaint (Administrative Complaint I) alleged that Respondent failed to comply with a lawful order of the Commission by not successfully completing certain educational requirements within the prescribed time period. Petitioner filed a second Administrative Complaint (Administrative Complaint II) against Respondent on September 23, 1996. This complaint alleged in five counts that Respondent violated multiple provisions of Section 475.25(1), Florida Statutes.

In each instance, Respondent disputed the charges and timely requested a formal hearing. The matters were separately forwarded to the Division of Administrative Hearings (Division) for assignment of an administrative law judge. Administrative Complaint I was filed with the Division on January 7, 1997, and Administrative Complaint II was filed on November 4, 1996. By

Order issued on February 12, 1997, the two cases were consolidated.

At the final hearing, Petitioner called four witnesses: Jerri Vincent, Stephanie Alcorn, Majorie G. Bennett, and Marie Hayes. Petitioner offered seventeen exhibits that were admitted into evidence. Respondent testified on his own behalf and presented four other witnesses: Harry Haskins, Arthur David Vandroff, Penelope Flanagan, and Prudence Varro. Respondent presented seventeen exhibits that were admitted into evidence.

The transcript of the proceeding was filed on July 28, 1997. At the conclusion of the hearing, the time set for submitting proposed recommended orders was ten days from the filing of the transcript. Prior to that date, Respondent requested an extension of time in which to file the proposed recommended order. The request was granted, and both parties timely filed their proposed recommended orders under the extended time period.

FINDINGS OF FACT

1. Petitioner is a state licensing and regulatory agency charged with the responsibility and duty to prosecute administrative complaints pursuant to the laws of the State of Florida; in particular, Chapters 455, and 475, Florida Statutes, and Rule Chapter 61J-2, Florida Administrative Code.

2. Respondent, S. Dudley Carson, is now and was at all times material hereto a licensed real estate broker in Florida having been issued license number 3001085 and 3004369 in

accordance with Chapter 475, Florida Statutes.

3. On or about April 19, 1994, the Commission entered a Final Order against Respondent whereby Respondent's real estate license was placed on probation for one year. Furthermore, the Final Order required Respondent to complete a 30-hour broker management course within one year of the filing of the Final Order. The Final Order was filed on May 6, 1994, and provided in pertinent part:

> 4. The licensee shall enroll in and satisfactorily complete a 30-hour broker management course within one (1) year of the filing date of this Order. These course hours are in addition to any other education required to maintain a valid and current license.
>
> 5. Failure to complete all conditions of probation may result in a new complaint being filed.
>
> This Order shall be effective 30 days from date of filing with the Clerk of the Department of Business and Professional Regulation. (emphasis supplied)

4. In accordance with the provisions of the Final Order, Respondent had until May 6, 1995, in which to satisfactorily complete a 30-hour broker management course. When Respondent read the Final Order, he mistakenly believed that he had one year from the effective date of the Final Order rather than one year from the filing date of the Final Order to complete the required course.

5. Respondent initially registered for a 30-hour management course to be offered in March 1995, but was unable to take the

course due to a business conflict. At that time, Respondent did not realize that the next 30-hour course would not be offered until June 1995. In May 1995, Respondent registered for the next available course that was offered in June 1995.

6. After registering for the June course, but prior to taking it, Respondent received a letter from Petitioner requesting that Respondent provide proof of having completed the required 30-hour course. Thereafter, Respondent immediately contacted Petitioner by telephone inquiring to how he could request an extension. Based on information obtained by telephone from Petitioner's staff, by letter dated May 18, 1995, Respondent requested an extension of time to complete the course.

7. On May 23, 1995, Petitioner placed Respondent's request for an extension of time to comply with the educational requirement on the Commission's June 20, 1995, agenda for consideration. Thereafter, Petitioner advised Respondent's attorney, Steven Voigt, that the matter had been tabled and no formal action was taken by the Commission.

8. Respondent completed the 30-hour broker management course on June 30, 1995, and on that same day so advised Petitioner by letter.

9. Respondent had no further contact from Petitioner regarding his request for an extension until eleven months after the request was made and almost ten months after the Commission tabled the matter. That communication was by Administrative

Complaint I that Petitioner filed against Respondent on April 21, 1996.

10. As to the Administrative Complaint II, Respondent was licensed at all times material herein as a real estate broker for Crescent Management, Inc., and for RE/MAX on the Key.

11. The broker is the person ultimately responsible for properly maintaining and reconciling all escrow and trust accounts. Further, the broker is charged with knowledge of and compliance with applicable laws and rules relative to trust accounts.

12. Petitioner interprets governing regulations to preclude a broker from keeping retained earnings or commissions in an escrow account, and to remove such earnings or commissions when they accrue, but never less than at least once a month. Moreover, Petitioner interprets certain relevant provisions as prohibiting real estate brokers from maintaining "personal funds" in their escrow or trust account to pay personal or office expenses.

13. Where an escrow or trust account has a deficit, if everyone who had funds in that account made a demand for the same, there would be insufficient funds to satisfy all claims.

14. At all times material hereto, Respondent maintained account number 1622184907 at Barnett Bank in the name of Crescent Management, Inc. (Crescent Management Account). Rental security

deposits and owners' funds were kept in the Crescent Management Account. The checks drawn on this account were styled "operating escrow."

15. Stephanie Aucoin was employed by Respondent as an officer manager for Respondent from August 1992 through April or May 1995. While employed as the officer manager and in regard to Crescent Management, Ms. Aucoin's duties included determining which bills and expenses were to be paid and to whom and the amount to be paid. Ms. Aucoin was also responsible for preparing checks via computer and presenting the checks to Respondent for his review and signing. Respondent trusted Stephanie Aucoin and relied upon her to properly prepare the checks.

16. The following checks drawn on the Crescent Management Account between January 1994 and February 1995 are the subject of the instant case: Check No. 5458 dated January 3, 1994, made payable in the amount of $246.40 to Pelican Press; Check No. 5460 dated January 3, 1994, made payable in the amount of $74.67 to Prestige Printing; Check No. 5347 dated January 21, 1994, made payable in the amount of $11,100.91 to RE/MAX on the Key; Check No. 5391 dated February 2, 1994, made payable in the amount of $82.00 to the Division of Real Estate; Check No. 6439 dated July 25, 1994, made payable in the amount of $237.83 to Sarasota Board of Realtors; Check No. 7388 dated December 31, 1994, made payable in the amount of $19,700.11 to RE/MAX on the Key; and Check No.

7005 dated February 16, 1995, made payable in the amount of $4,119.29 to American Express.

17. Respondent signed and authorized five of the seven checks noted in the above paragraph. The checks signed by Respondent were Check Nos. 5458, 5460, 5347, 5391, and 6439.

18. It is undisputed that Check No. 7388 dated December 31, 1994, made payable in the amount of $19,700.11 to RE/MAX on the Key, contained Respondent's forged signature and that Stephanie Aucoin had forged Respondent's signature. Contrary to Ms. Aucoin's testimony, Respondent did not request or authorize Ms. Aucoin to issue the check or sign his name to the check. Respondent had not seen this check prior to Petitioner's Investigator Hayes showing him a copy of the check during the May 1996 audit.

19. The last check in question is Check No. 7005 dated February 16, 1995, made payable in the amount of $4,119.29 to American Express. Although she was not an authorized signatory on the Crescent Management Account, Stephanie Aucoin signed her own name on this check. Respondent never authorized or directed Ms. Aucoin to pay his American Express bill using the Crescent Management Account.

20. Stephanie Aucoin's testimony lacks credibility. After Ms. Aucoin's employment was terminated, she filed a claim for unemployment compensation benefits. The claim was denied by the appeals referee by decision dated August 17, 1995, finding that

she "had been signing checks without the owner's permission and had forged the owner's signatures on some of the checks . . . claimant was using company funds to pay her personal bills."

21. On May 16, 1996, Stephanie Aucoin made the following statement in her sworn Petition For Injunction For Protection Against Repeat Violence filed against the Respondent: "Dudley Carson is under investigation for commingling of funds (escrow) and tax fraud . . . the chief investigator (Marie Hayes) had informed me that these charges are of a valid nature and that I could possibly be in danger by Mr. Carson." The statement of Ms. Aucoin is false in that Marie Hayes never made such a statement to Stephanie Aucoin.

22. During the course of Stephanie Aucoin's employment as officer manager for Respondent, Ms. Aucoin and Respondent developed a romantic relationship, beginning in November 1993. The personal relationship was an intermittent one, with Respondent terminating the relationship with Ms. Aucoin three different times, first in late February 1994, next in late November 1994, and finally in early March 1995.

23. Eventually, Respondent believed that Ms. Aucoin had been diverting business funds for her personal use. Based on this belief, Respondent fired Ms. Aucoin on or about April 28, 1995. Soon after he fired Stephanie Aucoin, Respondent employed Chip Harris to review the Crescent Management escrow records and bank statements. The records were in poor order, and it was

determined that there was a shortage of escrow funds in the bank account. As soon as practicable, Respondent deposited personal funds into the Crescent Management Account to cover the shortage: $25,000 on July 10, 1995, and $20,063.09 on July 13, 1995. Respondent has made no claim to the $45,063.09 that he deposited into the Crescent Management Account for the benefit and protection of those persons entitled to the trust funds.

24. The proper course of action to be taken by a broker upon discovery a shortage in an escrow account is to replace the missing funds as soon as possible.

25. On July 25, 1995, Petitioner audited Respondent's escrow account's maintained by Respondent for Carson and Associates Ltd., Inc., t/a RE/MAX on the Key and Crescent Management, Inc. Petitioner found that all accounts were in good order and balanced.

26. The two deposits of $25,000 and $20,063.09 had been made into the Crescent Management Account on July 10, 1995, and July 13, 1995, respectively, and prior to the July 25, 1995, audit. Nevertheless, the investigator did not question Respondent about the deposits nor did Respondent volunteer information concerning the deposits.

27. On May 10, 1996, Petitioner completed an audit of the escrow accounts maintained by Respondent for Carson and Associates Ltd., Inc., t/a RE/MAX on the Key and found that all accounts balanced.

28. On May 15, 1996, Petitioner completed an audit of the escrow account maintained by Respondent for Crescent Management, Inc., and found the account to be in good order and balanced.

29. During the time period pertinent to this proceeding, Crescent Management, Inc. earned a 15 percent rental management fee on all rental funds collected. The Crescent Management Account was labeled as an "operating escrow account" and the source of all funds in this account consisted of rent payments by tenants. Of the rents deposited into the account, 15 percent belonged to Respondent as an earned rental management fee and the balance belonged to the owners after deducting payment of the owners' expenses.

30. As each check from the Crescent Management Account was issued, either the "Owners'" account was charged or the "Fee, Property" account was charged. The "Fee, Property" account

consisted solely of the funds generated by the 15 percent management fees.

31. Each month, the accounts were reconciled and if there was a shortage or overage of funds, corrective action was taken.

32. The accounting procedure implemented by Respondent and described in paragraph 30 above utilized real estate property management software program, RPM. This program had been recommended to Respondent by one of Petitioner's investigators in 1993. Under this system, one account is set up on computer and all transfers are made internally. Respondent is no longer using this accounting method, but now uses Quick Books, a recognized bookkeeping system, without any apparent problems.

33. In regard to the checks noted in paragraph 16 above, Petitioner alleges that these seven checks were "unauthorized disbursements" in that Respondent used the escrow account to directly pay personal and office overhead and related expenses. However, Petitioner acknowledged that if earned fees in the escrow account were used for third party payments, there is no misappropriation. Furthermore, Petitioner's investigator supervisor testified that where there is no shortage of the escrow funds, the practice implemented by Respondent is just "very poor bookkeeping."

34. In January 1994, the following checks referenced above were issued: Check No. 5458 for $246.40 to Pelican Press, Check No. 5460 for $74.67 to Prestige Printing and Check No. 5347 for

$11,108.91 to RE/MAX on the Key. All three of these checks are listed on the January 1994 Trust Account Reconciliation form prepared on February 8, 1994, and signed by Respondent. At the end of January 1994, there was an overage of $1,532.09, representing "Management Fees." The corrective action taken was to remove the $1,532.89 overage and put it in the operating account. Thus, the funds used for payment of these checks were not trust funds, but fees earned by Respondent and to which he was entitled.

35. Check No. 5391 dated February 2, 1994, for $82.00 was payable to the Division of Real Estate for payment of renewal fees. The check cleared the Crescent Management Account on February 18, 1994. The bank statement for February reflects that on February 1, 1994, the account had a beginning balance of $52,109.45, eighteen deposits and credits totaling $95,676.64, and 135 checks and debits totaling $71,799.87. At the end of the statement period, on February 28, 1994, the Crescent Management Account had a balance of $75,986.22. The funds used to pay the $82.00 check when it cleared the bank came from the "Fee, Property" split of the operating account and represented funds generated from the broker's 15 percent rental commission fee. Accordingly, trust funds were not used in regard to payment of this check.

36. Check No. 6439 dated July 25, 1994, for $237.83 and payable to the Sarasota Board of Realtors cleared the Crescent

Management Account on August 2, 1994. The bank statement for the period August 1, 1994, through August 31, 1994, reflects that the account had a beginning balance of $45,409.21, 15 deposits totaling $50,287.19; 102 checks and debits totaling $37,184.09; and an ending balance of $58,512.31. The funds used to pay the $237.83 check came from the "Fee, Property" split of the operating account and represented funds generated by the broker's 15 percent rental commission. Trust funds were not used to pay this check.

37. Check No. 7388 dated December 31, 1994, for $19,700.11 payable to RE/MAX on the Key for overhead expenses cleared the Crescent Management Account on January 31, 1995, with funds from the "Fee, Property" split of the operating account with funds generated by the broker's 15 percent rental commission. The bank statement for the period ending January 31, 1995, reflects a beginning balance of $177,991.84; 15 deposits totaling $137,308.35; and 111 checks and debits totaling $116,469.67, resulting in an ending balance of $197,830.52. Trust funds were not used to pay this check. This check appears on the Trust Account Reconciliation form for the month of January 1995, performed on February 9, 1995, and signed by Respondent on that date. According to the Reconciliation Statement, there was a shortage in the trust account of $961.97, resulting from an overpayment to a customer. The amount of the shortage is the difference between the broker's trust liability of $179,159.46

and the adjusted account balance of $178,197.49. The Reconciliation statement further noted under "corrective action taken" that the "customer will reimburse."

38. Check No. 7005 dated February 16, 1995, for $4,119.29, payable to American Express appears on the Trust Reconciliation Statement for the period ending February 28, 1995, performed on March 10, 1995, and signed by Respondent. The Reconciliation Statement shows that the account was in balance with no overages or shortages. The monthly bank statements for the period ending February 28, 1995, reflects a beginning balance of $197,830.52; 13 deposits of $95,753.08; 115 checks and debits totaling $75,951.56, with an ending balance of $217,632.40. The check cleared the Crescent Management Account on February 17, 1995, with funds from the "Fee, Property" split of the operating account with funds generated by the broker's 15 percent rental commission. Trust funds were not used to pay this check.

39. Respondent has been disciplined on two prior occasions. In Case Nos. 92-83432 and 92-84338, Petitioner entered a Final Order on July 20, 1993, which adopted a Stipulation between Respondent and Petitioner. Pursuant to the Stipulation, Respondent neither admitted nor denied the allegations, but was reprimanded, fined $300, and required to take a 30-hour broker management course. The underlying administrative complaint in this matter, based on an August 7, 1992, audit by Petitioner, alleged that (1) Respondent's escrow account was not properly

reconciled and had an overage of approximately $661.50; (2) Respondent failed to inform clients that a certain escrow account was an interest bearing account; and (3) Respondent's required office sign was incorrect in that letters were not all at least an inch in height and the words "Lic. Real Estate Broker" were not included.

40. On May 6, 1994, a second Final Order was entered against Respondent in FDBPR Case Nos. 93-84352 and 93-5419. This Final Order required Respondent to pay a fine of $300 and placed Respondent on probation for a year. The administrative complaint which served as the basis for the final order was filed on January 25, 1994, and was based on a September 20, 1993, audit and investigation performed by Petitioner at Respondent's request. The Administrative Complaint alleged that Respondent had failed to properly reconcile his rental escrow accounts for July and August 1993 and had a total escrow shortage of $842.31.

41. The September 20, 1993, audit was performed at the request of Respondent. During May of 1993, the Respondent had concerns as to the proper handling of the rental property management escrow account by his bookkeeper. As a result of these concerns, Respondent contacted Petitioner and requested that Petitioner conduct an audit.

42. In response to Petitioner's request, Petitioner conducted an audit on September 20,1993, which revealed a shortage in the escrow account of $842.31. It was determined

that this was due to errors by the bookkeeper. Therefore, the bookkeeper immediately replaced the escrow account funds. The Respondent then terminated the bookkeeper's employment. Nonetheless, the Petitioner filed an eight-count Administrative Complaint on January 20, 1994, against the Respondent charging escrow violations.

43. The Respondent admitted the facts alleged in the January 20, 1994, Administrative Complaint and requested an informal hearing. The Commission heard the matter on April 19, 1994, and a Final Order was filed on May 6, 1994, providing for a reprimand, a $300 fine and completion of a 30-hour broker

management course. The Respondent paid the fine and timely completed the course.

CONCLUSIONS OF LAW

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

45. The Department is statutorily empowered to suspend, revoke, or otherwise discipline the real estate license of any licensee in Florida found guilty of any act enumerated in Section 475.25, Florida Statutes.

46. The Department 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).

47. In Evans Packing Co. v. Dept. Of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained:

> "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of [sic] conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

48. The Administrative Complaint dated April 21, 1996, alleges that Respondent failed to comply with a lawful order of the Florida Real Estate Commission. Such a failure constitutes a violation of Section 475.25(1)(e), Florida Statutes, which authorizes the commission to take disciplinary action against a real estate license where the licensee

> Has violated any of the provisions of this chapter or any lawful order or rule made or issued and the provisions of this Chapter or Chapter 455.

49. It is undisputed and Respondent admits that he failed to complete the 30-hour brokers' management course within the time period prescribed in the Final Order filed by the commission on April 21, 1994. Respondent argues that his failure to complete the course was unintentional and that he made a good-faith effort to timely take the course and to obtain an extension. Despite his intentions and good faith, the clear and convincing evidence established that Respondent completed the required course on June 30, 1995, not on May 6, 1995, the date specified in the April 21, 1994 Final Order.

50. The Administrative Complaint against Respondent issued on September 23, 1996, contains five counts. Count I alleges that Respondent deposited or intermingled personal funds with funds being held in escrow or trust or on condition. Count II alleges that Respondent knowingly concealed a violation of Rule 61J2-14.008(1)(c), Florida Administrative Code, during the course of an official investigation. Count III alleges that Respondent

improperly dispersed funds from an escrow or trust account. Count IV alleges that Respondent is guilty of fraud, misrepresentation, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence or breach of trust in any business transaction. Finally, Count V alleges that Respondent is guilty of having been found guilty for a second time of any misconduct that warrants his suspension or has been found guilty of a course of conduct or practice which shows that he is so incompetent, negligent, dishonest, or untruthful that the money, property, transaction, and rights of investors may not be safely entrusted to him. It is alleged that these offenses constitute violations of various provisions of Section 475.25, Florida Statutes.

51. In regard to Count I, Rule 61J2-14.008, Florida Administrative Code, provides in relevant part:

> (a) A "deposit" is a sum of money, or its equivalent, delivered to a real estate licensee, as earnest money, or a payment or a part payment, in connection with any real estate transaction named or described in s. 475.01(1)(c), Florida Statutes [which includes the rental or leasing of property].
>
> * * *
>
> (c) "Trust" or "escrow" account means an account in a bank or trust company, title company having trust powers, credit union, or a savings and loan association with the State of Florida. Only funds described in this rule shall be deposited in trust or escrow account. No personal funds of any licensee shall be deposited or intermingled with any funds being held in escrow, trust or on condition except as provided in Rule 61J2-

> 14.016(2), Florida Administrative Code. (emphasis supplied)

52. The rule chapter does not provide for a definition for "personal funds." However, Rule 61J2-14.010(2), Florida Administrative Code provides:

> (2) A broker is authorized to place and maintain up to $200 of personal or brokerage business funds in the escrow account for the purpose of opening the account, keeping the account open and/or paying for ordinary service charges.

53. Rule 61J2-14.012, Florida Administrative Code, states, in part:

> (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 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). . . ."

54. With regard to Count I of Administrative Complaint II, Petitioner has not met its burden of proof. It is undisputed that Respondent made two deposits to the Crescent Management account: a deposit of $25,000 on July 10, 1995, and a deposit of $20,063.09 on July 13, 1995. However, Respondent contends that these funds were to replace funds which he believed had been

wrongfully taken by one of his employees. There is no evidence or even an allegation that Respondent misappropriated these missing funds.

55. Respondent maintains that the funds he deposited in July 1995 were not personal funds nor brokerage business funds, but became trust funds for the benefit of those persons who dealt with Respondent in his capacity as a broker and with trust and confidence. Once the funds were deposited, Respondent asserts that he had or made no claim to the funds deposited.

56. Notwithstanding Petitioner's assertion that these deposits were improper, Petitioner's two witnesses, Investigator Supervisor Marjorie G. Bennett and Investigator Marie Hayes, testified that the appropriate corrective action to be taken by a broker upon discovering that his escrow account is short is to deposit sufficient funds to eliminate the shortage. Accordingly, the broker's appropriate corrective action of depositing funds in such a case cannot be deemed a violation.

57. Petitioner has failed to establish by clear and convincing evidence the allegation contained in County II that Respondent knowingly concealed a violation during the course of an official investigation. Petitioner alleges the Respondent concealed a violation during an investigation by failing to reveal to an investigator two deposits of $20,000 and $25,000 made in July 1995. In the first instance, Petitioner has not established that Respondent's depositing funds into the escrow

account was, in fact, a violation. As stated above, investigators testifying for Petitioner stated that the proper corrective action for a broker is to deposit funds to eliminate a shortage in a escrow account. Next, even if it is assumed that the mere act of making the two deposits was a violation, Petitioner did not show that Respondent knowingly concealed this information during the course of an official investigation.

58. The investigator, John Pence, who conducted the July 1995 audit, did not testify and there is no evidence in the record that Respondent knowingly concealed the two deposits from Investigator Peace or Petitioner. Respondent testified that he made the two deposits, both of which were disclosed on the July 1995 monthly reconciliation statement. Moreover, Respondent notified Marie Hayes, Petitioner's investigator of the two deposits during her May 1996 investigation.

59. As to Count III of the Administrative Complaint II regarding improper disbursement of funds from a escrow trust account, Petitioner has not met its burden of demonstrating that Respondent violated Section 475.25(1)(k), Florida Statutes. That section authorizes the Commission to impose disciplinary action on a license, if the licensee

> (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.

Based on the above quoted provision, upon receipt, any money, fund, deposit, check, or draft entrusted to him in his capacity as a broker shall be immediately placed with a title company, banking institution, credit union, or savings and loan association during business in this state. Moreover, such funds shall be kept until disbursement thereof is properly authorized.

60. Petitioner argues that this rule requires that no disbursements be made from the escrow account to third parties on behalf of the broker. According to Petitioner, this is true even if the disbursements are equal to or less than fees or commissions earned by the broker which have not yet been removed from the escrow account. Moreover, Petitioner asserts that funds representing Respondent's commission, should not be disbursed directly from the escrow account for payment of Respondent's personal or office expenses. Instead, Petitioner believes that, at least monthly commissions should be removed from the escrow account and placed in an operating account. According to Petitioner, the practice implemented by Respondent constituted only "poor bookkeeping."

61. There are no allegations that Respondent failed to properly deposit funds. Rather, Petitioner contends that several checks were improperly written on the Crescent Management

Account, thereby resulting in improper disbursements from a trust account. Respondent was the only person authorized to sign checks drawn on the Crescent Management Account. But in two instances, checks written on the account were not signed or authorized by Respondent. With respect to Check No. 7005 and Check No. 7388, Respondent never signed or directed anyone to sign on his behalf. Thus, it cannot be concluded that Respondent is guilty of improperly disbursing funds from the Crescent Management Account that are attributable to payment of these checks.

62. With regard to the remaining checks, Check Nos. 5458, 5460, 5347, 5391, and 6439, it is undisputed that Respondent signed these checks and that they were for office operation expenses and license renewal fees. Petitioner contends that these checks were improper disbursements, although there was no showing that the checks were funded by moneys belonging to property owners. The evidence adduced at hearing established that each of the checks alleged to be improper disbursements cleared payment by the bank and were charged in Respondent's internal computer bookkeeping system to funds in the "Fees, Property" portion of the account. For the months in question, the monthly reconciliation statements balanced or where explained, corrective action was promptly taken.

63. Count IV of the Administrative Complaint alleges that the Respondent

> . . . is guilty of fraud, misrepresentation, 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 in Subsection 475.25(1)(b) Florida Statutes.

64. In Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1138 (Fla. 1st DCA 1992), the Department charged a licensed broker-salesperson 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 court held:

> 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. See *Holmberg v. Department of Natural Resources*, 503 So. 2d 944 (Fla. 1st DCA 1987). Reading the first clause of Section 475.25(1)(b) . . ., and applying to the words used in their usual and natural meaning, it is apparent that it is contemplated that an *intentional* act be proved before a violation may be found. See *Rivard v. McCoy*, 212 So. 2d 672 (Fla. 1st DCA), *cert. denied*, 219 So. 2d 703 (Fla. 1968).

Munch at 1143-44.

65. In the instant case, the record establishes that at no time did the Respondent knowingly or intentional utilize or even attempt to utilize trust funds to pay his personal or business expenses. Based upon the findings of fact herein, the Petitioner has failed to meet its burden of proving by clear and convincing

evidence the charges filed against the Respondent.

66. With regard to Count V of the Administrative Complaint II, Respondent was charged with having been

> . . . found guilty for a second time of any misconduct that warrants his suspension or has been found guilty of a course of conduct or practices which shows that he is so incompetent, negligent, dishonest, or untruthful that the money, property, transactions, and rights of investors, or those with whom he may sustain a confidential relation, may not safety be entrusted to him.

Section 475.25(1)(o), Florida Statutes.

67. The record contains no clear and convincing evidence to support this alleged violation. The two prior Final Orders involved minor infractions. Specifically, the first Final Order revealed a bookkeeping error and determined an overage in the escrow account and involved a minor sign violation. The second Final Order also involved a bookkeeping error which resulted in a shortage of approximately $800. Corrective action was immediately taken. Neither of these cases involved any person losing trust funds or any intentional misconduct by Respondent. Likewise, there has been no pattern of wrongdoing by the Respondent.

RECOMMENDATION

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

RECOMMENDED that the Florida Real Estate Commission enter a final order finding that Respondent has violated Section

475.25(1)(e) Florida Statutes, as alleged in the Administrative Complaint filed on April 21, 1996, and imposing an administrative fine of $1,000.

RECOMMENDED that all counts of the Administrative Complaint issued September 23, 1996, be dismissed.

DONE AND ENTERED this 7th day of October, 1997, in Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of October, 1997.

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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.