

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 97-1854
)
HAROLD E. HICKS and)
SERVICE FIRST REALTY, INC.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held by telephone conference call in this case on September 12, 1997, with the parties participating from Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge 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: Harold E. Hicks, pro se
9715 Northwest 27th Avenue
Miami, Florida 33147

STATEMENT OF THE ISSUES

Whether the Respondents committed the violations alleged and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

This case began on March 12, 1997, when the Department of Business and Professional Regulation (Department) filed an Administrative Complaint against the Respondents, Harold E. Hicks and Services First Realty, Inc. Such complaint set forth six counts against each Respondent, all of which arose from alleged failures to keep and maintain appropriate financial records as required by Chapter 475, Florida Statutes, and the applicable rules set forth in the Florida Administrative Code. Respondents disputed the factual allegations and requested an administrative hearing.

The case was forwarded to the Division of Administrative Hearings for formal proceedings on April 14, 1997. Thereafter the case was scheduled for hearing. At the hearing, Petitioner presented the testimony of Kenneth Rehm and Roberto Castro. Petitioner's Exhibits 1 through 6 have been admitted into evidence. Petitioner's Exhibit 7 was marked for identification only.

The Respondent, Harold Hicks, testified on behalf of himself and the corporation and presented the testimony of Eugene Parker, an accountant.

A transcript of the proceedings was filed on September 24, 1997. In accordance with the parties' stipulation, they were granted thirty days' leave to file their proposed recommended orders. Petitioner filed a proposed order which has been

considered in the preparation of this order. Respondents have not filed a proposed order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the responsibility of regulating real estate licensees.

2. At all times material to the allegations of this case, Respondent, Harold E. Hicks, was licensed as a real estate broker, license number 0136248.

3. At all times material to the allegations of this case, Mr. Hicks was the qualifying broker for the Respondent corporation, Service First Realty, Inc. (the corporation), whose address is 9715 N. W. 27th Avenue, Miami, Florida 33147. The Respondent corporation holds license number 0223295.

4. Mr. Hicks was responsible for the day-to-day business operations of the corporation.

5. Mr. Hicks was responsible for the financial records kept and maintained by the corporation. All financial records at issue in this proceedings were in the name of the corporation.

6. In 1996, an investigator employed by the Petitioner, Kenneth G. Rehm, attempted to conduct an audit of the Respondents' financial records. This audit was in response to a complaint not at issue in this proceeding.

7. Mr. Rehm went to the Respondents' place of business and asked for the financial records for all real estate accounts.

8. Mr. Hicks provided the investigator with records which

established a negative escrow bank balance of \$761.00. Moreover, there was no monthly reconciliation for the escrow account.

9. Based upon the bookkeeping method used, the Respondents' records did not show how much money was being held in trust for individual clients.

10. Respondents pooled money for different rental properties into one escrow account without establishing that they maintained accurate ledger balances per client.

11. When Mr. Rehm was unable to reconcile the accounts, he elected to offer Respondents additional time to gather the records and to prepare for a complete audit. Such audit was assigned to Petitioner's investigator, Roberto Castro.

12. Mr. Castro attempted to complete the follow-up audit of Respondents' financial records on February 13, 1996.

13. Once again, the audit was hampered due to the lack of escrow account records. Based upon the records that were provided by Respondents, Mr. Castro computed that Respondents had \$3,922.45 in outstanding checks from the rental distribution trust account but only \$2,241.58 in the account. This calculation resulted in a shortage of \$1,680.87.

14. Mr. Castro also determined that Respondents were not completing monthly escrow account reconciliations in accordance with the rule promulgated by the Florida Real Estate Commission.

15. On May 3, 1996, Respondents were served with a subpoena to provide Mr. Castro with all escrow records from February 1995

to February 1996. Respondents did not respond to the subpoena.

16. As of the date of hearing, Respondents have not shown monthly escrow account reconciliations in accordance with the rule promulgated by the Florida Real Estate Commission.

CONCLUSIONS OF LAW

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

18. The Petitioner bears the burden of proof to establish by clear and convincing evidence the allegations of the Administrative Complaint.

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

(1) 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:

* * *

(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.

* * *

(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; or has failed, if a salesperson, to immediately place with his registered employer any money, fund, deposit, check, or draft entrusted to him by any person dealing with him as agent of his registered employer. The commission shall establish rules to provide for records to be maintained by the broker and the manner in which such deposits shall be made.

20. Rule 61J2-14.012, Florida Administrative Code, provides:

(1) 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 DPR or its authorized representatives at all reasonable times during regular business hours.

(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 minimum information to be included in the monthly statement-reconciliation shall be the date the reconciliation was undertaken, the date used to reconcile the balances, the name of the bank(s), the name(s) of the account(s), the account number(s), the account balance(s) and date(s), deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the bank account balance(s) with the balance per the broker's checkbook(s) and other trust account books and records disclosing the date of receipt and the source of the funds. 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). Whenever a trust bank account record reflects a service charge or fee for a non-sufficient check being returned or whenever an account has a negative balance, the reconciliation shall disclose the cause(s) of the returned check or negative balance and the corrective action taken.

(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.

21. In this case the Petitioner has established, by clear and convincing evidence, that the Respondents did not maintain financial records as required by the rule guidelines for real estate brokers. While Respondents may have kept records which, for their purposes, tracked the funds received and disbursed by the company, such records did not comply with the uniform guidelines for financial records as specified by the Florida Real Estate Commission. All real estate licensees are directed to conform to the standard for financial records set by their governing board. That a consumer was not financially harmed does not absolve Respondents of the mandates of their profession. Pursuant to the applicable statutes and rules, Respondents must maintain financial records as directed.

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 the Respondents guilty of violating Sections 475.25(1)(b), (e), and (k), Florida Statutes, and imposing an administrative fine in the amount of \$1,500.00. It is further recommended that the Commission suspend Respondents' licenses until the Respondent Hicks has completed a seven-hour course in real estate escrow management and that such suspension be followed by a probationary period with monitoring of the Respondents' financial records to assure compliance with all Commission rules.

DONE AND ENTERED this 25th day of November, 1997, in Tallahassee, Leon County, Florida.

J. D. Parrish
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(904) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 1997.

COPIES FURNISHED:

Henry M. Solares
Division Director
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802-1900

Lynda L. Goodgame
General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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

Harold E. Hicks, pro se
Service First Realty, Inc.
9715 Northwest 27th Avenue
Miami, Florida 33147

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.